IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cook v. Klassen,*
2013 BCSC 1846

Date: 20131008
Docket: S-S-88806
Registry: Kelowna

Between:

Donald Campbell Cook

Plaintiff

And

Susan Klassen and the Corporation of the City of Penticton

Defendants

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Plaintiff:	D. Yerema
Counsel for the Defendant, Susan Klassen:	M. Davies
Counsel for the Defendant, The Corporation of the City of Penticton:	J. W. Locke
Place and Date of Trial/Hearing:	Kelowna, B.C. August 29 and 30, 2013
Place and Date of Judgment:	Kelowna, B.C. October 8, 2013

[1] The underlying action in this matter is a claim for damages by the plaintiff for injuries sustained in a motor vehicle accident ("the Accident") which occurred April 24, 2010 when the plaintiff, Mr. Donald Cook ("Mr. Cook"), while riding his motorcycle, was in a collision with a vehicle driven by Ms. Susan Klassen ("Ms. Klassen").

[2] The Accident occurred at or near the intersection of Lakeshore Drive ("Lakeshore") and Main Street ("Main") in Penticton (the "City"). Both streets are within the City and are owned by the City.

[3] There are two applications before the court. The first is an application brought by the City pursuant to Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 for an order dismissing the plaintiff's action and the third party claim against the City brought by Ms. Klassen.

[4] The second application is brought by the plaintiff Mr. Cook pursuant to the same Rule for orders the defendant, Ms. Klassen, and the City caused or contributed to the Accident, and to his resulting injuries and damages.

Background

[5] As stated, Mr. Cook claims for loss and damage against the City and Ms. Klassen arising from a motor vehicle accident.

[6] In his notice of civil claim Mr. Cook alleges Ms. Klassen was negligent by driving without due care and attention, by failing to keep a proper or any lookout, by failing to see or observe him in a reasonable time so as to avoid the collision, by crossing his line of travel when there was not sufficient time to do so safely, by making an improper and unsafe manoeuver, in failing to yield the right of way to him, by violating a number of sections of the *Motor Vehicle Act,* R.S.B.C. 1996, c. 318 [*Motor Vehicle Act*] and other assertions of negligent driving.

[7] Mr. Cook also alleges the City was contributorily negligent. His claim reads:

…

2. Further or in the alternative, the Plaintiff states that the said Collision was caused or contributed to by the negligence of the Defendant City, including the failure to reasonably or adequately design, construct and maintain the Intersection to ensure the safety of people approaching or proceeding through the Intersection such as the Plaintiff, particulars of which negligence include but are not limited to the following:

    a. Causing or permitting the Plaintiff to be exposed to a risk of injury from an unusual danger which the Defendant City knew or ought to have known existed at the Intersection, namely the lack of visibility;

    b. Failing to install traffic control devices that the Defendant City knew or ought to have known would have improved the safety of the Intersection for motorists proceeding through or approaching the Intersection;

    c. Failing to take any or any reasonable care to ensure that the Plaintiff would be reasonably safe travelling on Lakeshore Road and approaching and proceeding through the Intersection;

    d. Causing or permitting the Intersection to be or to become or to remain a danger and a trap to persons lawfully approaching or proceeding through the Intersection;

    e. Failing to take any or any reasonable care to prevent injury or damage to the Plaintiff from unusual dangers at the Intersection of which the Defendant City knew or ought to have known;

    f. Failing to take any or any reasonable or any adequate measures, whether by way of examination, inspection, test or otherwise, to ensure that the Intersection was in a reasonably safe condition for motorists such as the Plaintiff;

    g. Failing to institute or enforce any or any adequate system for the inspection and maintenance of the Intersection whereby the dangers might have been detected and the same remedied before the Collision;

    h. Failing to pay any or any sufficient heed to or to act upon complaints made to the Defendant City about the dangerous condition of the Intersection;

    i. Designing and constructing the Intersection in such a fashion that fails to allow for safe passage of motorists approaching or proceeding through the Intersection, such as the Plaintiff;

    j. Allowing vehicles to park or failing to prevent vehicles from parking at or near the Intersection such that the visibility of motorists approaching or proceeding through the Intersection was impeded;

> k. Failing to remove obstructions in order to allow for unimpeded visibility for motorists and traffic approaching and travelling through the Intersection;
>
> l. Failing to remove or relocate the Lakeside Resort parking lot exit altogether;
>
> …

[8] In her third party notice Ms. Klassen seeks contribution and indemnity against the City, alleging the Accident was caused or contributed to by the City's negligence. The grounds of negligence she asserts are the same or are similar to those alleged by Mr. Cook.

