Citation: Port Coquitlam Building Supplies v. Corp. Dist. Maple Ridge	Date:	20081128
	File No.	C8487
	Registry:	Port Coquitlam

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

(Civil Division)

BETWEEN:

PORT COQUITLAM BUILDINGS SUPPLIES LTD.

CLAIMANT

AND:

CORPORATION OF THE DISTRICT OF MAPLE RIDGE

DEFENDANT

EXCERPT FROM PROCEEDINGS
REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE DYER

Appearing for the Claimant:	C. Coakley, a company representative
Counsel for the Defendant:	E.J. Walton
Court Recorder:	K. Tasalloti
Transcriber:	S. Wilson
Place of Hearing:	Port Coquitlam, B.C.
Date of Hearing:	November 28, 2008
Date of Judgment:	November 28, 2008

[1] **THE COURT:** The claimant, Port Coquitlam Building Supplies Ltd., sues to recover against the defendant, Corporation of the District of Maple Ridge, certain costs it incurred to replace a front passenger side tire damaged during the course of a delivery of building supplies to a customer, one Mr. Jennings, on 272nd Street in Maple Ridge, on the afternoon of April 26th, 2007.

[2] The facts of this case are not greatly in dispute. The claimant sells building supplies. On April 26th, 2007, it was engaged in the delivery of four pallets or lifts of plywood or OSB to the customer.

[3] This load was then secured on its large 10-ton Peterbilt tandem rear-axle delivery truck, which measures some eight-and-a-half feet in width and is 31 feet long. The load was some five to six feet high. This truck is a flat-deck model and immediately behind the cab is a crane used for loading and unloading of supplies. It has a rear window and small nine-inch by 12-inch mirror in the right passenger door.

[4] On April 26th, 2007, the truck was being driven by the claimant's employee driver, one Gary Johnson. When he testified, he explained that he was fully qualified for this task and had some 19-and-a-half years experience driving for the claimant prior to this mishap, and one-and-a-half to two years on this truck which was his regular truck which he drove Monday to Friday each week. He testified that 272nd Street runs

generally north and south.

[5] On the afternoon of April 26th, 2007, he proceeded up 272nd Street and pulled over onto the shoulder of the road facing northbound across the road to the east of the customer's property, and I think somewhat north of it. His purpose was to park and ascertain where the customer wanted the supplies delivered.

[6] At some point, he spoke to the customer who came out from his property to guide Mr. Johnson as he backed into his driveway or possibly help monitor the traffic flow. It was normal practice for the driver to back into a customer's driveway on delivery.

[7] In the course of starting to back up, Mr. Johnson punctured the right front tire of his vehicle which went flat very quickly as the delivery truck was in the early stages of making a wide turn to the left while backing up into the customer's driveway.

[8] The cause of the puncture was the tire coming into contact with likely one anchor bolt that was one of two such bolts set in a flat piece of concrete located on the eastern shoulder of 272nd Street across from and north from Mr. Jennings' driveway.

[9] As a result of this mishap, a tire repair serviceman was called to the scene and somehow that afternoon the puncture was at least temporarily repaired at a cost of $218.04. This amount is not in dispute in the sense that the claimant spent it to get

underway on April 26th, 2007 back to its place of business after no doubt completing the delivery.

[10] A short while later, the claimant elected to replace this damaged tire and after an allowance of 15 to 20 percent for existing tire wear on the damaged tire, claims the cost of one new tire at some $913.69.

[11] Mr. Johnson said that the damaged tire was fairly new. He could not say the extent of the wear on it but understood that the tire sales representative felt the damaged tire had 20 percent of wear. He felt the damaged tire had good tread still remaining.

[12] The tire sales representative did not testify. His view of the degree of wear is inadmissible hearsay evidence.

[13] I note that the notice of claim states that a deduction has been made for 15 percent wear, not 20 percent.

[14] The defendant has not at trial really quarrelled with the amount of money damages the claimant seeks in any event to replace this tire.

[15] There is no evidence as to who owned the precise area where the concrete base was located, apparently on the shoulder of the road, and no evidence as to who caused to be built the cement base with the two anchor bolts extending therefrom, initially at a 90-degree angle from the base. I accept, however, that 272nd

Street is a public road and that the shoulder area where this tire damage occurred was part of the public road as this term is generally understood including in s. 8(2)(b) of the ***Occupiers Liability Act*** (see the case of ***Talarico v. Town of Fort Nelson***, 2008 BCSC 861 in paras. 51 and 52).

[16] Mr. Wayne Hardy gave evidence for the defendant municipal corporation. He is now a Roads and Equipment Supervisor thereat and has been employed by this municipality for some 21 years. As a supervisor, it was Mr. Hardy's responsibility to look after all surface features of all roads and road shoulder areas of same within the District of Maple Ridge.

[17] Mr. Hardy testified that this road was originally a logging road but had been fully rebuilt in 1994 or by this date. The rebuild involved the roadbed being excavated by approximately two feet and from ditch to ditch on either side. Hence, Mr. Hardy was of the view that the piece of concrete in question must have been erected after 1994 and prior to 2008, but he could not say by whom or when. Had it been in place prior to the rebuild, it would have been removed in the construction.

[18] His best opinion was that it was likely a crude base for a rural mail box, probably constructed by some homeowner merely digging a hole in the ground and shovelling cement into same and then placing the anchor bolts therein. It was not built by the defendant District in his view.

[19] Photographs taken by the claimant's representative, Mr. Coakley, likely in September 2008, show that the cement base measures some 26 inches by 32 inches and appears to be about three inches thick (see especially photo 5 at Tab 5 of Exhibit 2). These photographs show that this concrete slab is located some 45 inches from the white line on the eastern edge of the road surface comprising the northbound lane of 272nd Street. This white line is some 24 inches from the edge of the asphalt of the road surface.

[20] The anchor bolts were said by one claimant witness, Mr. Galer, to extend about four inches above the concrete base. Mr. Hardy of the District of Maple Ridge estimated they stuck out likely three-and-a-half inches. Each has a nut thereon; they appear to be about three-eighths of an inch in diameter.

[21] Mr. Johnson said that on the day the tire was damaged the concrete base was covered with various detritus including dirt, gravel and grass covering it pretty much.

