**CITATION:** Deering v. Scugog (Township), 2010 ONSC 5502

**COURT FILE NOS.:** 55125, 55403, 55404
**DATE:** 20101005

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | |
| SHANNON DEERING, TONY DEERING and DEBORAH DEERING<br>Plaintiffs | R. Oatley, T. Lehman, and I. Hu, Counsel for the Plaintiffs |
| **– and –** | |
| THE CORPORATION OF THE TOWNSHIP OF SCUGOG, THE CORPORATION OF THE CITY OF OSHAWA, MILLER PAVING LIMITED, PRIMMUM INSURANCE COMPANY and TOTTEN SIMS HUBICKI ASSOCIATES (1997) LIMITED<br>Defendants | K. Boggs, J. Hunter, S. Zacharias, Counsel for the Defendants, The Corporation of the Township of Scugog and The Corporation of the City of Oshawa |
| **BETWEEN:** | |
| ERICA DEERING, ANTHONY DEERING, ANTHONY DEERING AND DEBORAH DEERING<br>Plaintiffs | D. Orlando and A. Burrison, Counsel for the Plaintiffs |
| **-and-** | |
| THE CORPORATION OF THE TOWNSHIP OF SCUGOG, THE CORPORATION OF THE CITY OF OSHAWA, THE REGIONAL MUNICIPALITY OF DURHAM, MILLER PAVING LIMITED, SHANNON DEERING and PRIMMUM INSURANCE COMPANY and TOTTEN SIMS HUBICKI ASSOCIATES (1997) LIMITED<br>Defendants | K. Boggs, J. Hunter, S. Zacharias, Counsel for the Defendants, The Corporation of the Township of Scugog and The Corporation of the City of Oshawa<br><br>P. Ho, Counsel for the Defendant, Shannon Deering |

**BETWEEN:**

ALEXANDER HEROUX, MARYANN HEROUX, ROBERT HEROUX and AMANDA GIBSON

Plaintiffs

**-and-**

THE CORPORATION OF THE TOWNSHIP OF SCUGOG, THE CORPORATION OF THE CITY OF OSHAWA, THE REGIONAL MUNICIPALITY OF DURHAM, MILLER PAVING LIMITED, SHANNON DEERING and TD HOME AND AUTO INSURANCE COMPANY and TOTTEN SIMS HUBICKI ASSOCIATES (1997) LIMITED

Defendants

K. Mazzucco, Counsel for the Plaintiffs

K. Boggs, J. Hunter, S. Zacharias, Counsel for the Defendants, The Corporation of the Township of Scugog and The Corporation of the City of Oshawa

P. Ho, Counsel for the Defendant, Shannon Deering

**HEARD:** May 17, 18, 19, 20, 21, 25, 26, 28, 31, June 1, 2, 3, 4, 15, 16, and 17, 2010

# INDEX

**HOWDEN J.:**

**OVERVIEW**

[1] In the late evening of August 10, 2004, Shannon Deering, 19 years of age, was driving her 2002 Pontiac Grand Am southbound on Durham Regional Road 2, the main road from Port Perry to the city of Oshawa. Her younger sister Erica, then 16 years of age, was in the centre rear passenger seat, between Alex Heroux and Ceri Boomsma. Amanda Davey accompanied Shannon in the front. They were all friends in their mid-to-late teens. Several of them were working together in summer jobs, and that night they were heading for an 11p.m. show at the AMC 24 theatre situated west of downtown Oshawa in Whitby, near Highway 401.

[2] When Shannon Deering reached Coates Road West, she turned right to travel westbound. Within two minutes, she was driving up the third and largest of three hills when the headlights of an eastbound vehicle appeared over the crest of the hill. The Deering vehicle moved toward the right, then arced left, and finally veered to the right over the shoulder, rolling and smashing into a rock culvert. It came to rest slightly west of the driveway to a residential property known as 1360 Coates Rd. West.

[3] Both Shannon and Erica Deering were severely injured. Amanda Davey and Alex Heroux also sustained major injuries and could not move without assistance. Ceri Boomsma miraculously suffered only minor injuries. Within minutes she was able to walk up the long drive and report what had happened to the home-owner at 1360 Coates Rd. West. From there, the message was relayed to the police and emergency services.

[4] I should make very clear at this point that there is no evidence or even suggestion before me that alcohol or drugs played any part in this tragedy.

[5] Coates Rd. West is paved and flat for close to two kilometres as one proceeds westerly from Regional Road 2. Then it climbs and falls away sequentially over three hills, the third (the accident hill) being the most significant. In August 2004, the road had no lane markings, no signage, and an unposted speed limit of 80 km./hr., the statutory limit. Since the crash in August 2004, Oshawa's forces, with the Region of Durham, laid down a centre line along the length of Coates Rd. West in November 2004. And in February 2007, Oshawa posted a reduced speed limit on Coates Rd. West of 50 km./hr., in accordance with an amendment to s. 128(1)(a) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8.

[6] Coates Road West is a boundary road and was then in 2004. It forms part of the southern boundary of the Township of Scugog ("Scugog") and the northern boundary of the City of Oshawa ("Oshawa"). As such, in 2004 both municipalities had jurisdiction over it, subject to a boundary road maintenance agreement entered in 1976 under the *Municipal Act*, R.S.O. 1970, c. 284. In 2004, Scugog was maintaining Coates Rd. West purportedly pursuant to the 1976 boundary road agreement with Oshawa.

[7] This road was known to the chief township road official, Larry Postill, as simply "a tired old road" badly in need of resurfacing. The two municipalities engaged in a joint rehabilitation project to improve the road's base and surface in 2003 and July, 2004.

More than a re-surfacing, a rehabilitation project aims to provide an adequate sub-structure and surface treatment. By July 20, 2004, a dark-coloured sealant or emulsion, called a slurry seal, was applied to it as the final phase of that project. The road was immediately re-opened in its otherwise previous state – unsigned, unlit and unlined, as it had been over its prior history.

[8] The Oshawa transportation department and council knew of Coates Rd. West from a study its director, Mike Bellamy, undertook in 1999 recommending the painting and maintaining of a centre-line marking on all through rural roads in Oshawa. Coates Rd. West was a through rural road. It was included in that study, but no centre line was put down on it because a new boundary road agreement was anticipated that would transfer the duty to maintain Coates Rd. West to Oshawa and Coates Rd. East to Scugog. The parties preferred this change due to recent subdivision development off Coates Rd. West to the south in Oshawa. The new agreement was not completed until 2006.

[9] This trial has raised serious issues of law and fact in the area of highway repair and tort law. Those issues relate broadly to the ambit or extent of the duty of municipalities to the motoring public to keep roads under their jurisdiction in a reasonable state of repair, and the expected driving capability and range of conduct of "the ordinary driver" to whom the duty is owed, in light of the Supreme Court of Canada decision in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Other live issues include causation and apportionment of fault in view of the involvement of the unidentified eastbound vehicle in the events leading to the crash, and the alleged negligence of Shannon Deering. During the trial, her counsel conceded contributory negligence to a minimal degree on her part.

[10] The stakes are high in these actions because catastrophic injuries are obviously involved and the road, Coates Rd. West, is said to be similar to many local country roads in Ontario which pre-date the road design manuals such as the Ontario Traffic Manual (Ministry of Transportation for Ontario, or "MTO"), the Manual of Uniform Safety Devices (MTO) and the Geometric Design manuals published by the MTO and the Transportation Association of Canada (TAC).

[11] It is one of the old concession roads through the Oak Ridge's Moraine with a varying topography typical of the moraine area. Coates Rd. West was and remains classified by the Scugog official plan as a local road. Up to and including the township's latest roads needs study in early 2004 by Totten Sims Hubicki, the traffic volume on Coates Rd. West was assumed to be only 265 vehicles per day, typical of a local road carrying local traffic from the properties adjacent to the road and the same as its Average Annual Daily Traffic (A.A.D.T.) level in 1992.

[12] According to a 2003 traffic count by Oshawa, not shared with Scugog, urban growth was having some effect on the amount and nature of traffic in the rural area of north Oshawa and, in particular, on Coates Rd. West. The extent or degree of change to be reasonably expected, post-rehabilitation, in the nature of the road, its volume of traffic, and traffic speed level, is in issue. The collision rate of Coates Rd. West has remained low according to reported accidents. The recent road rehabilitation project had dramatically improved the surface; increases in speed and traffic volumes were noted by municipal officials in Oshawa as early as the fall of 2003 (Email, P. O'Neill to C. Kelly, B. Simmons,

M.Bellamy,Oct.21/03,Joint Document Brief (2)(Jt. Doc't. Br., Vol.2), Tab (T.)27). The plaintiffs allege that such increases were foreseeable and to be expected following the road re-surfacing, requiring contemporaneous assessment of the need for road markings and warning signage. The defendants submit that, given the low historic collision rate and expected transfer of maintenance responsibilities, that assessment was going to be done in due course; meanwhile, the road was acceptably safe.

[13] Finally, these actions arise in the context of an area of law containing a defined statutory duty of reasonableness related to all the circumstances, which must include the character and location of the road in question. The standard of care required of road authorities is thus one of reasonableness and cannot be used to make them insurers for all losses on the roads under their jurisdiction.

[14] A question was also raised before me as to the effect of the relevant provisions of the *Municipal Act*, as it read in 1976 and subsequently, on the duty and liability for road repair of the two municipalities. Those provisions relieve the non-maintaining municipal party to the boundary road agreement from responsibility, but they also purport to limit the duration and effect of such agreements to 10 years. The 1970 *Municipal Act* provided a statutory release to the non-maintaining municipality from the road maintenance duty and any associated liability if and when an agreement was in effect.

[15] Four actions were brought against Scugog, Oshawa and several other parties arising from this crash. Shannon Deering, together with her immediate family, sued the Regional Municipality of Durham, State Farm Mutual Automobile Insurance Co., and Miller Paving Ltd, in addition to the present defendants. Her sister Erica Deering, Alexander Heroux, and Amanda Davey and their respective families brought similar actions, including claims of negligence against Shannon Deering.

[16] Pursuant to the order of Justice D. Ferguson of April 7, 2008, the actions are being tried together. Following a pre-trial conference held before Justice Shaughnessy on May 3, 2010, the parties arrived at agreements which resulted in the actions being discontinued or dismissed against all party defendants other than Scugog and Oshawa. Pursuant to the trial management conference held on May 11, 2010, I was satisfied that the bifurcation previously ordered on consent by Justice Rowsell on September 24, 2009 was appropriate.

[17] The trial proceeded, dealing with the liability issues only. The damages phase is to occur following the release of these reasons for judgment. It was agreed that the parties to the Davey action would take no part in this phase of the trial and would abide by the result. Counsel for Shannon Deering and counsel for Scugog and Oshawa conveyed these agreements to me formally on the first day of trial on May 17, 2010, confirmed by all other counsel present.

**The Parties' Positions: Identifying the Issues**

[18] Following the raising of legitimate concerns by counsel for the defendants over the number of counsel on the plaintiffs' side and examinations of witnesses, counsel for the three sets of plaintiffs in this combined trial, as well as the counsel for the insured interest of Shannon Deering, Mr. Ho, were able to arrive at a common position. Mr. Oatley and

co-counsel Mr. Lehman would lead all of the expert evidence for the plaintiffs, and the evidence given by each individual plaintiff who testified would be led by that party's own counsel.

[19] All parties having achieved consensus on proper limits on witness examinations, I ordered that, when the lead counsel completed an examination in chief of a witness, other counsel of similar interest could not examine in chief in the same subject areas without leave. As well, the counsel calling the witness would be the only one entitled, without leave, to re-examine the witness. I want to express my appreciation to all counsel for their cooperation in keeping within these parameters and also for no unnecessary objections where occasional parallel questioning occurred for a distinct purpose.

[20] Counsel and their clients were also able to agree on several factual matters which are set out in Exhibit 48. Two matters were added to the original list as the trial progressed, and were initialled by me after counsel agreed on the wording. Apart from agreements on individual and group admission of various documents in evidence, the major facts conceded or agreed to are the following:

- The plaintiff Shannon Deering, through her counsel, admits that the speed of the vehicle she operated was probably 90km./hr. while ascending the accident hill, just before she took evasive action or braked.
- Shannon Deering, through her counsel, admits that she was at fault to the extent of at least 1%.
- Totten Sims Hubicki (the consulting firm retained by Scugog for road engineering issues) and Miller Paving (which performed the resurfacing and slurry-sealing of Coates Rd. West in 2003 and July 2004) fulfilled all of their work properly as contracted.
- Temporary pavement markings could have been laid down within approximately two days of placement of the slurry seal.

[21] I should add one qualifier to the final matter listed above. Mr. Boggs stated, and all other counsel agree, that that admission is not meant to concede in any way the municipalities' position that they acted reasonably in not requiring temporary markings, or in not treating them as necessary or urgent, and in waiting in the normal course upon the assessment by Oshawa's transportation department of what, if any, pavement markings or signage or guide-wire fencing may be required. The admission merely concedes that it was physically, technically and scientifically possible to put down pavement markings within two days of applying the slurry seal.