[9] The City acknowledges it has a duty of care to make its roadways reasonably safe for motorists but says that duty is qualified by the requirement users are expected to exercise ordinary care for their own safety and that in this case the evidence establishes that neither exercised such reasonable care.

[10] On these applications the City says the evidence establishes it has met both its duty and standard of care and that the fault of the Accident rests solely with Mr. Cook and Ms. Klassen.

The circumstance of the Motor Vehicle Accident

[11] I turn first to describe the circumstances of the Accident in more detail.

[12] Ms. Klassen was an employee of the Penticton Lakeside Resort, Convention Centre and Casino (the "Resort") located at 21 Lakeshore Drive in the City. She was well familiar with the intersection as she used it on a daily basis when she attended to and from work.

[13] Lakeshore runs in a roughly east-west direction following the southern shore of Okanagan Lake.

[14] The Accident occurred near the intersection of Main and Lakeshore near the driveway entrance to the Resort.

[15] Main runs in a northerly one-way direction with its northern terminus at a “T” intersection with Lakeshore. The intersection of Lakeshore and Main is controlled by a stop sign on Main with drivers on Lakeshore having the right of way, that is, they are not required to stop at the intersection. Counsel for the City referred to the intersection as a “T” intersection. Counsel for Mr. Cook referred to the intersection as a four way intersection.

[16] The driveway entrance to the Resort is immediately to the north of the intersection.

[17] The posted speed along Lakeshore is 30 km/h.

[18] Lakeshore is two lanes in the area of the Accident - one in each direction - although as one proceeds east along Lakeshore there is a left hand turn lane into the Resort. There are two marked crosswalks on Lakeshore at the intersection with Main: one on each of the east and west side of the intersection.

[19] There is angle parking on the north side of Lakeshore. That angle parking extends both east and west of the entrance/exit to the Resort on Lakeshore. There are no hatch marks on the north side of Lakeshore adjacent to the angle parking on the left and right of the entrance to the Resort as there is at other roads intersecting with Lakeshore. There is no stop sign for drivers leaving the resort and exiting onto Lakeshore. There is a side walk on both the north and south sides of Lakeshore.

[20] Forbes Street (“Forbes”) runs parallel to Main one block to the east. It also forms a “T” intersection with Lakeshore. The posted speed limit on Forbes is 50 km/h. As on Main, there is a stop sign on Forbes and the Lakeshore traffic has the right of way.

[21] I will review the evidence of Mr. Cook and Ms. Klassen in more detail later in these reasons. It is, however, appropriate to briefly summarize their respective versions of events leading to the Accident at this stage.

[22] On April 24, 2010 Mr. Cook, riding his Harley Davidson motorcycle, travelled north on Forbes and stopped at the stop sign at Forbes and Lakeshore. He then turned west and travelled in a westward direction along Lakeshore. It is his evidence that he brought his speed up to 50km/h, perhaps more, and that he did not see the 30km/h speed limit sign posted in the vicinity on Lakeshore. It is his evidence that as he was proceeding west on Lakeshore the defendant's vehicle pulled abruptly in front of him and that he had no opportunity to avoid colliding with her.

[23] The defendant, Ms. Klassen, was leaving her place of employment at the Resort driving her vehicle. It is her evidence that as she was leaving the Resort's parking lot to enter onto Lakeshore she stopped before the sidewalk on the north side of Lakeshore to check for traffic. She says she saw none. She moved her vehicle forward and checked again for traffic. It is her evidence that she saw a white truck some distance east on Lakeshore but did not see the plaintiff's motorcycle before it collided with her vehicle.

Suitability of Determining this Case Pursuant to Rule 9-7 (Summary Trial)

[24] Rule 9-7(15) authorizes the court to grant judgment in favor of a party on the hearing of a summary trial application unless "the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or the court is of the opinion that it would be unjust to decide the issues on the application".