[22] Shortly after his tire was punctured, he cleared off the concrete pad so that the bolts would be more visible. The two bolts were initially upright but likely the customer, Mr. Jennings, later knocked them over so they were less hazardous. There is no evidence he knew this concrete base was on the side of the shoulder at any time prior to this mishap.

[23] It seems there is no dispute that this concrete base was on

the shoulder of the roadway being 272nd Street in Maple Ridge and that the upkeep of this road was the responsibility of the District of Maple Ridge, regardless of who owned the roadbed itself.

[24] No one knows who built this base and in what years it may or may not have been in use as for example a base or support for a rural mailbox with an actual mailbox sitting on top of it. It is possible it was never so used or that if it was so used, the mailbox might have been removed shortly before April 2007. In the event it was so used as a mailbox, on any drive-by inspection, it would likely resemble any such mailbox at the side of a rural road in the Lower Mainland area.

[25] Mr. Steven Butoia, an engineering inspector employed by Maple Ridge in April 2007, said that he was one of three road inspectors who inspected all roads in Maple Ridge, once per month, 11 of 12 months each year. He said had the concrete base in question had a mailbox on it, his attention would not have been drawn to it.

[26] When he inspected roads in Maple Ridge, he was alive to safety hazards to the public on their surface, on the shoulders, and was even alive to blockages in ditches beside roads that could cause flooding. Any such hazard would be noted and referred to the appropriate Maple Ridge department for action depending on its urgency.

[27] He had inspected 272nd Street on April 4th to 5th, 2007 and had seen no road hazards, including the concrete pad in question. If he had seen it, he agreed it would be a problem or safety hazard. If the base had a mailbox on it, he said his attention would not have been drawn to it.

[28] I should state that the claimant asserts that the concrete base was visible to anyone who cared to look for it because it was elevated above the grade of the shoulder gravel surface.

[29] It is far from clear to me that this was so on April 26th, 2007 at the time the puncture occurred. I am aware this entire area was cleared up somewhat on April 26th and later to allow certain photographs to be taken, some as late as September 2008. One photo (Exhibit 2, Tab 5, number 16) supposedly showing this elevation was taken by Mr. Coakley, I believe, in September 2008 but from the customer Mr. Jennings' driveway to the west of the concrete base and likely looking down on it. Photograph 6 at Tab 5, Exhibit 2, shows the surface of the slab to be arguably below grade level.

[30] In any event, Mr. Hardy for the defendant said there were some 450 kilometres of public roads in the District of Maple Ridge. Of course many but not all of these roads would have gravel shoulders as did 272nd Street because many would be somewhat rural in nature as compared to an asphalt road in a residential area bordered by cement curbs and sidewalks and residential lawns in many cases.

[31] No testimony was given as to the number of kilometres of roads similar in construction to 272nd Street that existed in Maple Ridge in the month of April 2007 but I think from my knowledge of this area of the Lower Mainland the number would be fairly extensive. Mr. Hardy did agree, nonetheless, that the piece of concrete with upright bolts was a hazard to members of the public using the road in 2007 and said that if he had located it on an inspection he would have reported it, in essence, to the appropriate department so that it could be removed.

[32] I find that this removal would not have been particularly time-consuming and costly and would at most have necessitated a brief backhoe attendance with say a pickup truck to carry away the remains of the concrete base.

[33] Mr. Hardy testified that for some time Maple Ridge had in place an in-house policy related to road inspections initially developed by a municipal engineer. This policy was approved and adopted by the Maple Ridge Council on April 10th, 2001. An extract from the town Council Minutes of that date shows that an agenda item entitled "Inspection of Municipal Works" was moved, seconded and carried that day. The Minutes of this meeting being part of Exhibit 3 at trial state in part as follows:

> Wherein the adoption of the 2001 provisional budget as the annual budget in principle provides for a level of inspection that is affordable be it resolved that for operational services activities:

> (a) the municipality be divided into 12 zones and that on a monthly cycle, the following items in each zone be inspected by motor vehicle and appropriate records of the inspection results be kept.

[34] There then follows a list of 11 areas, two of which are (2) road surface conditions and (3) road shoulders. Then follows paragraph (b)which states that a thorough walking inspection be undertaken once every four months of two items, namely, (1) core area sidewalks and (2) school walkways. Then follows paragraph (c) as follows:

> (c) that an annual inspection be undertaken of three items (1) road crossing culverts, (2) bridges, (3) wharves.

Then following is some language relating to inspection of potentially dangerous trees and other matters.

[35] This policy generally requires every road within the 450 kilometre total of public roads to be inspected monthly in 11 of 12 months every year. This program was developed and the inspections are done because Maple Ridge realized they could have hazards on the roads, especially those less travelled, and they wanted to regularly review all roads annually on this basis to detect same if present.

[36] The inspection of 272nd Street and other roads are by a road inspector driving an automobile. Mr. Hardy said that the District of Maple Ridge did not have the financial resources to do more inspections or different types of inspections than those

monthly driving inspections of all roads or I suppose the others mandated in the policy.

[37] In addition, he said the District of Maple Ridge received public input regarding road hazards or concerns, for example, calls from citizens, all of which were logged into a computer with a request for action. Mr. Hardy said that these complaints are delegated to the appropriate department within the municipal government and bureaucracy and do not go away until someone deals with them. He checked the computer database for complaints for the concrete pad and anchor bolts on 272nd Street and found they had received no notice of same prior to April 26th, 2007.

[38] Importantly, I think, he said the defendant was not aware of this road hazard prior to the claimant suffering damages that day. As I have said, there is no evidence the defendant municipality created this hazard in the first place or that the concrete base is an abandoned municipal project or work.

[39] In addition, Mr. Hardy said all municipal employees who are out and about using municipal roads are alive to safety issues and concerns, and if they see a problem or concern, they know to call in and report it. This is a further aspect of the Maple Ridge road inspection program in place in April 2007.

[40] In addition, he said the road maintenance program also involved in the growing season from May to the end of October

cutting the grass at the roadside in the area where the concrete base was located. It was apparently cut twice; the first time likely at the end of May each year and later likely in late August. He said the mower was set to cut to four inches above the surface hence even if freshly cut the grass growing at or near this concrete base would have extended one-half inch above the height of the bolts assuming the top of the concrete base was more or less level with the ground which generally appears to be the case.