[22] The position taken by the plaintiffs in these actions can be summarized in the following points.

(a) In their opening submissions, the plaintiffs suggested that the duty of repair in principle should now be held to be owed not only to motorists exercising due care, but also to those whose conduct falls below the standard of reasonable care, citing *Rider v. Rider*, [1973] 1 All E.R. 294 at 299 (C.A.). In their concluding submissions, however, the plaintiffs no longer took that position. The plaintiffs submitted, following *Roycroft v. Kyle*, [1999] O.J. No. 296 at para. 41 (Gen. Div.), that the duty of the municipality having jurisdiction is to "use all reasonable

efforts to keep its road[s] in such condition that a traveller using [the roads] in the ordinary way and with ordinary care may do so with safety." Following from this, the plaintiffs argued that the duty is to keep roads reasonably safe for "the normal run of drivers to be found on roadways", including those who are inexperienced or who make mistakes within the bounds of reasonable care.

(b) In the case of old roads which pre-date modern design guidelines, where permanent features create an unreasonable risk of harm to those normally using the roads, and where the authority lacks the means to reconstruct the road in order to correct such features, the road authority's duty is to install low cost traffic control devices to guide the motorist and to warn of the danger: *Roycroft*, *ibid*, at para. 100; *Housen v. Nikolaisen*, [1997] S.J. No. 759 (Sask. Q.B.) at paras. 86 and 91, aff'd [2002] 2 S.C.R. 235 (S.C.C.); *Houser v. West Lincoln (Township)*, [1983] O.J. No. 2178 (C.A.).

(c) On the facts in this case, the plaintiffs submit that a hidden dangerous situation existed at night on this portion of Coates Rd. West at speeds above 60 km./hr. without any warning signage or posted reduction in speed, which amounts to a condition of non-repair. They base this submission on the cross-examination of Alison Smiley, a human factors expert called by the defence, on the evidence of Russell Brownlee and Frank Pinder, transportation engineers with expertise in design standards and municipal road repair issues respectively, and on the evidence of the transportation engineer called by the defence, Gerald Forbes. They also rely on the direct evidence of Erica and Shannon Deering as to how the crash occurred, and the evidence of the municipal witnesses as to the 2003 traffic count, the centre-lining of all through rural roads in north Oshawa except Coates Rd. West in 2000 following a study done by Oshawa transportation staff and director, and Oshawa's failure to assess the road during the rehabilitation project for warning signs and/or pavement markings.

(d) The defendants had the means of knowledge, through their years of inspections and road needs studies prepared for them, of the sight-distance deficiencies existing on the subject section of the road, and they failed to delay the road project, or to delay opening the road after completion of the re-surfacing, until the review of signage and pavement marking issues by Oshawa transportation officials was completed; they also failed to share and update road use information, in particular the 1999 study by Oshawa transportation of required centre-line marking on through rural roads in Oshawa and the 2003 traffic count by Oshawa's transportation department. For these reasons, the defendants cannot make out the statutory defences in subsections 44(3)(a) and (b) of the *Municipal Act, 2001*, S.O. 2001, c. 25.

(e) On the issue of causation, the plaintiffs submit that the following proves that the condition of non-repair on the accident hill at night caused the crash and the plaintiffs' injuries:

(i) the evidence of Shannon Deering indicating she is a credible and bright person who was consciously trying to stay on her side of the unmarked centre of the road;

(ii) the evidence of Alison Smiley as to the danger posed by shortage in preview time and the demonstrated suddenness of contra flow headlights appearing to come straight at the westbound driver in the absence of a centre line to guide drivers; and

(iii) the importance given to low-cost devices like speed reduction warnings and centre-line marking on approaches to sight-deficient hills by human factors expertise and good engineering practise including road manuals such as the OTM.

(f) The plaintiffs concede that Shannon Deering was negligent, but her contribution to the crash should be held to be minimal based on her own evidence and that of the other passengers, as well as that of the human factors expert Dr. Smiley, that:

(i) like most drivers she was driving slightly over the speed limit, and that if she was over centre by .5 metre it was due to the lack of marking by the defendants; and

(ii) as to her reaction in panic, the deflected roadway, its narrowness, and the sight-deficient hill brought about an emergency situation requiring almost instant reaction on her part to prevent a perceived head-on collision, all the responsibility of the defendants.

In view of the unreliability and partiality of Joe Correia's reconstruction evidence for the defendants and the uncertainties surrounding the unidentified vehicle's part in this tragedy, any finding against Shannon Deering should be based only on her excessive speed of 90 km./hr.

[23] The defendant municipalities' position stresses the importance of ascertaining and applying the correct legal test for what constitutes a failure to keep this boundary road in reasonable repair, and that a holding against them on that issue would be an improper application of the law making them, in effect, insurers of the plaintiffs' losses. The defence submits that Coates Rd. West is no different from many hundreds or thousands of kilometres of local country roads in Ontario. The principal submissions on the defendants' behalf covered the following points. As with the plaintiffs' submissions, I have tried to find and record the essence of the arguments which were lengthy and detailed. I, of course, will deal with much of that detail later in the analytical sections of these Reasons.

(a) The fundamental position of the defendants is that no state of non-repair existed in August 2004 on the section of Coates Rd. West in issue in these actions, and that the crash happened due to one single factor – the negligence of the driver Shannon Deering.

(b) The defendants submit that, following *Housen*, a municipality is not obliged to make safe the roads for all drivers, regardless of their care or attention while driving, nor does its duty extend to correcting all dangerous conditions on the road system, even hidden ones, where drivers exercising reasonable care could be expected to traverse them in safety. The fact that drivers may make mistakes is acknowledged to be a proper and necessary consideration for road authorities to take into account in dealing with road and signage issues, but cases like *Rider* and *Roycroft* which go beyond a driver using reasonable care, though mistaken, to negligent drivers or those who make mistakes that a reasonable driver exercising reasonable care would not make, go too far, are not warranted by *Housen*, and should not be followed.

(c) Mr. Boggs submitted that, on all the evidence, Coates Rd. West was not in a state of non-repair on August 10, 2004. He suggested the 3-step procedure used in *Housen* by Justice Bastarache to assess whether a municipality has met its duty of care to warn of hazards that prudent drivers, using ordinary care, would be likely to appreciate, citing Justice Cameron's judgment for the Saskatchewan Court of Appeal [2000] 4 WWR 173 in *Housen*:

(i) determining the character, function and state of the road;

(ii) assessing whether persons could ordinarily travel on it in safety, exercising reasonable care; and

(iii) from the analysis at the second step, determine whether the road was in a reasonable state of repair or not. It is not a question of whether the road could have been safer, but rather, whether it was in a condition that reasonable drivers could travel through it safely.

The defence submits there was nothing to attract the defendants' attention to Coates Rd. West because its base and surface had been improved substantially by the rehabilitation project, the accident rate as reported was low, and Oshawa was to assess signage and pavement marking in due course, when the issue of the new boundary road agreement was decided – a reasonable decision in the circumstances where the road had never been marked or signed before.

(d) If the court finds as a fact that a state of non-repair existed, the defendants submit that they are not liable because they have made out the defence under subsection 44(3)(a) of the *Municipal Act, 2001*. They had no actual or constructive knowledge of the non-repair of Coates Rd. They argue that prior to the crash, there was nothing known by either municipality about Coates Rd. West that should have flagged it as a hazardous situation. The sight distance problem on the hills had never been a source of traffic difficulty that the municipalities knew or should reasonably have been expected to have known. As well, the defence of reasonable steps is proven under subsection 44(3)(b) in that there was no factor taking this road out of the ordinary course of dealing with future centre-lining and/or speed-limit reduction and posting. Following completion of the final stage of the road reconstruction - the slurry sealing - on July 20, 2004, their forces and

those of the Region for line-painting could attend to those matters when they might be available. The work schedules for the City and Regional forces show that could not have happened before August 10, 2004. The exercise of municipal discretion, in this case being to use its forces and prioritize as it sees fit, should not be second-guessed without cogent reason: *Greenhalgh v. Douro-Dummer (Township)*, [2009] O.J. No. 5438 at para. 67 (Sup. Ct.).

(e) The defence submits that the sole and only cause of the crash and the resulting injuries is the negligence of Shannon Deering: she drove at an excessive speed; failed to yield half the road to the approaching vehicle; over-drove her headlights, thus precluding a safe preview time according to Dr. Smiley; and failed to maintain control of her vehicle by causing a sudden rapid acceleration and torque steer, causing the veer into the ditch.

[24] Arising from the evidence in this case and the submissions, the essential issues in this case can be defined as follows:

(i) the crash: timing, urgency, and reconstruction issues;

(ii) the effect of the *Municipal Act* of 1970, 1980, and 2001 on the Boundary Road Agreement of 1976 and on the potential liability of each of the defendants;

(iii) the proper principles and approach in law to the ambit of the statutory duty of road authorities to keep their roads in reasonable repair;

(iv) the standard of care: the concept of the ordinary driver and 'human factors' evidence;

(v) whether the plaintiffs have established on all the evidence that a state of non-repair existed at the scene of the crash on August 10, 2004;

(vi) if so, whether the plaintiffs have established on all the evidence that the condition of non-repair caused their damages;

(vii) whether the defendants have established a defence under subsections 44 (3)(a) or (b);

(viii) whether the unidentified driver and/or Shannon Deering were negligent; and

(ix) how liability should be apportioned, should more than one cause of the plaintiffs' injuries be established.

I will commence with the evidence and findings concerning the crash, the relevant events leading to it, and the report to the police. It is important to have a grasp of this evidence before embarking on the issues of law.

**1. The Crash: What Happened**

[25] I heard direct evidence from several people involved in the events leading up to and including the crash itself, including Shannon Deering, Erica Deering and Alex Heroux. There is not a great deal of controversy regarding what led up to the crash. However, every detail is important as to what the parties draw from it and my eventual findings on the issues of non-repair, drivers' negligence, and causation.

[26] On the issue of speed, Shannon Deering's counsel has conceded her minimum speed was about 90 km./hr. before any initial braking or changing of direction. This alone is not an admitted fact, but merely a concession by one side. The defendants accept that 90 km./hr. was her minimum speed, but submit that probably she had been driving to the point of the initial steer to the right at 96 km./hr. and perhaps more because they were late for their movie. I will deal with these issues now under the following headings:

(a) What time did the crash occur?

(b) Was there urgency in the car that night over the time they were to get to the movie in Whitby?

(c) Is the evidence of these direct witnesses as to how the crash occurred credible and reliable in light of the reconstruction evidence led by both sides?

**(a) Time of the Crash**

[27] As to time of the accident, it is clear from Alex Heroux and Shannon Deering's evidence that she could not get away from her supervisor's job at the Port Perry Kentucky Fried Chicken ("KFC") outlet until after 10:00 p.m. In fact, she said she left at 10:10 p.m. I find that Shannon and Erica got to the Esso station before Amanda Davey, Alex Heroux and Ceri Boomsma, by about 10:22 p.m. (This comes from leaving KFC by 10:10 p.m., five minutes to get Erica and 5 to 10 minutes to the Esso – I estimate seven minutes). They waited at the station for about five minutes or so (she did not accept the 10-minute end of her estimated times on discovery of 5-10 minutes), and took another five minutes before leaving the station when the Davey car stalled.

[28] Taking into account that these are simply estimates, I find that it was probably in the range of 10:33 to 10:38 p.m. when they started on their way down Regional Rd. 2 to the turn-off to Coates Rd. West and thence to the crash scene, a segment of time on which I do not have evidence from anyone in the car. I understand it is 800 meters to Coates Rd. from the station, according to Shannon's unchallenged evidence (verified on the Durham Region Map at Ex. 1(4), T.79), and it is another 2240 meters to the accident hill crest (Ex. 1(4), T.79, and scale), a total of about 3 km. On the evidence of Shannon and Erica Deering, as well as the agreed minimum speed on the Coates hill, Shannon would have covered this distance in about two to three minutes at 70 to 90 km./hr. This would mean a possible time of the crash of about 10:34 to 10:42 p.m.

[29] There is a cross-check on this, though again it is not exact. There is no record of when the call came to the police dispatcher or 911. The police file (Ex. 22) records that the first officer was dispatched to the scene at 10:45 p.m., and we know that Ceri Boomsma had

to walk to the nearest home up a long driveway to report the incident. The home, 1360 Coates Rd. West, was owned by Scott Agnew. His evidence was that his driveway is half a kilometer in length. Agnew gave evidence that he thought Ms. Boomsma came to his door at about 10:30 p.m., but again it is an estimate. Working back from the dispatch time to Ms. Boomsma getting to the house from the crash scene, and checking that against the evidence of Shannon, Erica, and Alex Heroux, I find that the crash occurred at about 10:35 to 10:40 p.m.