[25] The principles under which the court will determine an application under Rule 9-7 are not in dispute. Both parties have brought applications pursuant to the Rule. Each says the facts they have put before the court should convince the court they have met the test for granting judgment. Each party defends the application brought against them by an assertion the applicant has not made out its case on the facts or that judgment should not be granted as material facts are in issue.

[26] A summary judgment will not be granted where the judge hearing the matter is unable to find facts sufficient to warrant judgment. In most cases where an application for summary trial is not suitable it is because the affidavit material in

support or against contains conflicting evidence on significant factual issues and the judge is not able to resolve those conflicts.

[27] The law regarding summary trials was recently summarized by Madam Justice Ker in *McVeigh v. Boeriu*, 2011 BCSC 400 at paras. 42-44

> [42] Whether a matter is suitable for disposition by means of the summary trial procedure has generated a significant amount of jurisprudence over the years. The proper approach on a summary trial under the former Rule 18A was set out in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) [*Inspiration Management*]. This test remains the same under the new Rule 9-7 of the *Supreme Court Civil Rules,* and whether a matter is suitable for disposition can be distilled to consideration of two critical factors:
>
> > i. Are there sufficient facts before the Court in which to make the necessary findings of fact?
> >
> > ii. Is it unjust to decide the case on a summary trial application?
>
> [43] Where the court is able to find the facts necessary to decide the issues before it, and it is not otherwise unjust to decide the matter summarily, the court should give judgment. At para. 7 of his decision in *Mariotto v. Waterman* (1996), 32 B.C.L.R. (3d) 125 (C.A.), McEachern C.J.B.C. stated the following with respect to Rule 18A applications: "Where possible it is always to be hoped that judges will give judgment and I repeat that admonition here."
>
> [44] Rule 18A(11) of the former *Supreme Court Rules* provided that judgment may be granted generally or on an issue unless the Court is unable to find the necessary facts to decide the issues of fact or law or it would be unjust to decide the issues summarily. Rule 9-7(15) contains identical language to the former Rule 18A(11).

[28] In *Charest v. Poch*, 2011 BCSC 1165, Mr. Justice Melnick cited the passage above with approval and added at paras. 52-53:

> [52] [In] *Inspiration Management Ltd.*, the Court of Appeal offered additional factors for consideration at 214-215:
>
> > In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.
> >
> > ...

> In deciding whether the case is an appropriate one for judgment under R. 18A [now Rule 9-7] the chambers judge will always give full consideration to all of the evidence which counsel place before him but he will also consider whether the evidence is sufficient for adjudication. For example, the absence of an affidavit from a principal player in the piece, unless its absence is adequately explained, may cause the judge to conclude either that he cannot find the facts necessary to decide the issues, or that it would be unjust to do so. But even then, as the process is adversarial, the judge may be able fairly and justly to find the facts necessary to decide the issue.
>
> [53] The primary concern is achieving a just result. As stated by Madam Justice Russell in *Boss Power Corp. v. British Columbia*, 2010 BCSC 1648 at para. 49: "[w]here a summary trial can achieve the ends of justice and save the parties either or both time and money, it is to be preferred."

[29] The fact there is conflicting evidence in the affidavit material on a summary judgment application does not mean a judge should not proceed to hear and determine the matter. The question in each case is whether, notwithstanding such conflicting evidence, there is other admissible evidence which makes it possible for the judge to find the facts necessary for judgment be given: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd* (1989), 36 B.C.L.R. (2d) 202 (B.C.C.A.) at 216 and *Charest* at paras. 54-62.

[30] I conclude there is sufficient evidence before me such that this is an appropriate case in which to make a determination under Rule 9-7.

[31] Let me first turn to the evidence.

The Evidence

[32] The City relies on the evidence of Mr. Cook and Ms. Klassen given at their respective cross-examinations at examinations for discovery, engineering reports filed by Dr. Francis Navin, a civil engineer retained by the City, and the affidavit evidence of Mr. Kerry Reid, an insurance adjuster, and Mr. Bruno Zaffino, an engineering technologist employed by the City.