[41] In April of 2007 it seems that the grass on the roadside would likely have been last cut by the municipality or one of its two subcontractors likely six or seven months earlier.

[42] In cross-examination, Mr. Hardy said that there was no requirement in Maple Ridge to first obtain a building permit for the construction of a roadside mailbox footing or base. He was not able to agree when shown the claimant's photos that the concrete pad was above road level. He confirmed that Maple Ridge had had a road inspection system for the 21 to 22 years he had been employed and that it was readopted in April 2001. The system was intended to be both workable and affordable from the municipality's standpoint. He agreed that if one of the Maple Ridge road inspectors had found the concrete pad with bolts standing upright prior to April 26th, 2007 that because the bolts were a hazard, it should have been reported.

Position of the Parties

[43] The claimant says the defendant District of Maple Ridge was in essence negligent in the manner in which it inspected this road. It does not allege the defendant's policy was defective, rather it alleges fault in the operational aspect of the policy. Had it done reasonable inspections it would have located this concrete base with two anchor bolts standing upright some three-and-a-half to four inches in height from the base, recognized it was a hazard to road users, and immediately removed it.

[44] The claimant asserts that proper inspections would have involved someone walking on the asphalt surface of 272nd Street at or near the perimeter white line and checking assumedly the road surface and shoulder areas adjacent thereto.

[45] Mr. Coakley, the claimant's general manager, suggested that a municipal worker could cover ten kilometres a day inspecting the roads in Maple Ridge in this fashion.

[46] Mr. Hardy again testifying for Maple Ridge said this municipality has 450 kilometres of roads as I have said, all of which are inspected monthly. Assuming that this is so and with one road inspector doing such an inspection on foot and only really able to inspect one shoulder at a time, then each road would require two trips; one up and one back down for a full inspection or 900 kilometres of walking or 90 full days with such inspector or some 18 five-day weeks of work, again assuming ten kilometres a day could be covered.

[47] This proposed type of road inspection was not put to the defendant's witnesses by Mr. Coakley in cross-examination and therefore they were not given an opportunity to comment upon it.

[48] It would be speculation on my part to assess such an inspection methodology to be reasonable, workable or affordable, or to conclude that if it was used, the cement base and bolts in question would have been detected at all by a person on foot.

[49] Mr. Coakley also asserted in argument that Maple Ridge had been negligent in allowing the grass at the side of 272nd Street to grow too long, thereby obscuring the concrete base and when it was cut, it was not cut short enough. He did not argue it was not cut often enough. He also asserted that whoever was in charge of road maintenance (and especially the shoulders of 272nd Street) was negligent as they had allowed the concrete base to become covered with debris so as to be difficult to see.

[50] I have commented above on his position on behalf of the claimant that a driving road inspection was also inappropriate especially one done at 30 to 50 kilometres per hour, and one that involved no foot inspections.

[51] The claimant offered no evidence, including expert evidence, in support of its various allegations of negligence, for example, evidence of another municipality having a different system on all of the above fronts and involving walking inspections of rural road shoulders. Nor was any report or

similar study offered relating to road safety and municipal road maintenance criteria with respect thereto.

[52] I am therefore not in a position to conclude that what Maple Ridge did in April 2007 was qualitatively or quantitatively different in scope as compared to other Lower Mainland municipalities, or different from some proposed scheme that might prior to April 2007 have been recommended to it and other municipalities as a viable and proper form of road inspection. I have no existing yardstick or standard of care based on such evidence that I can use to measure the reasonableness of the defendant's inspection and road maintenance scheme against.

[53] As to grass cutting, the photographs filed by the claimant do not in my view show the shoulder area of 272nd Street near where the mishap occurred to be unkempt. One, for example, shows grass growing near the concrete base to be about six inches in height by my estimation. It is not clear if this was taken in April 2007.

[54] I do not find that Maple Ridge was careless or breached any duty of care owed to the claimant in April 2007 by:

1. failing to cut grass on the shoulder of 272nd Street more frequently, or shorter; or

2. that it was careless in maintaining the road shoulder in question so as to allow detritus to build up on the

> concrete base for example, so as to obscure it from municipality road inspectors.

[55] This argument I think presumes the defendant was aware that this concrete base existed and failed to maintain it.

[56] I accept that the defendant did not know this concrete base existed and would therefore have had no reason to be concerned about grass build up on same.

[57] It would be sheer speculation on my part to conclude on the balance of probabilities that cutting the grass more frequently would have resulted in the municipality detecting the base in question. There is no evidence that the mower blades used could have been set lower than four inches. No cross-examination occurred on this point nor as I have said, do I see that it is an act of neglect or carelessness to allow grass clippings and dirt, for example, to build up on a base that may once have held a mailbox or if not, was a construction unknown to the municipality.

[58] I will return to the claimant's allegations of negligent inspection later in these reasons.

[59] The claimant relies on no fewer than seven cases in support of its various submissions as follows:

1. ***Pearson v. Maple Ridge***, [1994] B.C.J. No. 2751 (B.C.C.A.);

2. ***Simpson v. Baechler et al.***, 2007 BCSC 347 (B.C.S.C.);

3. ***Cullinane v. City of Prince George***, 2000 BCSC 1089;

4. ***Plakholm v. City of Victoria***, 2008 BCSC 1048;

5. ***Reid v. Hatty***, [2005] N.B.C.A. No. 5;

6. ***Aberdeen v. Township of Langley***, 2007 BCSC 993;

7. ***Ryan v. City of Victoria***, [1999] 1 S.C.R. 201 (S.C.C.).

[60] In ***Pearson***, *supra*, the trial judge found that the District of Maple Ridge owed a 66-year-old pedestrian who fell over some traffic cones owned by and haphazardly placed by the municipality a duty of care as set out in s. 3(1) of the ***Occupiers Liability Act***. It breached the same by leaving the cones so as to obstruct the plaintiff's walking. The trial judge apportioned liability between the plaintiff and municipality and of our Court of Appeal upheld the decision. No argument appears to have been made as to the effect of s. 8 of the Act if it was in April 1991 in force at all. It is clear the municipality in this case "created" the hazard that led to the plaintiff pedestrian's fall and at all material times, knew of its existence unlike in the case at bar.