**(b) Urgency**

[30] I turn now to the urgency issue. According to Joe Correia, the accident reconstructionist called by the defence, who drove the route to the theatre at the speed limit with stops for traffic lights, it took him 27 minutes from the Esso station to the AMC 24 in Whitby. The direct evidence from three of the occupants in Shannon Deering's car on the night of August 10 2004 is that the show was to start at 11p.m. There is no dispute about this. Shannon Deering, whose time and distance estimates I find to have been on the whole quite accurate, was certainly concerned about getting there on time. She said so in examination in chief, but it was not urgent because they all knew previews would consume the first 15 to 20 minutes after 11 p.m. She thought she had made the trip to the theatre from KFC in 30 to 35 minutes from Port Perry but this time there were two stops.

[31] She made sure by phone that her sister Erica would be waiting for her in the driveway, ready to go. Under cross-examination, Shannon accepted her discovery evidence forthrightly that the plan to meet at the Esso Station was also to save time; she had first denied the question put to her in cross-examination which was rather vague to say the least i.e. were they meeting at the Esso station to avoid being picked up by one car? Only when the discovery question and answer was put to her did she understand what she was being asked, and that it concerned urgency. Another indication that time was a concern was Amanda's suggestion to take Coates Rd. because it was a shortcut and there were no stops for traffic signals on it. When asked directly if she felt she was late, Shannon said she could not recall. When reminded of her answer on examination for discovery, she accepted her prior evidence without hesitation; that was, that there would be previews, she did think about it but they are "just previews." In my view, in saying this Shannon was minimizing somewhat her concern.

[32] Erica Deering gave similar evidence, though she did not recall times. She did remember, however, that she and Shannon did not talk about being in a rush. I understood her evidence to be that there was no anxiety about being on time. Shannon usually drove at the speed limit, Erica said, and she believed that was what Shannon was doing that night.

[33] The mood in the car was nothing out of the ordinary; no arguments. Shannon Deering said she and Alex were tired but happy to be going to a movie. Shannon, in her discovery evidence, said she believed the radio was on; she was not sure when she testified at trial, but she agreed that her prior answer would be true. Alex Heroux had no memory of events after stopping at the Esso station. Though neither Shannon nor Erica could recall much of what was happening in the car leading to the accident scene, it was probably the case that there was some singing or talking and the radio was playing.

[34] In summary, the evidence of Shannon and Erica Deering is that no one was anxious about time or in a state about the absolute need to be on time for 11:00 p.m. They knew that if they did not make it by 11:00 p.m., the film would not start until 11:15 to 11:20 p.m. However, Amanda's suggestion and the choice to take Coates Rd. West, a road Shannon was unfamiliar with as a driver and an action against her usual instinct to stay on main roads, does indicate at least a consciousness and a desire to arrive on time if possible. Her admitted speed on this dark road she had never driven before confirms that at least she felt some peer pressure, felt if not spoken, to get everyone there when they had planned, for 11:00 p.m. I find that while time was not an urgent issue, Shannon was not unconcerned about running a little late for 11:00 p.m.

**(c) What Happened: Direct and Crash Reconstruction Evidence**

[35] The facts of the crash itself were, in the end, not heavily contested, with two exceptions which I will come to in the reconstruction evidence. They come out of the evidence of the two reconstruction witnesses as well as Shannon Deering in regard to (i) her speed over 90 km./hr. and (ii) when and how, in the sequence of events, she lost control of the vehicle.

[36] What is clear is that before the crash, Shannon Deering had not owned her vehicle for long and she had had limited experience driving without the supervision of a licensed driver. She had purchased the vehicle only a month and a half before August 2004. She had obtained her G2 drivers license[1] just before she had left Ontario to spend the prior school year in Florida on a softball scholarship. Therefore, she had not been able to drive much before she purchased her 2002 Pontiac Grand Am. Erica Deering said that Shannon cared for the car as if it was her baby. Shannon loved it. It had taken all her savings to buy it. Shannon Deering said that she wanted to be responsible in driving it. Yet this evidence of Shannon's leaves a nagging doubt. She had been caught twice for speeding and was fined each time before she had left for Florida. The two speeding tickets occurred very soon after she had graduated to her G2 license. However, she now owned her own car and, as she said, she could not afford any more speeding tickets.

[37] Shannon and Erica Deering were living in Port Perry with their father and grandmother in August 2004. Both worked that summer at KFC. Erica had finished Grade 10. Shannon had finished her first year in college and had been working two summer jobs until she realized this regimen was impossible to continue. At some point before the crash, she quit her job as a flag-person and worked longer hours as a KFC supervisor, a responsible job directly below the franchise owner.

[38] On that Tuesday evening of August 10, 2004, the group had met in two cars at Old Simcoe Road and Regional Road 2 (also known as Simcoe St. North) at the Esso station. They all ended up in Shannon Deering's car after getting something to eat or drink at the convenience store there. Amanda was to have been the driver originally in her parents' car so as to save money on gas, but her car had stalled out at the Esso Station.

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[1] A G2 license permits the holder to drive without a licensed driver in the vehicle, unlike the more restrictive G1. The holder must have held a G1 license for at least one year, comply with its conditions and pass the G1 road test. A G2 driver must hold a G2 license and comply with the zero-alcohol and passenger-seatbelt conditions for one year before the road test (MTO, Graduated Licensing, pp.1-2).

[39] As they proceeded south on Regional Road 2 a short distance, Amanda Davey suggested that Shannon turn off onto the next road, Coates Rd. West, which would take them over to Thornton Rd. or Highway 7/12 (Brock St.). Both Thornton and Brock were through roads leading south toward the area of the theatres. When Shannon Deering turned right onto the unlit unmarked country road that she had not driven before, her first reaction was to notice how dark it seemed. After she went over a bump at the turn off Simcoe St. North, she noticed the road's smoothness and moved her speed up to what she thought was 70 to 80 km./hr. knowing, from Amanda, there were no traffic lights all the way across Coates Rd. West.

[40] That Tuesday evening was the first time Shannon Deering had ever driven on Coates Rd. West. She had been a passenger the night before in a car driven by Amanda Davey to pick up some friends. Under cross-examination, Shannon said that she recalled it as a straight road, with some hills and no centre line. She admitted she had driven country roads before, including some without centre lines, and she knew that she must stay on the right side of centre and slow down when she saw oncoming traffic. To her, the only difference on Coates Rd. West that night from other local roads was its smoothness. The weather was clear and dry. During cross-examination, she admitted being aware that Coates Rd. West was not lit and that she had to rely on her headlights. She was aware that the statutory limit was 80 km./hr.

[41] Shannon Deering drove through the flat straight section of Coates Rd. West. The video of the police drive along Coates Rd. West the following day indicated that this flat section takes some two minutes or so to pass through; it is not an insignificant distance before the hills, probably close to 2 kilometres. (Unfortunately, neither the police investigation file nor any of the witnesses provided measurements or an exact map of the road from where the Deering vehicle left Regional Road 2 to the scene of the loss of control and crash). By scaling from the regional map and using the Wallace survey of the accident hill (Ex. 47), I find that it is about 1700 to 1800 metres, or close to 2 kilometres, of flat straight road (2240 metres to the accident hill from Reg. Rd. 2 to accident hill crest, less 500 metres for the first two smaller hills and the ascent up the third or accident hill of 190 metres). Mr. Correia agreed that the distance from the prior crest to the crest of the accident hill is 295 metres. It was a further 120 metres from the crest of the accident hill to where the vehicle came to rest near the 1360 Coates Rd. driveway (Wallace survey, Ex. 47).

[42] Shannon Deering proceeded over and down the first two hills, her high beams on. She remembered the third hill because it was the largest. She proceeded up this third hill – the accident hill – at a speed she thought was about 70 to 80 km./hr. Her speed at a point just before any braking or turn motion is now conceded on her behalf to have been at least 90 km./hr. She testified that she believed she was on her side of centre, that she always drives on her side of the road, and she was consciously trying to do so that night, in view of the absence of any centre-line marking.

[43] As Shannon reached a point about 2/3 or 3/4 up the third hill, she said she saw the glare from approaching headlights, first the aura and then the glare of headlights coming towards her. At first she believed that she was to keep going straight so as to avoid hitting the car. Then she thought the other car was across centre; its headlights were in her face, it was hard to see anything else. She thought she was on her side of centre. The eastbound car was coming right at her, so she had to get out of the way or there would be

a head-on collision. She veered right and hit the shoulder, then went into the ditch. That was her memory of what happened.

[44] Under cross-examination, she said she could not recall, as she had at her examination for discovery, that her speed on the prior hill was 70 to 80 km./hr., much the same as she remembered it going up the larger hill. Because neither she nor Erica noticed any change in speed of their car until the headlights of the east-bound vehicle appeared, it would appear to mean that she had been driving close to 90 km./hr. through the two prior hills.

[45] Shannon said when she saw the aura of headlights, she switched to her low beams, taking her foot off the gas. It was a narrow road, so she wanted to slow down a little. She said she was staying on her side of the road as she believed it to be, but it was hard to see where the pavement/shoulder line to her right ended. She remembered the other vehicle coming over the crest of the hill before her car reached it, "to the best of my memory". What surprised her – and what she remembers vividly – was that the other vehicle seemed to be in her lane. The lights were in her face and it was hard to see anything.

[46] On her examination for discovery, she had said that she could still see ahead, and she acknowledged she had given that answer, but stated that her answer did not contradict her prior evidence that it was hard for her to see the pavement/shoulder line. She said under cross-examination that she applied the brake and then steered right as an emergency reaction because the other vehicle did not swerve to its right. As her vehicle swerved, she said, it was all so fast; it may have fishtailed and hit gravel, and she lost control.

[47] Erica Deering's evidence was largely confirmatory of Shannon's, though in much less detail. She said, in regard to speed, that she was not sure what it was as they passed over the hills, but she felt safe. Erica said that as they climbed the last hill, a car came over the hill. She had not seen any other cars on the road prior to that time. The car took up the entire road, and its lights were very bright in her eyes. In her estimation, the other car was halfway into their side of the road. Her last memory was those lights.

[48] The defendants called Joe Correia as their expert witness in accident reconstruction. He is a professional engineer who has specialized for years mostly in the reconstruction field and has been accepted on numerous occasions by courts as an expert in this field. As matters turned out, plaintiffs' counsel did not contest much of Mr. Correia's evidence, and so I will provide it in summary form. The areas which remained controversial between him and the reconstructionist called by the plaintiffs, Craig Wilkinson, were: i) the point in the sequence of actions at which Shannon Deering lost control irrevocably; and ii) speed, trajectory and sequence of actions of the driver in light of the vehicle airbag data recorder results.

[49] First, only Mr. Correia had done a relatively complete investigation in order to reconstruct the actions leading to the crash in this case. The expert witness called by the plaintiffs, Mr. Wilkinson, was not retained to do so. His retainer was a more confined one – that of a critique of certain aspects of Mr. Correia's work.

[50] By the opening of trial, the plaintiffs' counsel conceded the lower end of Mr. Correia's opinion on Shannon's speed before braking as at least 90 km./hr.; Mr. Correia's opinion was that her speed ranged between 90 and 96 km./hr. on the hill before any evasive or

braking action occurred. He based this estimate on the vehicle's recorded data as to how long braking was applied and a range of brake-pressure assumptions applied to the speed recorded roughly each second for five seconds before the impact which triggered the data-recording. The vehicle's airbag data recorder did not provide any brake-pressure data.

[51] While there is no doubt that Mr. Correia had done the more complete analysis of speed and rollover factors, when it came to causal issues and taking into account contextual factors beyond the dynamics of the Deering vehicle, Mr. Correia's analysis was far from complete. In fact, as Mr. Lehman's cross-examination revealed, Mr. Correia admitted that he did no sight distance analysis of the hill in question, nor was he asked to do so, though I would have thought such an analysis would have assisted him in understanding the accident he was trying to reconstruct. He had neither knowledge of the visibility or duration of headlight loom or aura, if any, to a westbound driver ascending the hill from an approaching vehicle's headlights before it crested this hill, nor had he studied the so-called deflection of the road northerly, stretching one lane in width along a distance of 110 metres over the crest and down part of the hill east of the crest. Mr. Brownlee's survey of this deflection (Ex. 5) shows it extending about 22 metres west from the crest and about 88 metres east of the crest, using the survey's scale – again no measurement was provided by the author. Mr. Correia said his interest was the speed and dynamics of the Deering vehicle. In my view, his analysis of its speed at the lower end of the range (90 km./hr.) and its rollover pattern was, on the whole, sound.

[52] I am not by any means satisfied by the completeness of Mr. Correia's work. His analysis showed strange gaps in reasoning at times. For example, he began an analysis of speed during what he called the pre-trip, trip, and post-trip phases as the vehicle was rolling and colliding with the rock culvert ("Trip" here means the point where the vehicle left its wheels and began rolling, shown by a gouge mark near the culvert). He concluded that the vehicle speed at the time of the "trip" was 40 to 55 km./hr., probably closer to the higher end of that range. He did not indicate where that conclusion took him – it simply stands alone – and he proceeded into an analysis of the airbag recorder's readings.