[33] Mr. Cook filed an affidavit in support of his application; Ms. Klassen did not. Both rely heavily on the engineering reports prepared by Mr. John Lisman, an engineer retained by the plaintiff's counsel.

Ms. Klassen

[34] Ms. Klassen was cross-examined at an examination for discovery on May 28, 2012.

[35] She testified she was familiar with the intersection exiting from the Casino onto Lakeside. She recalled that on the day of the Accident as she was leaving the parking lot she approached the intersection and stopped just before the sidewalk to make sure there were no pedestrians coming. She testified she planned to turn left. She said she looked right, then left and "inched a little bit forward, didn't see any traffic coming, so I pulled out and made my turn" (Q. 136, p. 20).

[36] She testified she stopped again when her vehicle was on the sidewalk, then had "pulled out just a little bit" (which she estimated to have been "maybe five feet") to see if there was any traffic coming (Q. 150-152, p. 21). She said she did so "as there [were] cars angle parked on the side so you'd have to pull out a little bit more further to see right and left" (Q. 175, p. 24). She stopped again and looked left and right, then proceeded to "inch" her way out because she could not see around the cars angle parked to determine if there was traffic approaching.

[37] Ms. Klassen testified that when she left her last stop and was turning left she saw "a car down at the far end of the parkade and I thought, okay, he's way at the end of the parkade. I've got plenty of time to pull out. Then I made my turn, and then after that I don't know what happened; all I heard was a big crash" (Q. 208, p. 30).

[38] She recalled the colour of the car she saw as being white and that after seeing the car, which she thought was far enough away it did not present a hazard to her, she looked to her right and saw no vehicle coming and then looked back to the left again, saw the white car "a long ways away; like, he was still near the end of the parkade so I pulled out" (Q. 263, p. 38). It was immediately after this Mr. Cook's motorcycle hit her vehicle.

[39] During further cross-examination Ms. Klassen testified she had no specific recollection of stopping before or after the sidewalk and that she said she had

stopped because it was her “regular routine” or “general pattern” to make such stops. She agreed her “pattern” could have been different the day of the Accident (Q. 280, p. 40).

Mr. Cook

[40] Again, the City relies on the examination for discovery of Mr. Cook.

[41] Mr. Cook acknowledged he was not aware the posted speed limit on Lakeshore in the area of the Accident was 30 km/h. (Q. 430-431, p. 58).

[42] Mr. Cook had not travelled down that portion of Lakeshore before.

[43] He said he stopped his motorcycle at the intersection of Forbes and Lakeshore, then turned left to travel west on Lakeshore. He said he got into first gear, then second gear then “notice[d] something from my right … and hit back brake and assuming that she was stopping and swerved out to the left” (Q. 516, p. 68-69).

[44] Mr. Cook acknowledged getting his motorcycle up to 50 km/h and said he was unsure when asked if he got beyond 50 km/h before he saw the Klassen vehicle. Further into his cross-examination he conceded that perhaps he was travelling a bit beyond 50 km/h (Q. 609-610, p. 81). He saw there was no traffic light where Main intersects Lakeshore and he did not know if there was a crosswalk across Lakeshore at that intersection or a stop sign for traffic exiting the Resort on the north side of the intersection.

[45] Mr. Cook testified he first noticed movement of a vehicle coming out of the Resort from his right when he was two-thirds of the way down the block but thought the vehicle was going to stop - that it was not until he was 30 or 40 feet away when he realized the Klassen vehicle was a hazard to him and he applied his brake (Q. 569 -72 p. 76; Q. 584-585, p. 78).

[46] Mr. Cook testified he thought he was two-thirds the distance along Lakeshore from Forbes when he let go of the brakes and tried to take evasive action by veering

around the front of the Klassen vehicle. He testified he let go of the brakes and veered to the left because “she should have been stopped because I have the thoroughfare” (Q. 665, p. 90).

[47] In re-examination Mr. Cook said he was “guesstimating” at the distances he had given in his cross-examination (Q. 945, p. 130).