[61] In ***Cullinane***, *supra*, a plaintiff pedestrian in late January 1997 slipped and fell on a build-up of ice on a City of Prince George sidewalk. The City owned the sidewalk and admitted that

it was an occupier of same within the meaning of the ***Occupiers Liability Act*** in this Province. The plaintiff in this case alleged that the City was in breach of the duty of care it owed to the plaintiff under the Act and that the City was negligent in failing to see that the sidewalk was reasonably safe for pedestrians to walk on. I think it is clear on the facts of ***Cullinane****, supra*, that on the date in question, the City through its Bombardier snow plough operators knew or ought to have known of the existence of this ice build-up and had not put sand or like abrasive material on it to make it less hazardous for pedestrians (see para. 48). Mr. Justice Coultas held that the City owed a duty to pedestrians to ensure that the sidewalk was reasonably safe and failed in this duty thereby breaching its duty as an occupier under the above Act.

[62] In ***Simpson,*** *supra*, the plaintiff pedestrian was injured by a motorist when he attempted to cross a road in Campbell River from a sidewalk and when his vision was partly obscured by a utility pole located close to the corner and which prior to the accident date had been recommended in an engineering report given to the municipality and others to be moved because it posed a safety hazard by hiding pedestrians from motorists using this area of roadway. The recommendation when made resulted in the pole becoming a known risk and the defendant municipality ignored this report and was ultimately held to be 20 percent negligent in not removing or relocating the pole in question, said to be a hazard to pedestrians.

[63] In ***Plakholm,*** *supra*, the plaintiff fell on a piece of uneven roadway while crossing the road. It was caused by a recent repair, a repaving done by the City of Victoria, which left a difference in elevation where the repaired road surface met the undisturbed portion of the roadway.

[64] The trial judge found that the defendant knew the repaired area would settle and that the surface difference which caused the fall would inevitably result. The difference was an unusual danger to the plaintiff pedestrian who was not warned of it and who could have been expected to use the street in the area where the repair occurred.

[65] Liability was based on the common law principles of occupiers' liability. The plaintiff was seen to be a licensee of the roadway; the law governing the liability of the City as road licensor was set out in para. 32 of Mr. Justice Johnson's reasons he having earlier found that s. 8(2) of the ***Occupiers Liability Act*** excluded the City of Victoria from having any statutory liability to the plaintiff based on a statutory duty of care arising under the Act. At para. 32 he said having first found that the plaintiff as a member of the public had a right to be on the street at the time as in the case at bar as follows:

> [32] The duty owed by an occupier to an licensee was described in ***Mersey Docks and Harbour Board v. Procter***, [1923] A.C. 253, at p. 274, in this way:

> A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself: if it is one to be expected, he must expect it and take his own precautions. If he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements. As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgement and conduct under the circumstances that can be reasonably foreseen. The licensee is to take reasonable care of himself and cannot call a thing a trap, the existence of which a reasonable man would have expected or suspected, so as to guard himself from falling into it.

[66] Mr. Justice Johnson said this language was to be viewed with caution (at para. 40) and finally concluded in para. 41 thereof that the duty of care owed by the City of Victoria to the plaintiff pedestrian as a licensee on the roadway when she fell was as set out in the case of ***Bartlett et al. v. Weische Apartments Ltd.*** (1974,) 7 O.R. (2d) 263, a judgment of the Ontario Court of Appeal, given by Mr. Justice Jessup therein, namely, to avoid foreseeable risks of harm from unusual danger of which the City knew or ought to have known. It seems he found that the uneven pavement was at least a situation which created a potential risk of harm to a pedestrian of which the City ought to have known. As Mr. Johnson said in para. 33, the ***Plakholm*** case was not one in which a municipality's duty to

inspect roadways or the frequency with which they occurred was in issue as in the case at bar. In ***Plakholm*** unlike the case at bar, the defendant municipality created the hazardous road conditions in the first place.

[67] The same can be said as well in ***Aberdeen,*** *supra,* a judgment of Mr. Justice Groves of our Supreme Court of British Columbia, decided July 7th, 2007 before ***Plakholm,*** *supra*, and not referred to in the ***Plakholm*** reasons.

[68] In ***Aberdeen,*** *supra*, a cyclist was forced off 272nd Street in Langley by an approaching driver. The cyclist in his evasive action hit a patch of gravel on the roadside and without time to brake, was propelled against a metal guardrail earlier constructed and maintained by the City of Langley. It was so constructed as to have a gap between the first metal barrier and the following cement "no post" barrier after the guardrail ended. The cyclist Aberdeen was directed along the metal barrier, through the gap and over an embankment and suffered in the end result very serious long-term injuries. The plaintiff successfully established at trial that the defendant City of Langley was negligent in both creating the gap in the two barriers when it built them and in failing to recognize this existing danger during inspections. It called two expert witnesses who testified that unrepaired gaps in roadside barriers were unsafe and ought to have been remedied.

[69] The trial judge in ***Aberdeen****, supra*, said this at para. 38 of his reasons:

> [38] I have concluded that Langley owes a duty of care to those who travel on its roads to ensure that the roadways are reasonably safe for the purposes of travel. I have concluded that Langley breached its duty of care to Aberdeen, a reasonably foreseeable user of the road operating a bicycle on a dedicated bicycle route. As a result of the breach of the duty of care, Aberdeen was injured. I note that the guard rail configuration was a hazard put in place by Langley. It is something that with a relatively modest cost, approximately $1,500 expended in July 1999, could have been avoided. Funds would have been available to eliminate this hazard, had it been properly identified as such. Even balancing environmental and financial constraints, Langley should not have left what two witnesses immediately described as an unsafe barrier configuration when the cost to remedy the situation was so low.

[70] Mr. Justice Groves was referred to three cases defining the duty of care he should use, two of which defined it as a duty to use reasonable care to keep its streets in a reasonable safe condition and also quoted from ***Just v. British Columbia***, [1991] B.C.J. No. 3328 which I shall come to in stating:

> This duty of care ordinarily extends to reasonable maintenance and includes the duty to take reasonable steps to prevent injury to users of the roads by reason of hazardous conditions: ***Just v. British Columbia***, [1989] 2 S.C.R. 1228.