[53] To determine the time of travel and distance from the Esso station on Reg. Rd. 2 to the theatre, he used a Google Map off the Internet, the scale of which I found to be demonstrably wrong for the distance stated from the station to Thornton Rd., the first main road west of the accident scene. He went beyond the evidence in expressing certain opinions on speed and lateral location of the Deering vehicle on the road before any tire marks appeared on the road and before any data was recorded, both to Shannon Deering's detriment. It then becomes difficult to accept his opinion, as one independently arrived at, that it was solely the 'rapid acceleration' one-second throttle application recorded by the data recorder, after her initial turns right and left, that produced torque steer and caused this crash. Both reconstructionists conceded that there is no physical evidence of the occurrence of torque steer.

[54] Mr. Correia did a thorough job of examining several factors, including the police work, the measurements of the tire stress marks from the Deering vehicle on the road, the accident scene, the Deering vehicle damage and its significance for the number of rolls, the vehicle data recorder or SDM (the Sensing and Diagnostic Module), and the event data and crash data retrieved from this instrument. There is no question that his input of

data into the PC-Crash software programme was correct, and he tested the same make and model of car in reaching his opinions. But it seems to me that this work was done in isolation, without the context in which the Deering vehicle moved in those last moments.

[55] I find that Mr. Correia's opinion on the vehicle's speed is not seriously challenged, and I accept his opinion of speed at the lower end of the range he gave. I find that Shannon Deering's vehicle speed on the ascent of the accident hill was 90 km./hr. before braking and the initial steer right, and that it was probably above that speed to 95 km./hr. on the descent of the prior hill, in view of the coast speed tests Mr. Correia did, and Shannon's and Erica's own estimates of Shannon's vehicle speed staying within a 10 km./hr. range.

[56] I accept that prior to the final turn right and entry into the north ditch, the Deering vehicle's tires at no time came into contact with, or approached closer than 1 metre of, the northerly shoulder. The application of a slurry seal coating into the shoulder area therefore played no part in Ms. Deering's loss of control. I accept that the gouge visible north of the long groove in the ditch in Photos 45 and 46 (Ex. 61, T.G) is the place where the vehicle "tripped" i.e. where the vehicle began to roll. Furthermore, I accept Mr. Correia's analysis as a probability (and therefore proven for civil trial purposes) that the event which triggered the Algorhythm Enabler [AE][2] (to start recording the data found in the SDM) was the impact of the rolling vehicle with the rock culvert at the entrance to 1360 Coates Rd. West. Mr. Correia looked at three possible triggering events, and I accept his opinion and reasoning that neither the entry into the ditch nor the vehicle's final landing on its tires west of that driveway are as likely to have produced the force required of 2g x 2 to trigger the data recording. I understand Mr. Wilkinson's doubt that there is absolute proof of this, but Mr. Correia's findings and reasoning convince me on a balance of probabilities.

[57] The SDM is General Motor's label for the recording device in its vehicles which controls airbag deployment. It is the brains of the airbag, as Mr. Wilkinson explained it. The SDM starts recording when its AE is triggered by a certain combination of acceleration and jerk. It records events prior to either a deployment or a non-deployment event up to eight seconds. Pre-crash data are stored differently, so that every five seconds the oldest prior record is erased. The plaintiffs did not dispute Mr. Correia's understanding of the force required as a trigger to this AE of 2g x 2. In this case, the SDM did not activate the airbag, but data for eight seconds prior to the last non-deployment event are recorded.

[58] There is a complication mentioned by both Mr. Wilkinson and Mr. Correia in applying the results of the SDM too literally, as if each time recorded accurately states the time of the events recorded next to them. They are not. We were fortunate in this case to have two expert witnesses who both have conducted considerable published research in this area. Even though a time is registered, before the non-deployment event, beside each data subject and reading, there is no certainty that the event recorded actually occurred at precisely that second prior to the non-deployment event (see Appendix A for the readout in this case - from Ex. 61 T.1-F, p.3 and T.2-D, last line of graph). For instance, the record of any different throttle application comes from the engine, not the gas pedal, and

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[2] "AE" is described as occurring when a non-deployment event is severe enough to 'wake up' or enable the algorhythm in the SDM to decide whether or not the airbag should be deployed. See Joe Correia *et al.*, "Utilizing Data from Automotive Data Recorders," Road Safety Conf.: London, Ontario, 2001.

it is not measured at the same instant as the time shown, or a data entry from another source shown as occurring at the same time; Mr. Wilkinson said there is often a significant time lag between them of .5 to 1 second.

[59] This uncertainty means one cannot automatically place the recorded events on the known path of the vehicle and say this point in the path is exactly where a sudden throttle application occurred. Mr. Wilkinson accepted that in this case, where the event record shows a virtual full throttle application causing an increase to 4300-4800 rpm, that application lasted only .6 to .8 second, and it probably occurred somewhere between the apex of the curve to the left and that of the final curve to the right. The increase in speed of the vehicle is shown to be only 3 km./hr., from 66 to 69 km./hr., but of course these are tire speeds and not necessarily the speeds of the vehicle itself when in yaw. Mr. Wilkinson was of the opinion that this reading confirms that the vehicle was in yaw at the time, and therefore the vehicle speed had little relation to the sudden huge and momentary throttle application; the vehicle was already irrevocably out of control by that time.

[60] Mr. Correia disagreed with Mr. Wilkinson's conclusion. Mr. Correia relies on the timing recorded by the SDM for the brake application between -8 and -5 seconds. No brake pressure data is recorded; he assumed .19g as the pressure required for the initial rightward manoeuvre and to produce the tire stress marks at their start and location on the road. He also used .10g for minimal deceleration prior to the start of the tire marks. He assumed at -5 seconds that Shannon's speed was 76 km./hr. after braking stopped. The difference in these assumptions produced the speed range of 90 to 96 km./hr. just prior to the initial braking.

[61] There is a short period of what he calls rapid acceleration at the -4 and -3 second points, shown by the large increases to 4300 and 4800 rpm. This "rapid acceleration" led him to conclude that Ms. Deering's sudden application of the gas caused her to lose control of the vehicle, which until then was still on the road. To him, that was the sole cause of the crash because he believes that that the high throttle application occurred at a time when the lateral g forces were near zero. This opinion assumes that no road-based factor was in play, and that the approaching eastbound vehicle was in its own lane. He said one can tell where the driver saw the halo of light from the other car and took her foot off the gas to brake – if it happened, it would have been 25 – 40 metres before the -8 mark shown on the SDM data. That would place it at about 50 to 90 **meters** east of the crest if one can assume that you can place the data recording times over the vehicle tire marks and allowing for the uncertainty of event timing at each recorded time of .5-1 second.

[62] Mr. Wilkinson stated his conclusions as to the trajectory of the Deering vehicle and what, if any, effect the sudden throttle application had on its situation in the following outline. He used the PC Crash software programme, as Mr. Correia had done. Mr. Wilkinson said that the tire marks left by the Deering vehicle began 100 meters east of its resting place at the 1360 Coates Rd. West driveway. This accords well with Mr. Correia's survey profile of the scene and overlay of scene evidence (Ex. 61, T.1-J&L). The tire marks commence 15 to 20 metres west of the crest of the hill. From the first mark, that of the right rear tire, the vehicle is starting to yaw in a counter-clockwise direction, indicating that the first steer to the right began prior to these tire marks. The rear tire marks go outside the front tire track, tires slipping and the rear rotating round the vehicle

front, indicating an over-steer condition caused by a hard left steer following the initial one to the right.

[63] Mr. Wilkinson could not be certain, but he concluded that the initial right steer occurred before the point where the tire marks start, likely east of the hill's crest. In this, he and Mr. Correia agreed. A vehicle is in over-steer where the vehicle ceases travelling in the same condition as it is being steered; this was what happened here when it was steered hard to the left and then to the right. The direction of the tire marks change as they go west, and it is here that the vehicle starts turning right again as it entered a clockwise yaw. That point, Mr. Wilkinson stressed, is not certain on the tire mark path. That transition from counter-clockwise to clockwise yaws occurred somewhere between the apexes of the two curves, one to the left and the final one to the right. So, as the vehicle entered the ditch, it transitioned to clockwise. He agreed that the vehicle tripped at some point off the road, and I did not understand that he was disagreeing with Mr. Correia that that could have been east of the rock culvert where it started to roll, then impacting the rocks.

[64] Mr. Wilkinson strongly disagrees with Mr. Correia as to the description and significance of what Mr. Correia called the 'rapid acceleration' phase at -4 to -3 second marks from the SDM. He accepted that 4800 rpm is close to the maximum speed for this vehicle. However, he sees it as not a rapid acceleration, as the throttle application took under 1 second, tire speed was only affected by 3 km./hr., and so by this time the vehicle was clearly in yaw and out of control. Mr. Wilkinson also pointed out that the programme Correia used does not simulate timing or a vehicle out of control and in yaw. Rather, that programme simulates a vehicle under control making an abrupt turn.

[65] Mr. Correia is of the opinion that the driver steered right, then left, then to the right some 25 degrees, and then further to the right by 12 to 18 degrees, and that this increased rightward steering only happened after the throttle increase occurred. He sees the situation as one where control was being regained, until that final throttle increased, driving rpm to 4300- 4800 for .6 to 1.0 second. Following his initial report, Mr. Correia did some throttle application testing, trying acceleration or throttle increases from 70% up to 100%, and it was only the 100% throttle application for 1 second which could produce the range of rpm increase recorded by Shannon Deering's 2002 Grand Am.

[66] Mr. Correia's conclusion is that, prior to this throttle application, the vehicle was in a situation where it was coming out of its yaw condition, the lateral forces reduced to nearly zero. The "rapid acceleration" caused by this quick but hard throttle increase resulted in a condition called "torque steer," where there is a lateral load shift, the drive shaft angle causes the outside of the wheels to have greater traction and the inside less traction, meaning the vehicle is pulled to the right, off the road. Also, it is a fact known to both expert witnesses that front-wheel drive vehicles are more likely to go into torque steer. Mr. Wilkinson, on the other hand, sees no physical evidence to indicate that torque steer occurred; he says it might have, but that by then, the vehicle was going to crash in any event. Under cross-examination, he explained that the tire marks are NOT skid marks. Rather, they represent striations from the wheels consistent with a vehicle in yaw, and they continue right up to entry into the ditch.

[67] Cross-examination by Mr. Lehman brought out what I had alluded to earlier– Mr. Correia seemed at times to go beyond the known evidence or try to protect his clients' position rather than being forthright with the court. For instance, it took four questions and the use of figures as examples to have him admit that if the driver steers to the right to avoid a perceived hazard, it would be a reasonable reaction. First, he did not answer the direct question instead, he observed that proximity could have produced that perception, that the limited distance did not allow enough to the crest of the hill. He was then asked if Ms. Deering was .5 metre over centre and saw headlights only 1.7 seconds away (representing two vehicles approaching each other at 80 km./hr.), and was on a collision course, is there no option but to steer sharply to the right to avoid it? Mr. Correia argued with the figure of 1.7 seconds as being reaction time only, and not including perception time. Then he was asked, assuming she was .5 metre over centre, the available sight distance was 77.5 metres, well below the recommended 150 metres in the OTM, and both vehicles were approaching at 80 km./hr., with only 1.7 seconds before they would intersect or pass, would it not be reasonable to steer right? Mr. Correia finally agreed.

[68] As to extrapolating Ms. Deering's speed and path back beyond -8 seconds, he said that he could not extrapolate beyond this point. He admitted that he cannot contradict her evidence that she was on her own side of the road when she was starting up and during most of her ascent of the final hill, despite speculating earlier that she was probably over centre coming up the hill. Finally, Mr. Correia argued that his estimate of Shannon Deering's minimum speed at 90 km./hr. was probably unreasonably low; then he admitted that it is actually consistent with the SDM data. He also admitted that the time of continuous braking he had assumed to be over four seconds could be only 2.5 seconds, that it may not be continuous due to the uncertainties of the SDM recording lag, and that the SDM does not register the degree of braking – the pressure levels were his assumptions. As well, there is no evidence before me that, in an emergency situation, during a panic swerve right and left and right again, a driver could be expected to gauge when the g forces are zero. Finally, he admitted that in the circumstances, if a driver was just missing a head-on collision and pressed the gas resulting in torque steer, he could not say it was a mistake.

[69] From the above, there is no doubt in my mind that Shannon Deering was proceeding westbound on Coates Rd. West at a speed over the limit, probably in the range of 90 to 95 km./hr., and at 90 km./hr. as she entered the last half of her ascent of the accident hill, on an undivided and unlit two-way road. I found both Shannon and Erica Deering to be forthright witnesses who admitted at times facts that were not always in their favour, particularly facts that confirmed Mr. Correia's evidence as to speed. I also find that there was no contra flow traffic as they passed the two kilometres of straight road.

[70] I find no evidence to support Mr. Correia's conclusion that the vehicle went into torque steer and only then did it go out of control. It is possible, but without physical evidence to support his opinion, and especially since I have found he had voiced other conclusions verging on advocacy for his principals, I do not find that conclusion to meet the test of probability. I accept Mr. Wilkinson on this point.