[48] Mr. Cook’s affidavit of May 15, 2013 includes the following:

> …
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> 2. On April 24, 2010, I was driving my motorcycle down Forbes Street in Penticton, B.C. and I turned left onto Lakeshore Drive and proceeded west.
> 3. I did not see any posted speed limit signs on Lakeshore Drive and I thought the speed limit was 50 kilometres per hour.
> 4. I was travelling on Lakeshore Drive and a vehicle suddenly appeared from my right and pulled out in front of me.
> 5. I thought the other vehicle would stop and when it did not I tried to avoid the collision.

The Expert Reports

[49] In this case the primary areas of conflict are found in the expert opinion evidence of the engineering consultants retained by each of counsel for the City and Mr. Cook.

[50] The City retained Dr. Navin. Mr. Cook’s counsel retained Mr. Lisman. Both are professional engineers. Counsel agreed each was qualified to offer an expert opinion to the court. Both Dr. Navin and Mr. Lisman filed an initial report and several rebuttal reports.

[51] Dr. Navin prepared his initial report dated September 7, 2012 to provide the City with an expert opinion “relating to the road layout and traffic control devices” at the intersection of Main and Lakeshore. Noting the 30 km/h speed limit along Lakeshore and the “maneuver area” between westbound vehicles and the cars angle parked on the right hand side of Lakeshore, he concluded drivers exiting from the Resort had “ample sight distance along Lakeshore Dr. for the posted speed of 30

km/h." He also opined "the intersection's design and driveway's design met traffic engineering standards".

[52] Mr. Lisman's initial report, dated May 7, 2013, concluded the intersection at Main and Lakeshore was not designed "in accordance with correct intersection design" pursuant to a US publication on the design relating to the positioning of driveways at intersections, "A Policy on Geometric Design of Highways & Streets". He further stated that photographs he took indicated that "the intersection approach views of each other by both Ms. S. Klassen and Mr. D. Cook in their moving vehicles, would have been obscured by the vertical physical features and any parked cars in the angled parking bays." It was also his view that the specific location of the 30 km/h speed limit sign was "somewhat more offset from the roadway than is usual" and the lack of a stop sign and stop line at the Resort driveway entrance both contributed to the collision between the two vehicles.

[53] Mr. Lisman issued a response report, also dated May 7, to Dr. Navin's September 7, 2012 report. He opined "[i]t might not be wise to rely on driver compliance with this atypically low Posted Speed of 30 km/hour for calculating the sight distances needed to see and respond to the appearing of approaching vehicles." He also noted the location of the 30 km/h speed limit sign was "only 52 metres before the Main St. intersection facing west bound traffic" and opined that the location was so close to the Forbes intersection that it was "doubtful" that it would be seen by all drivers turning left from Forbes onto Lakeshore. He reiterated his opinion that drivers exiting from the Resort would have their view of traffic approaching from the east interrupted by the angle parking until such traffic was "very close".

[54] Dr. Navin responded with two reports, dated May 20 and 21, 2013, in which he opined the 30 km/h speed sign was placed in a location as set out in the Manual of Standard Traffic Signs and Pavement Markings produced by the BC Ministry of Transportation and Highways and, in any event, in his opinion was in a place of good visibility and would have been within Mr. Cook's field of view as he made his left turn onto Lakeshore.

[55] Dr. Navin opined that while under ideal conditions driveways should be located away from intersection, such relocation could be extremely difficult in urban areas where physical space was confined within the corners of the intersection while what he described as the "functional" area of the intersection often extended for some distance both upstream and downstream in both directions from the physical intersection, making it "extremely difficult to locate access driveways away from an intersection's functional area". He opined the Resort driveway "was an acceptable engineering solution" to this issue.

[56] He also opined that given Ms. Klassen's familiarity with the intersection, a stop sign and stop bar at the exit from the Resort would probably have had no influence on the collision.

[57] Mr. Lisman responded with a further report, dated May 31, 2013, in which he reiterated his opinions and took issue with Dr. Navin's conclusions.

Other relevant evidence

[58] The court also had other evidence before it.