[71] Finally, Mr. Justice Groves held that the cases which limit a municipality's liability for negligence where it has a policy in place to check roads for hazards for the most part dealt with among other things hazards created by others, as here, and said

that they did not apply in the circumstances present in ***Aberdeen****, supra*, where the municipality itself actually created the hazard (see para. 39).

[72] In ***Hatty****, supra*, the New Brunswick Court of Appeal allowed an appeal from a trial judgment which found a New Brunswick homeowner 50 percent responsible for the personal injuries suffered by a neighbour, one Ms. Reid, who tripped and fell on a raised piece of cement in the homeowner's walkway at 8:30 p.m. one evening when delivering some mail. The Court of Appeal held that the defendant, Ms. Hatty, had acted reasonably in placing safeguards to visitors to her property including a motion-activated sensor light which would illuminate the rise in the walkway if the visitor actually used the walkway on entry to the property which the plaintiff had not done.

[73] This decision is not binding on this court but it does contain a useful discussion of various ***Occupiers Liability Acts*** in Canada at the date of the judgment, January 27th, 2005, including our own which is said to place a single positive duty on every occupier to take reasonable care to see that all visitors are reasonably safe in using the premises (see ***Tutinka v. Mainland Sand and Gravel Ltd.*** (1993), 110 D.L.R. (4th) 182 at p. 197-8, a judgment of our Court of Appeal).

[74] This court did follow ***Ryan v. City of Victoria****, supra*, in its discussion of the appropriate standard of care to apply in assessing the reasonableness of Ms. Hatty's conduct (see para.

30) and did so applying the law of negligence as the claimant in the case at bar invites me to do. The court applied the standard of care referred to in ***Ryan v. City of Victoria*** at paras. 30-31 and I quote from para. 31 in ***Ryan v. City of Victoria***, Major J. states at para. 28 :

> [28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[75] It exonerated Ms. Hatty in this case who it found had taken reasonable efforts to prevent the injury by placing safeguards for the protection of visitors that were reasonable in the circumstances, namely, lighting, and in telling Ms. Reid on her leaving the premises in question to "watch your step".

[76] ***Hatty***, *supra,* did not involve a roadside hazard, nor did it concern itself with inspection policies and procedures adopted by municipalities in this province.

[77] The claimant in the case at bar in its supplemental submission relies on the above test in ***Ryan***, *supra*, and essentially asserts that the defendant should be found to have breached its duty of care by failing to exercise a standard of care in its road maintenance that would be expected of an

ordinary, reasonable and prudent person in the same circumstances.

[78] In ***Ryan****, supra*, the Supreme Court of Canada held that the legal responsibility of all defendants must be determined on basic negligence law principles. Here, a plaintiff motorcyclist had injured himself while riding in Victoria in attempting to cross a rail track running down the centre of a downtown street. Much of this case deals with a very narrow issue not applicable to the case at bar of whether or not if a railway, a named defendant in the ***Ryan*** case, complies with all statutes and regulations in doing its business, can it nonetheless be found liable and in breach of the duty of care owed to the plaintiff Ryan?

Defendant's Position

[79] In summary, the defendant argues that the claimant's case is referred to at least in its trial submissions are all situations where the defendant municipalities had knowledge of a dangerous situation and failed to act.

[80] I agree with this submission save for my above comments on the ***Plakholm****, supra*, case.

[81] Ms. Walton in a very helpful supplemental submission argues as well that when s. 8(2) of the ***Occupiers Liability Act*** operates as here to exclude the defendant municipality from the

scope of the legislation, then the common law of negligence applies.

[82] The claimant accepts this proposition in its also very helpful supplemental submission.

[83] I accept that the intent of this Act was to replace and refine the common law principles relating to among other things the duty of care owed by occupiers of premises to visitors thereon (see for example ***Waldick v. Malcolm***, [1991] 2 S.C.R. 456 at p. 10 of the CanLII report.) I accept that the Act is a code which supersedes the common law principles dealing with occupiers of premises (see the ***Tutinka***, *supra*, case referred to above at para. 52).

[84] Ms. Walton argues that since the intention of the Act is to codify the common law, that where s. 8(2) applies as here to a municipality and to then apply common law occupiers liability principles to premises including public roads exempted under s. 8(2) of the Act would nullify the intention of the Act. Therefore, only common law principles of negligence apply.

[85] As an example of this approach, she cites the case of ***Storey v. Prince George*** (1979), 11 B.C.L.R. 224, a judgment of our Mr. Justice MacKinnon of our Supreme Court, a case involving the plaintiff slipping and falling on an icy sidewalk in front of the Prince George library.

[86] There was some dispute on the facts of this case whether the fall occurred in a lane or a sidewalk. If in a lane, MacKinnon J. held that s. 8(2) of the ***Occupiers Liability Act*** applied excluding public roads and therefore, in such circumstances, the plaintiff would have to rely on a breach by the defendant Prince George of a duty owed under the common law principles of negligence (see para. 9 of the reasons). If the fall was on a sidewalk, the test which MacKinnon J. seems to have settled on is set out in para. 14 of his reasons as follows, and I quote:

> [14] Thus the occupier must take reasonable care to avoid foreseeable risk of harm from any unusual danger on the occupier's premises of which the occupier has knowledge or of which he ought to have knowledge because he was aware of the circumstances.

[87] This is almost exactly the same legal test as in the Ontario Court of Appeal judgment in ***Bartlett*** above referred to and followed by Mr. Justice Johnson in ***Plakholm****, supra*.

[88] Ms. Walton relied on some eight authorities in her submission on behalf of the defendant which in chronological order as follows:

1. ***Thornhill v. Martineau***, [1987] B.C.J. No. 467;

2. ***Rowe v. British Columbia***, [1998] Carswell B.C. 263;

3. ***Brown v. British Columbia***, [1994] 1 S.C.R. 420;

4. ***Short v. City of New Westminster***, unreported, March 20th, 1995, Vancouver Registry No. S011935;

5. ***Asch*** (phonetic) ***v. City of New Westminster***, unreported, April 11th, 1997, Vancouver Registry No. C960121;

6. ***Einarson v. City of Richmond***, [1998] Carswell B.C. 1927;

7. ***McDonagh, guardian ad litem of v. Gavin***, [2004] Carswell B.C. 3132;

8. ***Duddle v. City of Vernon***, 2004 BCCA 390.