[71] I do not accept Shannon's evidence that as the other vehicle crested the hill, she lowered her headlights. I am sure she believes it as something she should have done, but I fail to see how there was any time for her to do that, in view of the suddenness of the eastbound

vehicle's appearance over this seriously sight-deficient hill which I was able see for myself at lesser speeds on Dr. Smiley's night video-disc.

[72] I do accept the evidence of both Shannon and Erica Deering, which was not contradicted by other evidence, that whether it was due to the unidentified vehicle driving slightly over centre, or the Deering vehicle being .5 metre over centre just before any braking occurred, or an illusion caused by the deflected road alignment on that particular hill, Shannon Deering saw the approaching vehicle as coming directly at her, its lights blinding her. To avoid an apprehended collision, she steered right to avoid the oncoming vehicle, lost control and panicked, over-steered left trying to stay on the road, tried momentarily to brake but hit the accelerator very briefly, veered into the ditch still at a tragically high speed, rolled twice, collided with the rock culvert, and stopped west of the 1360 Coates Rd. driveway of Mr. Agnew.

[73] I will return to make my findings later in these reasons regarding the condition of the road on the accident hill, and negligence, causation and apportionment issues regarding the eastbound vehicle, Shannon Deering's driving, and any road-based default by the defendants.

## 2. The *Municipal Act* and the Boundary Road Agreement of 1976

[74] The Defendant municipalities in 2004 were discharging their duties to repair Coates Rd. West and East, pursuant to the provisions of the Boundary Road Agreement of 1976. Oshawa was maintaining Coates Rd. East and Scugog was maintaining Coates Rd. West. That agreement defined the roles each municipality would play with respect to Coates Rd. West and the duration of the agreement in the following terms:

> 1.1 The Township agrees that it shall not undertake major work on [Coates Rd. West] such as regravelling, repaving, asphalting or emulsion resurfacing, or reconstruction, without the written consent of the Council of the City of Oshawa, but the Township may do such work as ditching, culvert replacement, scarifying, priming, gravel patching, snow plowing, sanding, salting, and other normal maintenance and repair operations without notice to the City and without the consent of the Council thereof.
>
> 5.0 Nothing in this agreement shall limit the right of the City or the Township to do such work as is necessary to fulfil any obligation imposed by Section 427 of the *Municipal Act* 1970, Chapter 284....
>
> 6.0. This agreement shall come into force on the 25th day of May 1976, and shall continue in force from year to year until terminated. Either party may terminate the agreement at any time upon 3 months notice....

[75] Section 427 of the 1970 *Municipal Act* was the section imposing the duty to repair on municipalities. The relevant provisions of the *Municipal Act*, R.S.O. 1970, c. 284, in force in 1976, provide as follows:

> 410. (1) The corporations of adjoining municipalities may enter into an agreement for the maintenance and repair of any highway forming the boundary between such municipalities, including the bridges thereon that it is their duty to maintain and repair, whereby each of them may undertake, for a term of years not to exceed ten years, to maintain and keep in repair any portion of such highway for its whole width, and to indemnify and save harmless the other from any loss or damage arising from the want of repair of such portion.
>
> (2) A copy of any agreement made under subsection 1, together with a copy of the by-laws of each of the municipalities authorizing the execution of the agreement, shall be registered in the registry office of the registry division in which the highway is situate.
>
> (3) After the registration of the agreement and by-laws, each corporation has jurisdiction over that portion of the road that it has undertaken to maintain and keep in repair, and is liable for the damages incurred by reason of neglect to maintain and keep the same in repair, and the other corporation is relieved from all liability in respect of its maintenance and repair.

[76] The provisions in the 1970 *Municipal Act* remained the same until the *Municipal Act, 2001*, S.O. 2001, c. 25, came into effect. I understand the "in effect" date for the *Municipal Act, 2001* was actually January 1, 2003. The equivalent provisions in the *Municipal Act, 2001* read:

> 29.1 (1) If municipalities having joint jurisdiction over a boundary line highway enter into an agreement under which each municipality agrees to keep any part of the highway in repair for its whole width and to indemnify the other municipality from any loss or damage arising from the lack of repair for that part, the agreement and a copy of the by-law authorizing the agreement may be registered in the proper land registry office for the area in which the highway is located.
>
> (2). If municipalities enter into an agreement under subsection (1), each municipality has jurisdiction over that part of the highway that it has agreed to keep in repair and is liable for any damages that arise from failure to keep the highway in repair and the other municipality is relieved from all liability in respect of the repair of that part.

[77] For the defendants, Mr. Boggs submitted that the 1976 Boundary Road Agreement does not offend the 10-year term set out in section 410(1) of the 1970 *Municipal Act* because it provides in para. 6.0 for the agreement to be in force "from year to year" until it is terminated. Mr. Oatley submitted for the plaintiffs that the 1976 agreement ceased to have effect by May 26, 1986, when the 10-year period from its coming into force ceased.

No authorities were cited to me for either position, and counsel could not find any relevant legal authorities. I have similarly found that there appears to be no assistance from precedent.

[78] The 1976 Boundary Road Agreement between Scugog and Oshawa names Scugog as the maintaining municipality for Coates Rd. West, and in 2004, Scugog continued to accept that it was the municipality responsible for maintaining the road. However, the *Municipal Act, 2001* had come into effect prior to the accident date. I will deal, therefore, with whether the *Municipal Act, 2001* applies to the agreement in view of the accident occurring after it came into effect. Section 29.1 of the 2001 Act does not contain the 10-year term. If the *Municipal Act, 2001* does not apply, then the next issue is the effect of the 1970 *Municipal Act* on the liability of both defendants. Assuming that the registrations called for by the 1970 *Municipal Act* were carried out, and that the agreement continued to be in force in 2004, Oshawa would appear to be relieved from responsibility civilly for any failure to maintain this road in August 2004, and Scugog then would be liable for all damages assessed as recoverable as a result of the crash on Coates Rd. West on August 10, 2004. I will deal with this issue, first assuming the registrations called for by both statutes were carried out, and second, assuming the agreement was not duly registered. No evidence was led to establish that the registration was done.

[79] As to the possible application of the *Municipal Act, 2001* to the boundary road agreement, it is necessary to determine whether the proposed application of the *Municipal Act, 2001* is retroactive, retrospective, or immediate. To make that determination, one must determine two relevant time periods – when the event takes place, and when that event starts to have legal effects: *1392290 Ontario Ltd. v. Ajax (Town)*, 2010 ONCA 37 at para. 33. The analysis is further complicated where a new law is passed while: (i) the events are still taking place; and (ii) the legal effects are ongoing: see *Épiciers Unis Métro-Richelieu Inc., division "Économos" v. Collin*, 2004 SCC 59, [2004] 3 S.C.R. 257; *1392290 Ontario Ltd., ibid.* at para. 34.

[80] The Supreme Court of Canada in *Épiciers Unis Métro-Richelieu Inc., ibid*, at para. 46, defined and distinguished between immediate, retrospective, and retroactive application:

[81] If events are under way when [new legislation] comes into force, the new legislation will apply in accordance with the principle of immediate application, that is, it governs the future development of the legal situation (Côté, *supra*, at pp. 152 *et seq.*). If the legal effects of the situation are already occurring when the new legislation comes into force, the principle of retrospective effect applies. According to this principle, the new legislation governs the future consequences of events that happened before it came into force but does not modify effects that occurred before that date (Côté, *supra*, at pp. 133 *et seq.* and pp. 194 *et seq.*). When new legislation modifies those prior effects, its effect is retroactive (Côté, *supra*, at pp. 133 *et seq.*).

[82] While the accident date was in 2004, Scugog and Oshawa entered into the agreement in 1976, pursuant to section 410 of the 1970 *Municipal Act*. When the *Municipal Act, 2001* took effect, the contractual relation and its purported effects had already been in existence since 1976 between Scugog and Oshawa. As such, the proposed application of the *Municipal Act, 2001* on the agreement is retrospective.

[83] It is presumed at common law that the legislature does not intend its law to apply retrospectively; however, that presumption does not apply to purely procedural law and laws that merely confer a benefit on persons or that are designed to protect the public: Ruth Sullivan, *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007) at 248. Legislation is considered beneficial for purposes of considering retrospective application only if there is no prejudice to others. Legislation which is purely procedural does not affect substantive rights in any way. It is difficult to draw a distinction between procedural and substantive, so the courts look to the real impact of the provision on the parties: *Statutory Interpretation*, ibid, at 264-65.

[84] In this case, retrospective application of the *Municipal Act, 2001* would be prejudicial to Scugog because Scugog would bear sole responsibility for damages in these actions. As well, the words of section 29.1 – "If municipalities having joint jurisdiction over a boundary line highway enter into an agreement" – appear to signal a legislative intent to have it apply to agreements entered into after January 1, 2003, not agreements entered into prior to that date. The section does not use the words "or have entered into an agreement." I conclude therefore that the *Municipal Act, 2001* does not apply to the 1976 Boundary Road Agreement.

[85] Assuming that the registration called for by the 1970 *Municipal Act* in force in 1976 was accomplished, the words in para. 6.0 "shall continue in force from year to year until terminated" do not, in my view, take the agreement out of the 10-year term of years in the 1970 *Municipal Act*. The 1970 *Municipal Act* clearly states that this type of agreement is not to remain in effect beyond a total of 10 years. When the agreement ceased to have effect on May 26, 1986, the parties were under the *Municipal Act*, R.S.O. 1980, c.302. It contained the same provision limiting the term of boundary road agreements to 10 years. Therefore, as of May 26, 1986, when the defendant municipalities did not affect a new agreement, they became jointly responsible in law for their boundary roads. They could have avoided that joint liability by entering into a new boundary road agreement then.

[86] Assuming that the registrations of the agreement and by-laws were not done in 1976, there would have been no agreement in compliance with the governing *1970 Municipal Act* in 1976, and the result would again be that the defendants were jointly liable for loss and damage caused by a condition of non-repair on boundary roads like Coates Rd.

[87] My conclusion is that, on either registration scenario, both defendants are jointly liable for the consequence of failure to maintain and keep in reasonable repair Coates Rd. following 1986, and until the new Boundary Road Agreement between them came into effect in 2006 when Oshawa took over responsibility for maintaining Coates Rd. West. This ruling applies to the crash on August 10, 2004 and the issues arising from it.

## 3. Principles of Law and Approach to the Duty to Repair Roads and Highways

[88] The law in Canada is still very much influenced by its historic origins in a strong sense of independent self-responsibility, individual freedom, and traditions from English common law in Upper Canada and French civil law in Quebec. Early settlers and their successors before and after the time of Confederation had to develop homes and farms from the primeval forests and rock of the East coast and the Canadian Shield, the plains and

mountain ranges of the West, and to maintain their livelihood largely without help from government or others but themselves.

[89] Unlike some other legal traditions emanating from a different history, the law in Canada in respect of responsibility for loss did not start from a communal sense of mutual responsibility. Tort law in the common law portions of Canada continues to express, at its heart, values of individual responsibility, individual dignity and self-worth, and satisfaction of fundamental human needs for justice, imperfect though it may be: Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markham, Ont.: LexisNexis Canada, 2006) [Linden and Feldthusen] at 14-18. Therefore, as Mr. Justice Lauwers quite rightly pointed out in *Greenhalgh*, *supra* at para. 2: "In our system of justice, the personal losses arising from unfortunate events lie where they fall unless there is a legal basis for transferring responsibility for them to another ..."

[90] The concept in Canadian tort law for transferring responsibility for loss is to relate recovery for loss to fault. To explain, each person is responsible for his or her own life and for the misfortunes and tragedies which may befall one, but if that person can prove in a court of law that the injuries and loss were caused by the fault of another, recognized in law, then the claimant can obtain recovery from the person or entity whose fault caused the loss.

[91] The law of torts and personal injury has been ameliorated somewhat by common law developments such as the lessened burden on plaintiffs to prove, for example, a future change in physical condition or risk of deterioration in the future. More significantly, various governmental programs and statutory amendments have come to pass over the past century relating to the duty of governmental institutions to individuals who suffer loss. The *Insurance Act*, R.S.O. 1990, c. I.8 now provides accident victims with no-fault benefits to provide some replacement income and therapeutic services quickly. Nevertheless, in motor vehicle cases, personal loss and damages for injuries beyond one's entitlement to accident benefits are borne by the person who suffers injury, unless that person can prove that the injury was caused by the fault of another. The burden on the plaintiff to establish fault and causation is the civil standard of proof i.e. what is more likely than not, or on a balance of probabilities.

[92] In Ontario, the *Municipal Acts* over the years placed a duty upon road authorities[3] to keep the roads or highways in a reasonable state of repair. Until 1996, the *Municipal Act* provision expressed the duty to repair in these terms, as stated in section 427(1) of the 1970 *Municipal Act* and section 284(1) of the 1980 *Municipal Act*:

> Every highway and every bridge shall be kept in repair by the [municipal] corporation the council of which has jurisdiction over it or upon which the duty of repairing it is imposed by this Act and, in case of default, the corporation, subject to [The] Negligence Act, is liable for all damages sustained by any person by reason of such default.