[59] The defendants filed a Final Technical Report from a 2005 Transportation Study - Phase 2 prepared by a consulting engineering firm to the City which made recommendations for improvements to upgrade Lakeshore. I cite portions of the Report:

> The recorded collision data does not point to Lakeshore Drive being a particular problem area. This could suggest that any incidents which do occur may not be sufficiently serious to warrant reporting. However, there is evident potential for friction between a broad range of roadway users - children, and young adults, elderly, pedestrians, pets, people using bicycles and cycle carts, scooters, in-line skaters, and vehicles. Also, the possibility that some persons may sometimes be less attentive to their surroundings than is prudent could certainly create situations of real or perceived danger.
>
> Management of this situation requires encouragement of responsible behaviour and safe sharing of the common space - a 'Traffic Calming' type strategy. The most serious potential for injury would be between vehicles and other users of the roadway. The existing posted speed limit on the roadway is 30 km/h, trucks are prohibited, and crosswalks are provided at key points along the route. Angled parking is provided on the north (beach) side of the

> roadway. There is a pathway along the north side of the roadway and a sidewalk on the south side. Police presence is noticeable during the busy season.
>
> **13.2.1.1 Possible Improvements**
>
> **Vehicle Speed**
>
> The 30 km/h speed limit is appropriate. Signage could be improved by using 'oversized' signs, and locating signs in the westbound direction closer to the travel lane. The parked vehicles on the north side of the roadway distract from the signage for westbound vehicles, and although recreational vehicles are prohibited from parking in those locations, there are other tall vehicles which do park that can obscure the signage.

[60] The City filed an affidavit from Mr. Reid, an insurance adjuster retained by the City in respect of this action. Mr. Reid deposed he observed the 30km/h sign to be "plainly visible" when he stopped at the intersection of Forbes and Lakeshore, that it remained visible to him when he made a left hand turn onto Lakeshore and that the sign was visible whether or not there were cars angle parked on Lakeshore. Mr. Reid had taken photographs and taken measurements relating to the location of the Accident and 30 km/h sign.

[61] Mr. Zaffino, an engineering technologist employed by the City, deposed that angle parking and the 30 km/h speed limit had been features along Lakeside since approximately 1974 for the purpose of allowing access to beach areas along the south shore of Okanagan Lake.

[62] Mr. Zaffino deposed the City maintained records of complaints made to it concerning roadway and traffic issues and that no complaints were on record since 2006 (the date from which records currently held commenced). The City had requested accident statistics from the Insurance Corporation of British Columbia pertaining to the area and a review of such records showed no history of accidents "which relate in [any way] to the design or construction of the intersection of Lakeshore Drive and Main Street and/or Lakeshore Drive and the Penticton Resort Driveway."

[63] In addition, I have had the opportunity to review the numerous photographs taken at or near the scene of the Accident by various deponents as well as plans

and sketches of the area in and about the Accident and portions of the examination for discovery of the City Engineer, Mr. Ian Chapman, all of which I have considered.

Discussion

[64] The issue before me is whether the City has met the duty of care imposed upon it to maintain its roadways (the area of Lakeshore in which the Accident occurred) in a reasonably safe condition. That duty includes a duty to take reasonable steps in the design and maintenance of the road to prevent injury to users of the road caused by hazardous design configuration: *Rimmer v. Township of Langley*, 2006 BCSC 703 at para. 192; *Friedrich v. Shea*, 2008 BCSC 1243 at para. 62.

[65] As stated, in this case the City admits it owes such a duty but says the evidence establishes it has met that duty.

[66] Based on the evidence in the material before me and the extent of the legal duty imposed on the City, I accept City's application must be granted.

[67] The duty on the city does not render a municipality an insurer of all users of its roads. As stated by Mr. Justice Barrow in *Friedrich* at para. 66, "a municipality's duty extends to maintaining and configuring its roads, such that they are safe for use by someone using ordinary care." He further observed:

> [63] The duty on a municipality does not render it an insurer of those that use its roads. The duty was expressed by in ***Fafard v. Quebec (City)*** (1918), 39 D.L.R. 717 at p. 718 as follows:
>
> > A municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety.
> >
> > (emphasis added)

[68] In *Housen v. Nikolaisen*, 2002 SCC 33 at para. 64, Iacobucci and Major JJ. stated:

> 64 It is in this context that we view the following comments of the trial judge, at para. 90:

> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.
>
> From this statement, we take the trial judge to have meant that, given the occurrence of prior accidents on this low-traffic road, the existence of permanent residents, and the type of drivers on the road, the municipality did not take the reasonable steps it should have taken in order to ensure that Snake Hill Road did not contain a hazard such as the one in question. Based on these factors, the trial judge drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question. This factual inference, grounded as it was on the trial judge's assessment of the evidence, was in our view, far from reaching the requisite standard of palpable and overriding error, proper.