[89] Ms. Walton submits that the obligation or duty of care on a municipality with respect to maintenance of public highways is as set out by Madam Justice Baker in ***McDonagh***, *supra*, at para. 31 as follows:

> [31] … There is no dispute as to the law. It is set out in a number of authorities including statements by the Supreme Court of Canada that the obligation on a municipality is to maintain roadways in such reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety.

[90] In ***McDonagh***, *supra*, the passenger was injured when the vehicle in which he rode struck a power pole located at the corner of an intersection. It was alleged that the Municipality of Vernon was negligent in that they allowed or placed this pole

on and not beside the roadway when it knew or ought to have known that it was unsafe to do so.

[91] In this case, the court considered a report from an independent expert in intersection design who said the location of the pole in issue met the standard of intersection design. There is no evidence that the placement of the pole led to past difficulties as in the case at bar.

[92] Baker J. held that ordinary vehicles driving in the lane in question would face no hazard from the pole in question and dismissed the plaintiff's claim.

[93] The ***Rowe v. British Columbia***, *supra*, decision was referred to by Baker J. with approval at para. 32 of her reasons. In ***Rowe***, *supra*, a case also relied on by the defendant, a known object, a large boulder over two metres in height located some 5.65 metres beside the northbound lane of Highway 97 was struck by the plaintiff's vehicle resulting in injuries to a passenger. It was alleged that the provincial Crown having responsibility for this highway was negligent in uncovering the boulder during road construction, thereby making it larger than when it was in its natural state and leaving it so close to the highway that it created a hazard for anyone who ran off the road. Mr. Justice Maczko of the Supreme Court of British Columbia adopted a test very similar to that used by Baker J. in ***McDonagh***, *supra*, in para. 31 above.

[94] In his reasons at para. 11 he noted that the law states that municipalities are not insurers of the safety of the travelling public, for example, see ***McCready v. County of Brant***, [1939] S.C.R. 278 (S.C.C.), and the portion of Kerwin J.'s reasons quoted therein at para. 12.

[95] Maczko J. adopted Kerwin J.'s analysis in ***McCready***, *supra*, at p. 282 in para. 12 of his reasons and appeared to accept in determining whether a municipality exercises reasonable care in road maintenance or due diligence is to be determined having regard for the reasonable driver, the physical characteristics of the road, the public needs, the season of year, and climate conditions. He did not find that the Crown was negligent with respect to the situation it created when the highway was constructed in allowing the boulder to be dug up and remain at the roadside. This was because it was not foreseeable by the municipality or Crown entity involved in road maintenance that it presented a hazard to motorists using the highway with reasonable care. The provincial Crown was not required in his view to remove the boulder as it presented a hazard only to drivers who might veer off the road.

[96] I think it important to emphasize in ***Rowe***, *supra*, that the Province created the alleged hazard in the first place and therefore knew of its existence at all times for this reason and as well because the boulder was there to be seen by anyone. This fact distinguishes ***Rowe*** from the case at bar.

[97] Nonetheless, Ms. Walton argues that in our case, the anchor bolts were some five feet from the asphalt surface of 272nd Street, far enough away from the travelled portion of the highway so as to not present a hazard to persons using the road with ordinary care. This point of view is not shared by the defendant's own witnesses who identified the concrete base if known about, as a hazard to road users.

[98] Ms. Walton next argued that the defendant had a policy for inspection as set out in the above April 10th, 2001 council minutes that all road inspections be done by motor vehicle and that this policy was not reviewable by the court if it is not alleged that the policy was made other than in good faith. No such allegation is made by the claimant in the case at bar.

[99] Ms. Walton further argues that the Maple Ridge road inspection policy set out in the minutes was reasonable and was one that was followed at all material times, and I should find as I understood her submission, that this reasonable policy exempts Maple Ridge from having a private law duty of care to the claimant at all.

[100] Policy decisions made by government bodies are immune from liability, she argued, unless they are made in bad faith, which was not so here, or are so irrational as to not be a proper exercise of discretion.

[101] Finally, a *bona fide* policy decision involving consideration of financial resources or personnel which is not so irrational that it could not be a proper exercise of discretion cannot be reviewed on a private law standard of reasonableness. Maple Ridge's policy was reasonable. It followed its own policy. There were no complaints hence there was not want of care on the municipality's part. She relied substantially on the ***Brown v. British Columbia****, supra*, case in support of this submission.

[102] In her written submission she did state in para. 11 that the only basis upon which a public authority could be held liable was where the operational aspect of its policy falls short. This of course is where the claimant alleges liability in this case should lie.

[103] ***Brown v. British Columbia****, supra*, was decided by our Supreme Court of Canada with reasons on March 17th, 1994, some four-and-a-half years after another leading Supreme Court of Canada case on point in British Columbia which I have alluded to above, namely, ***Just v. British Columbia****, supra.*

[104] ***Just****, supra*, involved a large boulder tumbling down a local mountain and striking the plaintiff's vehicle while he was driving on the Whistler highway, killing the plaintiff's daughter and injuring him.

[105] It was alleged this event would never have occurred had proper inspections of the mountainside been done. As Cory J. of the Supreme Court of Canada said in para. 31 of his reasons:

> [31] ...Here what was challenged was the manner in which the inspections were carried out, their frequency or infrequency and how and when trees above the rock cut should have been inspected, and the manner in which the cutting and scaling operations should have been carried out.

[106] Mr. Just sued the Province representing the Department of Highways who at all material times was responsible for maintaining the highway in issue. He alleged that they had negligently failed to maintain the highway properly and had they done so, the loose rock would have been located and scaled, that is to say, removed safely.

[107] He lost at trial and our British Columbia Court of Appeal upheld the trial judge's decision that the Department of Highways had conferred on its various rock-scaling crews the responsibility of formulating policy with respect to prevention of rock falls on highways. Their decisions were policy decisions made by governmental authorities and for which they were exempt from liability. These decisions did not involve the implementation of policy.