[3] I refer to road authorities instead of municipalities, at times, because section 33(10) of the *Public Transportation and Highway Improvement Act*, R.S.O. 1990, c.P.50, provides that the liability of the Ministry of Transportation (as the provincial highway authority) does not exceed that of a municipality in any case.

[93] Section 284(1) was amended in 1996 in the following terms, and was continued in the same terms from January 1, 2003 as section 44(1) in the 2001 *Municipal Act*. I will include for convenience section 44(1) and the other subsections relevant to this case at this point:

> 44(1). The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge.
>
> (2). A municipality that defaults in complying with subsection (1) is, subject to *The Negligence Act*, liable for all damages any person sustains because of the default.
>
> (3). Despite subsection (2), a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if,
>
> > (a) it did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge;
> >
> > (b) it took reasonable steps to prevent the default from arising; or
> >
> > (c) at the time the cause of action arose, minimum standards established under subsection (4) applied . . . and those standards have been met.
>
> (4). The Minister of Transportation may make regulations establishing minimum standards of repair for highways and bridges or any class of them.

[94] In this case, it is accepted by the parties and by me that the minimum standards established by regulation have no relevance to this case.

[95] Counsel for the defendants, Mr. Boggs, drew the court's attention to the changed wording of the duty of highway authorities to the motoring public, in force since 1996. In his view, the legislature amended the governing section to correct a tendency of some courts to over-emphasize the strictness of the road authority's duty of repair whereby, in the 1980s and 1990s, in his words, "the test for liability was being pushed in a direction that the legislature felt did not constitute a fair burden to place on a municipality." Mr. Boggs did not cite any ministerial statement or legislative record in support of his view. Though that may have been one purpose, I do not think the significance of the 1996 amendments is limited only to possibly over-strict applications of the law against municipalities prior to 1996.

[96] The Courts have been applying negligence-like principles in highway repair cases since the nineteenth century, despite the absoluteness of the wording prior to the 1996

amendments. The classic formulation of the standard of care in highway repair cases was enunciated by Chief Justice Armour in *Foley et al. v. Township of East Flamborough* (1898), 29 O.R. 139, at 141 (Div. Ct.):

> ... I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied.

[97] There may be reason for caution in applying pre-1996 cases, as Mr. Boggs suggests, though not necessarily restricted to the one he suggests. Because the legislation did not spell out a standard of care, there was room left for a certain amount of case-by-case adjustment of the law. These adjustments are particularly noticeable to me in some pre-1940 judgments where the courts placed great emphasis on the potentially difficult or impossible burden on municipalities unless the duty to keep roads in repair is applied strictly.

[98] For example, see the lengthy discussion in *Fafard v. City of Quebec* (1917), 55 S.C.R. 615, 39 D.L.R. 717 at 718 [*Fafard* cited to D.L.R.] by then-Chief Justice Fitzpatrick, pointing out the impossibility of reconstructing every possible hill, lighting every street, or lining roads with stone walls in order to make them safer; there is no mention of warning signs or other less costly alternatives, perhaps because he was trying to convince the rest of the court's panel in a very close 3-2 decision, and because in some provinces, there was no duty to post warning signs recognized in law. Until the mid-twentieth century, courts were still holding that municipalities had no duty to provide such things. In *Rural Municipality of Franklin v. Hupe et al.*, [1953] 1 D.L.R. 141, [1952] M.J. No. 50, the Manitoba Court of Appeal held that road authorities had no duty to post warning signs of dangerous conditions, in a case where a vehicle was driven past the terminal point of the road into a ditch in a heavy snow storm where no sign warned of the terminal point, following *Hordal v. Buors*, [1941] 2 D.L.R. 240, [1941] M.J. No. 33 (Man. C.A.).

[99] However, in Ontario by 1966, *Ontario (Minister of Highways) v. Jennings*, [1966] S.C.R. 532 had reached the Supreme Court of Canada. The Court by then regarded the duty of road authorities to maintain warning signs in appropriate situations as unquestioned established law, including signs posted outside the highway right-of-way. The message from *Jennings* was that where the sign's purpose is to warn motorists of a dangerous situation, the position of the sign is not as important as its being maintained to inform and warn motorists of a highway-related danger ahead. In *Jennings*, the highway-related danger was an intersecting road where motorists on one highway had the right-of-way, and a sign facing drivers on the other road had been turned around so that a driver could only see its back. That sign was there to warn drivers on the other road to yield the right-of-way and to stop.

[100] What flows from *Fafard*, *Foley* and *Jennings* is the principle that the standard of care to be met by road authorities is not perfection. Further, it is neither determinative of liability that an accident occurred on the road in question, nor is it sufficient for a claimant to show that the road could have been made safer by some improvement, pavement marking, or other means where cues that should be reasonably obvious to the ordinary driver called for caution. The question remained in all such cases: was the road at the

material time sufficiently in repair that those users of the road, exercising ordinary or reasonable care, could use it in safety?

[101] The other important and timeless principle out of the early cases is the proposition that remains, even today, in no doubt: road authorities are not insurers for all losses incurred on the highways or roadways under their jurisdiction. In the early cases, the factual findings were made in very different times, when either the roads were used by horse-drawn carriages or by early motor vehicles travelling at speeds now considered quite slow along, say, a road on a sheer cliff with a very sharp curve at the bottom (*Fafard, supra*), or a road that simply ends without warning to those unfamiliar with it where the vehicle speed was regarded as too fast at 25 mph due to poor visibility (*Hupe, supra*).

[102] As long ago as 1939 in Ontario, in *Groves et al. v. The County of Wentworth*, [1939] O.R. 138, [1939] O.J. No. 456 (C.A.) [*Groves* cited to O.R.], Chief Justice Robertson noted the need for principles to inform the standard of care with respect to road repair that were adaptive to changing conditions. I am not citing this case as an authority for recovery from a road authority because of the lack of roadside barriers. The "*Groves*" amendment now embodied in section 44(8) of the 2001 *Municipal Act* and the Ontario Court of Appeal decision in *Hopper v. The County of Bruce*, [1950] O.R. 284, 2 D.L.R 638 (C.A.) have virtually closed that possibility: David G. Boghosian & J. Murray Davison, *The Law of Municipal Liability in Canada*, looseleaf (Markham, Ont., LexisNexis Canada, 1999) [Boghosian & Davison] at para. 3.158. But the concept of law changing with the times is worth recalling here, recognizing as it should that motor vehicles are manufactured to go much faster than the speeds of 10 to 12 mph (which was an estimated range of speed of the automobile in *Raymond v. Bosanquet* (1919), 59 S.C.R. 452), that their capacity for damage and for efficient travel have increased, road design and engineering knowledge of safety precautions and driver expectations have improved exponentially, road engineering expertise is available to municipalities including (in this case) a rural municipality, municipalities and provincial road authorities no longer rely on manual shovelling to clear ice and snow, and communications systems available to them enable quicker response times in fluid situations.

[103] In *Groves*, the plaintiff, whose driving and driving experience were both beyond reproach, suffered an accident on a hill beside a ravine when her vehicle hit a significant rut or "frozen mass of snow and ice almost four inches deep" and of some length in the roadway where no protective barrier existed on the ravine side. Counsel for the road authority strongly argued that the municipality had no duty to provide barriers at "dangerous places" to prevent travelers from sliding off the road. The road in that case sloped sideways toward the ravine. Robertson C.J.O. held at p. 145 as follows:

> The duty of a municipality . . . is to keep the highway in such condition that travellers using them with ordinary care may do so in safety: *City of Kingston* v. *Drennan* (1897), 27 S.C.R. 46 ...; *Foley* v. *Township of East Flamborough* [*supra*], per Armour C.J. at p. 141 ...
>
> "As the ordinary traffic expands or changes in character, so must the nature of the maintenance and repair of the highway alter to suit the change": *Sharpness New Docks and Gloucester and*

> *Birmingham Navigation Co.* v. *Attorney-General*, [1915] A.C. 654, per Lord Atkinson, at p. 665; *Davis* v. *Township of Usborne* (1916), 36 O.L.R. 148; *Walker* v. *Township of Southwold* (*supra*), per Middleton J., at p. 274; *McCormick* v. *Township of Caledon* (1923), 55 O.L.R. 93.

[104] As Robertson C.J.O. remarked above, changes in road use and character occur, and the law must be sufficient to deal with these changes. Changes over the years in automotive technology, power and speed, in highway design standards, road maintenance and communication systems, signage and road delineation have also rendered many of the older cases less applicable on a factual basis to today's conditions, though the basic principles to be applied are relevant and often still important.

[105] As I have inferred above, cases involving allegations of highway non-repair in this province are subject to both the statute law enacted by the Ontario legislature and the common law established over the years by judges applying the statutory provisions in various factual situations, thus establishing a line of precedential authority. This body of law under section 44 of the *Municipal Act, 2001* and under the applicable provisions governing the provincial highway authority now forms a code of legal requirements and principles. As I concluded in *Thornhill (Litigation Guardian Of) v. Shadid* (2008), 289 D.L.R. (4th) 396, [2008] O.J. No. 372 at para. 26 (S.C.J.) [*Thornhill* cited to D.L.R.], the common law principles applied in highway repair case law have been subsumed by tort principles and negligence law now expressed in s.44 of the *Municipal Act, 2001*, to the point that, as Bastarache J. found in *Housen v. Nikolaisen*, *supra*, at para. 171, "it is unnecessary for this Court to impose a common law duty of care where a statutory one clearly exists. In any event, the application of the common law test would not affect the outcome in these proceedings."

[106] While the majority in *Housen* did not see it as necessary to comment on the possibility of some residual common law duty of care surviving in highway repair cases , I think that the same conclusion would be reached in all such cases. Section 44 has plugged the previous loophole which allowed an action framed in nuisance to avoid the statutory notice and limitation provisions. Some of the old language engaged in by courts under the former highway repair provisions requiring, for instance, in snow and ice cases, an especially dangerous ice condition in a specific location to exist for whatever period was found proper in each case, on unknown and at times inconsistent bases of reasoning, is no longer relevant where the duty is expressed in terms of reasonableness in all the circumstances: see Boghosian & Davison, *supra* at paras. 3.21-3.23 and 3.145-46; *Gould v. County of Perth* (1983), 42 O.R. (2d) 548, [1983] O.J. No. 3116 at 556-57(H.C.) [*Gould* cited to O.R.], aff'd (1984), 48 O.R. (2d) 120, [1984] O.J. No. 3348 (C.A.). It is correct now to say that the duty of care of the road authority to maintain its road system consists of protecting ordinary users of the highway, exercising reasonable care for their safety, from unreasonable risks of harm to them. In this, I am following the analysis established by Justice Southey in *Gould*, at p. 556-57, which synthesized tort and highway repair principles:

> 18 It is true that in all of these cases in which liability was imposed on the agency responsible for the highway, there was a localized situation of danger that the court might have regarded as

> being in the nature of a trap. In *The Queen v. Coté*, [1976] 1 S.C.R. 595 it was a patch of ice that could not be seen until the drivers were on it. In *Landriault v. Pinard* [(1976), 1 C.C.L.T. 216 (Ont. C.A.)], it was a hill. In *Simms [v. Municipality of Metro-Toronto et al.* (1978), 28 O.R. (2d) 606 (Ont. C.A.)], it was a ramp leading to a divided highway. These could all be described as highly special dangerous situations. The courts pointed out in each case that liability did not depend on the imposition of a general duty to salt or sand highways, but, in so doing, I do not think they intended to say that there could never be a duty to apply salt or sand on a substantial stretch of highway. Otherwise, the agency responsible could ignore with impunity the effect of a freezing rain that coated all roads in an area with ice. I do not think such a result would be reasonable. All that was meant by saying there is no general duty to sand or salt highways, in my judgment, was that the failure to salt or sand will not in itself be a sufficient ground for imposing liability on the responsible authority. Liability will only result where the situation gives rise to an unreasonable risk of harm to users of the highway, and the authority has failed to take reasonable steps to eliminate or reduce the danger within a reasonable time after it became aware, or ought to have become aware, of its existence. As Lacourcière J.A. said in *McAlpine v. Mahovlich, supra*, [9 C.C.L.T. 241 (Ont. C.A.)], it is a question of fact in each case whether a condition of non-repair exists.
> [emphasis added]

[107] In the recent case of *Frank v. Central Elgin*, 2010 ONCA 574, [2010] O.J. No. 3736, Laskin J.A. at para. 10 put it most succinctly, citing, among others, *Gould, supra*:

> Gradually, however, courts began to recognize that a municipality may also have a duty to repair widespread or general ice and snow conditions within its jurisdiction. The general negligence standard applies. A municipality's duty of repair arises not just in a "highly special dangerous situation at a certain location in the highway" but in any situation where road conditions create an unreasonable risk of harm to users of the highway. The former is simply a subset of the latter. See, for example, *Gould v. County of Perth* (1983), 42 O.R. (2d) 548 (H.C.J.), aff'd (1984), 48 O.R. (2d) 120 (C.A.); *Thornhill (Litigation Guardian of) v. Shadid* (2008), 289 D.L.R. (4th) 396 (Ont. S.C.); *Roberts v. Morana* (1997), 34 O.R. (3d) 647 (Ont. Ct. (Gen. Div.)), aff'd (2000), 49 O.R. (3d) 157 (C.A.).