[69] The duty of care falls to be determined in accordance with the ordinary principles of negligence as described in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 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.

[70] The question in this case is whether the City has complied with the standard of care imposed upon it in the design, repair and maintenance of the roadways leading to the intersection and of the intersection itself.

[71] I am of the view the evidence establishes neither the plaintiff Mr. Cook nor the defendant Ms. Klassen were exercising ordinary care for their own safety immediately prior to the Accident.

[72] Mr. Cook was admittedly travelling considerably in excess of the posted speed limit of 30 km/h. By his own admission he may have been travelling above 50 km/h: the speed he believed he was allowed to travel. As he travelled toward the intersection he was approaching an area in which there were two pedestrian crosswalks. Had he been travelling the posted speed limit the Accident may have been avoided.

[73] Mr. Lisman opined that the 30 km/h speed limit sign was not particularly noticeable for a driver turning onto Lakeshore from Forbes and that had the sign been larger and placed closer to the roadway it may have attracted Mr. Cooks' attention. The insurance adjuster, Mr. Reid disagreed, saying the sign was clearly visible to him when he re-enacted the route taken by Mr. Cook. Dr. Navin similarly concluded that the placement of the 30 km/h sign accorded with the Manual of Standard Traffic Signs and Pavement Markings and would have been within Mr. Cook's field of view.

[74] I am able to draw my own conclusions concerning the visibility of the sign to a driver stopped at Forbes turning left onto Lakeshore. It is my conclusion the sign was visible to anyone who was paying reasonable attention to his or her surroundings. I conclude Mr. Cook simply did not look at it as he proceeded to make his turn.

[75] While a larger speed limit sign placed closer to the street may have assisted bringing the speed limit to Mr. Cook's attention, the City is not to be held to a standard of perfection, but rather, to a standard of an "objectively unreasonable risk of harm" (*Ryan*, at para. 28). The evidence is that historically the area in and about the Accident on Lakeshore had not been a problematic area involving excessive speed.

[76] Ms. Klassen's evidence was that as she left the Resort parking lot she thought she followed her usual pattern of stopping before the sidewalk and again several times before she actually pulled out onto Lakeshore. Of significance is that she testified that she saw a white vehicle some way down the block to her left before

she pulled out and made her left turn onto Lakeshore. Her evidence was that she felt it was far enough away for her to make her move out onto Lakeshore to make her turn.

[77] Whether or not there was a stop sign before the sidewalk, stop lines or hatching on the street, as recommended by Mr. Lisman, would not have had any effect on whether this Accident occurred. I find they were not contributing factors to the Accident.

[78] Further, there was an obligation on Ms. Klassen to yield the right of way to traffic “approaching on the highway so closely that it constitutes an immediate hazard” (*Motor Vehicle Act*, s. 176(2)).

[79] Ms. Klassen’s evidence is that she stopped several times before edging out onto Lakeshore. She testified she could see to the left far enough to see a white vehicle on two occasions and that it did not pose a threat to her proceeding to turn safely. There is no evidence that her view was impeded by cars angle parked on Lakeshore and that is why she did not see Mr. Cooks’ motorcycle. On the evidence, I must conclude the motorcycle was there to be seen. Ms. Klassen simply did not see it.

[80] For these reasons I conclude the application by the City must succeed. The action and third party notice against the City are dismissed.

[81] The plaintiff Mr. Cooks’ application that the City caused or contributed to the Accident is dismissed. I emphasise that these reasons are based solely on the material filed on these applications and do not purport to address any issue of liability as between Mr. Cook and Ms. Klassen. Those issues will be addressed by the trial judge based on the evidence adduced at trial.

[82] Unless counsel wish to speak to the matter the City is entitled to its costs of the applications.

"Greyell J."