[108] Mr. Just appealed to the Supreme Court of Canada. Mr. Justice Cory therein gave the reasons for the majority of

the court. This court found the two British Columbia courts had erred in their analysis and ordered a new trial.

[109] I think the ***Just****, supra*, case is important because it is applied in the later ***Brown****, supra*, case and it sets out the test at para. 11 and the following paragraphs to be applied by a trial judge in a case as here where the user of a highway or public road suffers damages as a result of alleged neglect on the part of the government entity charged with the responsibility of maintaining and inspecting the roadway. The test involves a number of steps as follows:

1. Does the government body, here the Corporation of the District of Maple Ridge, owe a duty of care to the claimant road user? Is he in a relationship of sufficient proximity to the government body that in reasonable contemplation of that body the carelessness on its part in, for example, maintaining the road in question is likely to cause damage to the latter? The Supreme Court of Canada held in ***Just****, supra*, that a duty of care was owed by the Province to those who use its highways to reasonably maintain the highways. Likewise, I find the defendant did owe a duty of care to the plaintiff in this case a road user of 272nd Street in the month of April 2007.

2. If a duty of care is owed, are there any statutory provisions that impose any obligation on the

government body to maintain its highways? In ***Just,*** *supra*, by implication the ***B.C. Highway Act*** did impose an obligation to maintain highways. The claimant did not argue in the case at bar that there were any relevant statutory provisions which I should consider on point and I am not aware of any.

3. Alternatively, does such legislation, if it exists, provide the government body with an exemption from liability for failure to maintain them? In ***Just,*** *supra*, the answer was no. In the case at bar, s. (1) and (2) of the ***Occupiers Liability Act*** are relevant. They state as follows:

> 8(1) Except as otherwise provided in subsection (2), the Crown and its agencies are bound by this Act.
>
> (2) Despite subsection (1), this Act does not apply to the government or to the Crown in right of Canada or to a municipality if the government, the Crown in right of Canada or the municipality is the occupier of...
>
> (b) a public road ...

I find that 272nd Street in the District of Maple Ridge is a public road as I have said. By virtue of s. 8(2) of the ***Occupiers Liability Act***, any statutory duty of care therein set out does not apply to Maple Ridge as the occupier of 272nd Street where the mishap occurred. I do not find, however, that this provision exempts Maple Ridge from liability with respect to any

negligent acts (see, for example, ***Brown v. British Columbia***, *supra*, at para. 36). Rather s. 8(2) has the effect, I find, of removing this defendant from owing a duty of care defined by the Act to the realm of common law negligence principles.

4. Next, it must be determined if the government body is exempted from liability on the grounds that the system of inspections including their quality and quantity constituted a policy decision of a government agency and was thus exempt from liability.

Cory J. asked whether the decision of the Department of Highways Rock Section as to the quality and quantity of inspections was a policy decision, exempting the government from liability to Mr. Just. In his discussion of this last point, he suggested that not every policy decision made by a government body will exempt the government from liability in ***Just***, *supra,* our Province. It must be one adopted in a *bona fide* or good faith exercise of discretion and having regard to all circumstances including budgetary restraints if it is appropriate. Policies can be attacked by claimants on this basis. Cory J. suggested that a government policy in a large urban municipality to inspect roads once every five years would not be one that would exempt the said

municipality in the event a road user were injured by some hazard (see para. 15 of his reasons).

Cory J. also said in ***Just*** that the Crown, meaning the provincial government, but in context including I think all levels of government, must be free to govern and make true policy decisions without becoming subject to court liability, for example, in negligence as a result of those decisions, thereby, governments are not restricted in making decisions based on social, political, and economic factors. But not every government decision was a policy otherwise government would never be responsible for any action. Policy decisions must be differentiated from operational implementational decisions which may be subject to court claims. He said particularly difficult decisions will arise in situations where government inspections may be expected (see para. 16 of his reasons).

Cory J. further held in para. 21 that a government agency in reaching a decision pertaining to inspection must act in a reasonable manner which constitutes a *bona fide* exercise of discretion. To do so, he said, they must specifically consider whether to inspect and if so the system of inspection must be a reasonable one in all circumstances. If a decision is made to

inspect they must also be done properly. Once a decision to inspect is made the court may review the scheme of inspection to ensure it is reasonable and has reasonably been carried out in all the circumstances including the availability of funds to determine whether the government agency has met the requisite standard of care (see para. 23).

He held in answer to the question in (4) above that the Department of Highways rock inspection plan involving visual inspection of all slopes and further inspection of certain slopes where taking of additional safety measures was warranted were not policy decisions, but manifestation of the implementation of the policy decision to inspect and were operational in nature. These discussions could therefore be reviewed by the court to determine if the Province had been negligent in carrying them out (see para. 31).

5. If there is no exemption from liability available to the government agency, then the trial judge must engage in the traditional tort analysis and the issue of standard of care required by the government agency must be considered (see para. 29 of his reasons). The system and manner of inspection may be reviewed (see para. 34).

6. The manner and quality of an inspection system Cory J. said was clearly part of the operational aspect of a government activity and was to be assessed on the consideration of the standard of care issue. This requisite standard of care to be applied to the particular operation (in the case at bar: road inspections) must be assessed in light of all the surrounding circumstances including budgetary constraints, availability of qualified personnel and of equipment.

[110] I should state that where this court speaks of a traditional tort analysis, I think it means that once it is found by the trial judge that the government agency, here the roads department I expect of Maple Ridge, owes a duty of care to the user, here the claimant, then the court must determine if the agency breached the duty of care owed to the claimant road user by failing to meet a requisite standard of care and if so did that breach cause the claimant's loss?

[111] What is meant by the term standard of care is used by Cory J. in ***Just***, *supra*, and generally in the law of negligence? As pointed out by Linden in *Canadian Tort Law, 6th ed.* conduct is negligent if it creates an unreasonable risk of harm but not all risky conduct attracts liability. The standard of care in any given case can be assessed based on some evidence. Is there a compelling report done by some respective body setting out

safe road inspection methodologies that for example the defendant in question agreed to follow or at least knew about? Here, no such report as I have said is proven in evidence. In assessing the appropriate standard of care, the four factors set out in Linden's text starting at p. 117 is a reasonable starting point.