[108] The 1996 amendments, as well as case law development, have brought the tort and highway repair concepts together in practice and in theory. This, to me, has more to do with the change in language than a presumed legislative intent to ease the standards imposed on road authorities which had evolved by then by case law to one of reasonableness.

[109] That having been said, Mr. Boggs submitted that certain decisions made before and at least one decision made after the 1996 amendments do not accord with the principles re-stated by the Supreme Court of Canada in *Housen v. Nikolaisen, supra.* It was stated in *Roycroft, supra* and in *Greenhalgh, supra*, that road authorities have a duty not only to drivers using reasonable care, but also to negligent drivers and drivers who make mistakes which a reasonable driver exercising ordinary care would not make.

[110] Mr. Boggs is saying, as I understand his purpose in citing the older authorities, two things – first, that *Housen* amounts to a restoration of the discipline from cases like *Fafard* and *Raymond* in interpreting the municipalities' duty to repair their roads strictly, and second, that, for purposes of applying the correct standard of care, courts should not include, in the concept of the ordinary driver using due care, driving conduct which is not only mistaken, but falls below any reasonable and ordinary standard of care. An example of such a motorist is Kyte in *Roycroft, supra*, whose conduct involved speeding, ignoring steep hill and speed advisory signs, and lack of caution on a gravel road near the top of a hill over which visibility was limited and where the paved surface ended. Kyte was held liable for damages to the extent of 60%. In Mr. Boggs' own words, the submission is:

> The inclusion of the words 'reasonable in the circumstances, including the character and location of the highway...' was intended to clarify that the duty of care required of the municipality was not to be viewed as an onerous one or that the road needed to be maintained perfectly...
>
> Accordingly, it is asked that this court make clear in its reasons that the approach in *Rider v. Rider, supra,* which made its way into Ontario law in Justice Shaughnessy's trial decision in *Roycroft v. Kyte, supra,* and has been noted in at least a couple of trial decisions since then, does not form part of the proper test in Ontario, at least since *Housen v. Nikolaisen, supra*...

[111] In *Roycroft, supra*, at paras. 44-45, Mr. Justice Shaughnessy cited an English Court of Appeal case, *Rider v. Rider*, [1973] 1 All E.R. 294, in the course of his reasons for judgment in the following terms:

> 44 In considering the statutory duty to maintain the roads under its jurisdiction, the issue arises whether the Town of East Gwillimbury can avoid liability on the ground that a sufficiently careful driver would not have been put at risk by the state of the road, including the absence of a warning sign. In other words, how far does the duty of the municipality extend? In the case of *Rider v. Rider* [1973] Q.B. 505 at p. 514, the Court of Appeal, per Sachs L.J. stated:
>
> > *Motorists who thus use the highway and to whom a duty is owed, are not to be expected by the authority all to be model drivers. Drivers in general are liable to make mistakes, including some rated as negligent by the Courts, without being merely for that reason stigmatized as*

> *unreasonable or abnormal drivers;* some drivers may be inexperienced and some drivers may find themselves in difficulties from which the more adept could escape. The highway authority must provide not merely for model drivers, but for all the normal run of drivers to be found on their highways and that includes those who make mistakes which experience and common sense teaches us are likely to occur.

45 Lord Justice Laughton at page 518 of the same decision stated:

> In my judgment highway authorities when performing their statutory duty to maintain their roads should keep in mind the driver who may take a corner too fast or may be slow to notice changes in road conditions. *Such drivers form part of the traffic on our roads and it would be unrealistic for the highway authorities when deciding what standard of maintenance is necessary to forget their existence and to provide only for those who always use reasonable care* - if such paragons of driving virtue are to be found.
> [emphasis added]

[112] Mr. Boggs submits that where *Rider* suggests that the standard of care owed by road authorities goes beyond keeping roads in repair sufficiently for drivers exercising ordinary care to include, as added beneficiaries, those who fall below the standard of reasonable care and are negligent, *Rider* goes beyond *Housen* and earlier decisions of the Supreme Court of Canada, and is not the law in Canada. *Rider* and cases that follow it to this extent should be disavowed expressly. He accepts that the reasonable driver exercising ordinary care does include those who make mistakes and are not perfect drivers. However, he urges that I rule that the municipalities' duty is met where it keeps its roads in such a state of repair as will allow a reasonable driver exercising ordinary care to drive with safety.

[113] On this point, the defence relies on statements by Mr. Justice Bastarache in dissent in *Housen*. Mr. Boggs submits that the statements of Bastarache J. in dissent do not differ from the majority – not only with respect to the standard of care to be used in highway repair cases, but also with respect to the extended analysis of Bastarache J. applying the law as he saw it. In *Greenhalgh, supra*, Lauwers J. reached a similar conclusion (at para. 17), without a supporting cite reference, that "the majority approved the obiter discussion of signage and the standard of repair in the dissenting reasons of Bastarache J."

[114] From Mr. Boggs' analysis of *Housen*, he suggests that a municipality's duty, and the standard of care, must be approached in a purely objective way, by looking only at the road section in question and answering this fundamental question: could an ordinary driver, exercising reasonable care, use that section of road in safety? The fact of an accident having occurred, or that the road in the area in question could have been improved, or that something could have been done to prevent the specific crash or

accident, do not bring with them an inference of a state of non-repair. On the other hand, as the Supreme Court of Canada stated in *Raymond, supra*, the fact that a curve or hill has been driven over constantly without an accident is strong evidence that it is reasonably safe for those operators using reasonable care.

[115] In order to ensure that I was correct in my understanding of Mr. Boggs' argument, I put the following alternative suggestions to him, including the one I understood he was suggesting in accordance with his analysis of *Housen*:

> (i) Could the section of road in issue be driven safely by a driver using reasonable care?
>
> Or:
>
> (ii) Could the section of road in issue be driven safely by a driver using reasonable care, given all the circumstances as the court may find them existing at the material time (i.e. another vehicle suddenly approaching at night, headlights glaring at the westbound driver over a sight-deficient hill with a deflection or mild curve over the crest)?

If the answer to either of these questions is "yes", then the case against the road authority fails.

[116] On the following day, Mr. Boggs submitted that the first question is the correct approach; the court must engage in an objective analysis only of the road section in question. When the unidentified vehicle enters the picture, the municipalities have no control over that driver or how he or she might have affected Shannon Deering's actions. Mr. Boggs forthrightly conceded that such a situation (i.e. involving another driver over which the road authorities have no control) could be road-based, but to him, that was not this case. Additionally, he submitted that what happened here is known and is one of two scenarios, both pointing to the driver Shannon Deering as the cause, and both not road-based: either Shannon Deering went over the centre of the road and, in trying to avoid a collision, she lost control and went into the ditch, or she did not go over the centre and became disoriented from the headlights of the approaching car. The condition of the road does not play a part in either scenario, and the low collision rate on Coates Rd. West illustrates the lack of any road-based issue.

[117] In reply, Mr. Oatley submitted the following:

- The proper question to ask in law in determining the issue of non-repair of a highway is not simply what Mr. Boggs suggests because it is too high a threshold to fit within existing law; rather, the proper starting point is whether a road segment presents an unreasonable risk of harm to an ordinary driver using reasonable care in the position of the plaintiff;

- Collision history is not the major factor to consider in determining the issue; Mr. Boggs' reliance on lack of significant collision history is misplaced from a reading of the majority decision in *Housen* at para. 67;

- The point of *Rider* is that the meaning of the term "ordinary driver" in the case law denotes a range of experience, driving capability and ability to absorb a rapidly changing situation quickly, but it is not necessary to include the negligent driver in that range; and

- If Mr. Boggs is correct, there would not have been a finding against the road authority in *Housen* or in *Johnson v. Milton*, *supra*, or any other case where drivers were faced with having to avoid an un-cued road hazard that is part of the permanent roadway.

[118] In dealing with *Housen* and its relation to the other cases cited, I have reviewed all of these cases. The gravamen of Mr. Boggs' suggested analysis lies in an analysis of *Housen*, and I will turn to that analysis now.

[119] *Housen* was a case on appeal from the Court of Appeal of Saskatchewan. It is most often cited for its discussion of standards of review on judicial review of various types of rulings, from those dealing primarily with conflicting factual evidence to rulings of mixed fact and law, to those of law with wide-reaching application.

[120] Factually, *Housen* dealt with a claim by a passenger in a motor vehicle alleging road non-repair against a rural municipality and negligence against the driver of the vehicle. The plaintiff alleged that a permanent feature of a local road, a sharp curve, was obscured from the view of oncoming drivers and no sign was put in place to warn motorists of the deceiving sharpness of the curve or of the need to slow down from the speed limit of 80 km./hr.. The trial judge found it to be a hidden hazard. The crux of the issues on which the majority and minority disagreed, in a 5-4 decision, was described by Iacobucci and Major JJ., writing for the majority in the following excerpt:

> 39 We note that our colleague bases his conclusion that the municipality met its standard of care on his finding that the trial judge neglected to consider the conduct of the ordinary motorist, and thus failed to apply the correct standard of care, an error of law, which justifies his reconsideration of the evidence (para. 114). As a starting point to the discussion of the ordinary or reasonable motorist, we emphasize that the failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence... In our view, as we will now discuss, there can be no reasoned belief in this case that the trial judge forgot, ignored, or misconceived the question of the ordinary driver. It would thus be an error to engage in a re-assessment of the evidence on this issue.

[121] The colleague mentioned in the above quotation is Bastarache J., who wrote for the four dissenting judges. For our purposes, the important aspect of *Housen* is not simply the decision, but the reasoning of both the majority and dissenting judgments. The majority and minority did not disagree on the fundamental test to be applied in order to ascertain whether the municipality met its duty to maintain roads in Saskatchewan. That

articulation agrees in substance with what the court regards as the test in Ontario. The following excerpt from the majority decision written by Iacobucci and Major JJ. states:

> 38 [T]he correct statement of the municipality's standard of care is that found in *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (Sask. C.A.), per Martin J.A., at pp. 558-59:
>
> > The extent of the statutory obligation placed upon municipal corporations to keep in repair the highways under their jurisdiction, has been variously stated in numerous reported cases. There is, however, a general rule which may be gathered from the decisions, and that is, that the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety. What is a reasonable state of repair is a question of fact, depending upon all the surrounding circumstances...
> > [emphasis added]

[122] Bastarache J. cites the same excerpt as the general rule, and adds the following regarding the law in Ontario:

> 115 The long line of jurisprudence interpreting s. 192 of *The Rural Municipality Act*, 1989 and its predecessor provisions clearly establishes that the duty of the municipality is to keep the road "in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety" (*Partridge, supra*, at p. 558; *Levey v. Rural Municipality of Rodgers*, No. 133, [1921] 3 W.W.R. 764 (Sask. C.A.), at p. 766; *Diebel Estate v. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68 (Q.B.), at pp. 71-72). Legislation in several other provinces establishes a similar duty of care and courts in these provinces have interpreted it in a similar fashion (*R. v. Jennings*, [1966] S.C.R. 532, at p. 537; *County of Parkland No. 31 v. Stetar*, [1975] 2 S.C.R. 884, at p. 892; *Fafard v. City of Quebec* (1917), 39 D.L.R. 717 (S.C.C.), at p. 718). This Court, in *Jennings, supra*, interpreting a similar provision under the *Ontario Highway Improvement Act*, R.S.O. 1960, c. 171, remarked at p. 537 that, "[i]t has been repeatedly held in Ontario that where a duty to keep a highway in repair is imposed by statute the body upon which it is imposed must keep the highway in such a condition that travellers using it with ordinary care may do so with safety."
>
> 116 There is good reason for limiting the municipality's duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. As stated by this Court in *Fafard, supra*, at p. 718: "[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". Correspondingly, appellate courts have long held that it is an error for the trial judge to find a municipality in breach of its duty merely because a danger exists, regardless of whether or not that danger poses a risk to the ordinary user of the road...

[123] Both the majority and the minority therefore agree that there is no intention in *Housen* of going beyond the standard of care in highway repair cases used throughout most of Canada, including Ontario. Both agree that one factor must be the "ordinary driver". The majority made clear in the first paragraph excerpted above that the term "ordinary driver" also connotes "reasonable driver" – they use those words interchangeably. The point on appeal on which they obviously disagree is the sufficiency of the trial judge's application of the concept of the ordinary driver exercising reasonable care.

[124] In addressing that point on appeal, the majority and minority differ in their reasoning on the approach to the application of the standard of care by the trial judge. The difference between the majority and the dissenting judgments extends beyond the narrow point on appeal to a significantly different expression of the essential meaning of the concept of the ordinary or reasonable driver, and how that standard should be applied. This difference is important to the development of the law in this field.