[112] In ***Brown****, supra*, a plaintiff while driving from Gold River to Campbell River went off the road when he hit a patch of black ice and suffered injuries. He sued the Province alleging it through the Department of Highways had failed to remedy the icy patch when it knew of it and failed to properly maintain the road in the first place so ice would not form. Highways knew of the icy patch due to three earlier accidents thereon being reported to it. The evidence was that a sanding truck did not arrive to sand the patch where the plaintiff had his accident because of worker scheduling issues.

[113] The headnote of the Supreme Court of Canada decision upholding the trial judge's and our Court of Appeal's dismissal of the plaintiff's claim succinctly sets out the court's findings and reasons.

[114] Ms. Walton argues based on ***Brown****, supra*, that Maple Ridge's approved policy of roadside inspection in effect on the date of the mishap in April 2007 was reasonable, rational and made *bona fide* or in good faith and was in April 2007 being followed and accordingly, Maple Ridge in this lawsuit is immune

from liability absent evidence showing that it fell short in the operational aspects of this policy. On this last point, she argues that the defendant is not an insurer of its roads and based on what was actually done by way of implementation of its policy it was not negligent.

Discussion and Findings of Fact

[115] In addition to any facts I have found to be unchallenged and which I accept above, I find the following facts based on the evidence before me:

1. 272nd Street in Maple Ridge where the concrete slab was located on the eastern shoulder was a public road and the shoulder area where the slab was located was part of this public road.

2. The defendant owed the claimant a duty of care to avoid foreseeable risks of harm from unusual dangers of which it knew or ought to have known including through a reasonable road inspection system. This duty is the same and in my view requires the same standard of care on the part of the defendant as if the definition in ***McDonagh****, supra*, were to be adopted in this case.

3. The concrete base or slab with two anchor bolts extended three-and-a-half to four inches from the base was a safety hazard or unusual danger to users of the

road and if known about, did pose a foreseeable risk of harm to a road user who might as did the claimant's driver pull onto the shoulder of the road, namely, 272nd Street.

4. This concrete base was not proven at trial to be elevated above the 272nd Street road surface in my view on April 26th, 2007. It was covered with grass, dirt and like objects at the time the tire puncture occurred.

5. The claimant's driver did not see it when he pulled over or when he commenced reversing on his turn to back into the customer's driveway. In completing these two manoeuvres, the claimant's driver acted reasonably. I do not find that he was in any way contributorily negligent for what occurred. He was not doing something that was unlawful or a manoeuvre that was not foreseeable to Maple Ridge, at least insofar as the evidence before me at trial proved. In other words, people using roads do pull over onto the shoulder and occasionally drive in forward or reverse thereon having done so. On the day in question, the claimant's driver in my view exercised ordinary care having regard to where he was in the District of Maple Ridge and what he was intending to do, namely, make a delivery of heavy building supplies to a customer.

6. The defendant did not, including through any agency or department, create this hazard or on April 26th, 2007, know of its presence. There is no evidence the customer, Mr. Jennings, who lived across the street therefrom did either.

7. The defendant's road inspection policy was enacted in good faith by the District of Maple Ridge following a recommendation from its engineering department and was made in a proper and appropriate exercise of its discretion as a municipality having regard to all circumstances including budgetary ones.

8. The defendant Corporation's decision to adopt a mode of road inspection as enacted by the Maple Ridge Council was one of policy, in my view. Unlike the policy discussed in ***Just***, *supra*, at para. 31, in my view the Council decision makes it clear when and how the road inspections were to be done. In the result, the Corporation of the District of Maple Ridge is exempt from any liability to the claimant flowing from the imposition of a duty of care with respect to highway maintenance, including inspections.

9. At all material times, the defendant followed and adhered to its policy of road maintenance and inspections, including in the month of April 2007, immediately prior to the mishap in question.

10. The defendant acted reasonably with respect to users of 272nd Street in April 2007, including the claimant in following its own policy and system of inspections as described in the defendant's evidence above. The manner and quality of its inspection was then in my view appropriate and reasonable having regard to the likely resources of this municipality in April 2007. I reject as being unreasonable the claimant's suggestion that the system of inspections ought to have involved walking inspections of the shoulder in question or cutting the shoulder grass shorter, perhaps more frequently.

I accept Ms. Walton's submission that the applicable test in assessing the reasonableness of the defendant's actions in a case like this is to consider whether what was actually done was reasonable or not and not what more could have been done perhaps in a perfect world (see ***Duddle v. City of Vernon****, supra,* at paras. 16 and 22). There is no question that in theory at least the defendant might have done more than it did in April 2007 by way of inspections, but the defendant's witnesses were not cross-examined on, nor did they admit that the extra care or work which the claimant argues the defendant should have undertaken was either reasonable, viable or affordable by Maple Ridge. I seriously doubt that any

> municipality could find workers to do walking inspections of all roads within their limits, or even some roads. There are obvious safety concerns for such a worker performing such a task. I also doubt that Maple Ridge could in this case dedicate, for example, one worker for a third of a year to do only such a task of road inspection.
>
> I am far from convinced on the evidence that I have heard that even if such a walking inspection was conducted in April 2007 on 272nd Street, that the concrete base not seen by Mr. Johnson at all on the afternoon of his delivery and apparently not known to the neighbour living across the road would necessarily have been detected either.

CONCLUSION:

[116] Based on all the evidence in this case, I do not find that the claimant has established that the defendant was in any way negligent or in breach of its duty of care owed to the claimant with respect to the implementation or operational aspects of its road inspection system on April 236th, 2007.

[117] Accordingly, the claimant's action against the defendant is dismissed.

[118] The defendant may recover all costs reasonably incurred by it against the claimant as provided for in Rule

20(2) of the *Rules of Court*. The Registrar of this court is authorized to allow any reasonable charges or expenses directly relating to the conduct of this proceeding therein in addition to those specified in Rule 20(2)(a) and (b).

[119] Finally, I would be remiss if I did not commend both parties for the care, time and attention they each took with respect to all aspects of the presentation and argument of this case. I am indebted to each of them for their assistance in my resolution of this case.

(ORAL REASONS FOR JUDGMENT CONCLUDED)