[125] To me, that difference in meaning appears through the following excerpts from the majority and minority judgments in *Housen*. As I read these judgments, they indicate not only disagreement on the sufficiency of the trial judge's approach to the factor or concept of the ordinary driver, but also disagreement on its very meaning. It seems to me that in finding the trial judge's approach sufficient, the majority is indicating that the issue of the state of repair of the road hinges not only on whether an ordinary driver using reasonable care could pass the particular road feature in safety, but also the potential for that driver, paying due attention to what he or she is doing, to be mistaken in a situation of impending danger and to guess wrong without a clear cue from the road environment or proper warning of the hazardous configuration or condition of the roadway.

[126] As the following excerpt indicates, the majority found the trial judge's reasoning to have considered, to an acceptable standard, the factor of the "ordinary motorist" in relation to the finding of a state of non-repair. It is easiest to deal with this portion of *Housen* first because it contains the reasoning of the trial judge on the standard of care:

> **41** The discussion of the ordinary motorist is found in the passage from the trial judgment immediately following the statement of the requisite standard of care:
>
> > Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

> There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the maximum speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be safely negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet.
>
> ... where the existence of that bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation.

[127] The majority goes on to find:

> **42** In our view, this passage indicates that the trial judge did consider how a motorist exercising ordinary care would approach the curve in question. The implication of labelling the curve a "hidden hazard" which is "not readily apparent to users of the road", is that the danger is of the type that cannot be anticipated. This in turn implies that, even if the motorist exercises ordinary care, he or she will not be able to react to the curve. As well, the trial judge referred explicitly to the conduct of a motorist exercising ordinary care: "it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86).
>
> **45** In our respectful view, our colleague errs in agreeing with the Court of Appeal's finding that the trial judge should have addressed the conduct of the ordinary motorist more fully (para. 124). At para. 119, he writes:

> A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question.

And later, he states, "In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road" (para. 125). With respect, requiring the trial judge to have made this specific inquiry in her reasons is inconsistent with *Van de Perre, supra*, which makes it clear that an omission or a failure to discuss a factor in depth is not, in and of itself, a basis for interfering with the findings of the trial judge and reweighing the evidence. As we note above, it is clear that although the trial judge may not have conducted an extensive review of this element of the Partridge test, she did indeed consider this factor by stating the correct test, then applying this test to the facts.

[128] Bastarache J. wrote the following in explaining why he found insufficient the trial judge's findings that an impending and hidden hazard existed and that a warning sign should have been in place to warn motorists of it.

> **117** From the jurisprudence cited above, it is clear that the mere existence of a hazard or danger does not in and of itself give rise to a duty on the part of the municipality to erect a sign. Even if a trial judge concludes on the facts that the conditions of the road do, in fact, present a hazard, he or she must still go on to assess whether that hazard would present a risk to the reasonable driver exercising ordinary care. The ordinary driver is often faced with inherently dangerous driving conditions. Motorists drive in icy or wet conditions. They drive at night on country roads that are not well lit. They are faced with obstacles such as snow ridges and potholes. These obstacles are often not in plain view, but are obscured or "hidden". Common sense dictates that motorists will, however, exercise a degree of caution when faced with dangerous driving conditions. *A municipality is expected to provide extra cautionary measures only where the conditions of the road and the surrounding circumstances do not signal to the driver the possibility that a hazard is present.* For example, the ordinary driver expects a dirt road to become slippery when wet. By contrast, paved bridge decks on highways are often slick, though they appear completely dry. Consequently, signs will be posted to alert drivers to this unapparent possibility.
>
> **129** *I agree with the trial judge that part of the danger posed by the presence of bushes on the side of the road was that a driver would not be able to predict the radius of the sharp right-turning*

> *curve obscured by them. In my view, however, the actual danger inherent in this portion of the road was that the bushes, together with the sharp radius of the curve, prevented an eastbound motorist from being able to see if a vehicle was approaching from the opposite direction. Given this latter situation, it is highly unlikely that any reasonable driver exercising ordinary care would approach the curve at speeds in excess of 50 km/h, a speed which was found by the trial judge to be a safe speed at which to negotiate the curve.* Since a reasonable driver would not approach this curve at speeds in excess of which it could safely be taken, I conclude that the curve did not pose a risk to the reasonable driver.
>
> **135** Although they may be compelling factors in other cases, in this case the "dual nature" of the road, the radius of the curve, the surface of the road, and the lack of superelevation do not support the conclusion of the trial judge. The question of how a reasonable driver exercising ordinary care would approach this road demands common sense. There was no necessity to post a sign in this case for the simple reason that any reasonable driver would have reacted to the presence of natural cues to slow down. The law does not require a municipality to post signs warning motorists of hazards that pose no real risk to a prudent driver. To impose a duty on the municipality to erect a sign in a case such as this is to alter the character of the duty owed by a municipality to drivers. *Municipalities are not required to post warnings directed at drunk drivers and thereby deal with their inability to react to the cues that alert the ordinary driver to the presence of a hazard.* (emphasis added)

[129] The evidence in *Housen* was that Nikolaisen had been drinking alcoholic beverages for much of the 24-hour period prior to the accident, but he had stopped drinking three hours before he drove to the accident scene. The trial judge found that his ability to drive was impaired and found that he was contributorily negligent to the extent of 50%. The municipality's negligence attracted a lower degree of fault, fixed at 35%. It is unclear why Bastarache J. mentioned Nikolaisen's condition at this point in his decision because the test he is discussing at this point requires him, as he properly saw it, to consider as a factor how the ordinary driver exercising reasonable care would fare on the road in question Whether the standard of care is met by the municipality does not require at this point the trier of fact to consider Nikolaisen's condition or how a drunk driver would fare on this road. I understand, of course, that Mr. Justice Bastarache may have been drawing a distinction between, or removing as a subset, those drivers who are drunk from the class of reasonable drivers mentioned in the first sentence of the paragraph who could comprehend road clues and thus required no sign to warn them. However, the determination of whether the driver was drunk plays no part in Bastarache J.'s own suggested approach to the non-repair issue. It has everything to do with issues of causation and contributory negligence issues.

[130] Contrary to Mr. Boggs' submission, it is not at all clear that the majority agreed with the narrow rationale of Bastarache J. for the posting of warning signs as part of the duty to repair. In fact, in my view, they rejected his "re-assessment of the evidence" in stating expressly their disagreement with the basis for the re-assessment (i.e. that the trial judge had erred in law with respect to the municipality's standard of care) and in finding it to be "an unjustified intrusion into the finding of the trial judge that the municipality breached its standard of care": *Housen, supra* at para. 49.

[131] There is no disagreement in *Housen* that an important factor involved in the general rule is the ordinary motorist driving reasonably. The majority made clear in para. 39 that they were using the term "ordinary motorist" and "reasonable motorist" interchangeably, but it appears to me that the majority assumes a wider range of experience and inexperience, perception or misperception as coming within those terms, than the minority. The majority notes at para. 42:

> 42 In our view, [paras. 84-86 of the trial judge's decision] indicate that the trial judge did consider how a motorist exercising ordinary care would approach the curve in question. *The implication of labelling the curve a "hidden hazard" which is "not readily apparent to users of the road", is that the danger is of the type that cannot be anticipated. This in turn implies that, even if the motorist exercises ordinary care, he or she will not be able to react to the curve.*
> [emphasis added]

[132] They do not read into the ordinary driver a prescient sense of need for extra caution by slowing down to 50 km./hr. That driver would not be proceeding in excess of the speed limit and there is no visible cue to spark anticipation of some danger or risk from approaching traffic on a difficult curve because the dangerous sharpness of the curve cannot be seen by that driver.

[133] In contrast to the view of the majority, Bastarache J. notes at para. 128 that "[t]he evidence does not ... support a finding that a reasonable driver exercising ordinary care would have been unable to negotiate the curve with safety." He further states, at para. 135, that "any reasonable driver would have reacted to the presence of natural cues [e.g. the fact that the driver cannot see approaching traffic around the curve] to slow down." I read the judgment by Bastarache J. as taking a rather rigid view of the capabilities of the ordinary motorist to discern a hidden sharp turn ahead, without natural cues, and to foresee, without any posted warning sign, not only that caution is required because traffic may be approaching on a curve but that additional caution should be required due to a sense of the sharpness of the curve that is not visible before the driver enters it. Without forewarning of the sharpness of the curve, how is the ordinary motorist, having no problem keeping to the right lane at his or her normal speed up to and probably less than 80 km./hr. before encountering the sharp turn, to know that he or she may not be able to stay within the right lane without slowing to exactly the speed found to be safe (i.e. 50 km./hr.)?

[134] The majority does not confine the concept of the "reasonable" or "ordinary" driver to a static construct embodying a perfect or near-perfect driver who somehow would know

that a hazard ahead, its severity obscured and not visible to that driver, requires caution to the extent of reducing speed exactly to the level enabling the driver to pass through that unseen hazard safely.

[135] To me, the difference between the two approaches in Housen centres on whether the standard of care to be applied is to be one of unspoken but unrealistically high assumptions of the ordinary driver's prescience, capabilities and expectations, or a more traditional standard that is informed by knowledge of human factors and relates to ordinary drivers who exercise due care but are not prescient or more than ordinary or average in driving capability, perception or reaction time or other attributes. When reflecting on the ordinary person's driving habits and knowledge of the standard of care expected of them, the words of Cory J, writing for the majority on driver qualifications and the often-reflexive nature of driving in *R v. Hundal*, [1993] S.C.R. 867 , at paras. 30 to 32, are instructive:

> (a) The Licensing Requirement
>
> **30** *First, driving can only be undertaken by those who have a licence.* The effect of the licensing requirement is to demonstrate that those who drive are mentally and physically capable of doing so. Moreover, *it serves to confirm that those who drive are familiar with the standards of care which must be maintained by all drivers.* There is a further aspect that must be taken into consideration in light of the licensing requirement for drivers. Licensed drivers choose to engage in the regulated activity of driving. They place themselves in a position of responsibility to other members of the public who use the roads.
>
> **31** As a result, it is unnecessary for a court to establish that the particular accused intended or was aware of the consequences of his or her driving. The minimum standard of physical and mental well-being coupled with the basic knowledge of the standard of care required of licensed drivers obviate that requirement. As a general rule, a consideration of the personal factors, so essential in determining subjective intent, is simply not necessary in light of the fixed standards that must be met by licensed drivers.
>
> (b) The Automatic and Reflexive Nature of Driving
>
> **32** Second, the nature of driving itself is often so routine, so automatic that it is almost impossible to determine a particular state of mind of a driver at any given moment. *Driving motor vehicles is something that is familiar to most adult Canadians. It cannot be denied that a great deal of driving is done with little conscious thought. It is an activity that is primarily reactive and not contemplative. It is every bit as routine and familiar as taking a shower or going to work.* Often it is impossible for a driver to

> say what his or her specific intent was [page 885] at any moment during a drive other than the desire to go from A to B. (emphasis added)

This was a case before the Supreme Court of Canada on the development of an effective and realistic test for the criminal offence of dangerous driving; it is not directly applicable to this case. However, the routine, primarily reactive and non-contemplative nature of driving is an important consideration in considering the application of the concept of the ordinary person exercising due care and it also bears on the difference in realism between the two approaches expressed in *Hausen*.

[136] Mr. Justice Laidlaw provided the traditional description of the reasonable person, accepted still as an accurate one in Linden & Feldthusen, *supra*, at 143:

> [The reasonable person] is a mythical creature of the law whose conduct is the standard by which courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances... [The reasonable person] is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; his is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct...

[137] To which description should be added that the standard of the reasonable person is an objective one, by which the law requires a minimum level of performance. The reasonable person is not perfect, and may have an occasional accident. The ordinary or reasonable driver neither has the wisdom of Solomon nor is that person obligated to "exercise the best possible judgment in an emergency. ...What the model human must do is act in accordance with normality and practicality rather than judicial technicality or diversity of view." Linden & Feldthusen, *supra*, at 141-2.

[138] The concept of the reasonable person is the law's attempt to have triers of fact assess conduct without personal bias or judicial whim. As Linden and Feldthusen write,

> The exercise is a unique process in which a value judgment based on community standards is reached. ... The reasonable person test is meant to assist in this task. [Canadian Tort Law, *supra*, at 143]

[139] I accept Mr. Boggs' submissions in part, but not whole. I accept that the determination of whether a portion of road is in a state of non-repair requires an objective analysis of the segment of road in question, including its location, character, and place within the road system, but that analysis must include all other circumstances material to the condition of that road at the material time. I also accept, however, that the duty of repair must include the need for the road authority to consider, as users of the road, the ordinary driver who is reasonably careful for his or her own safety and that of other users of the road and who may make mistakes due to inexperience or less than perfect reaction time, or who may perceive the rapidly changing environment, including the road condition, less than

perfectly or with no more, but no less, than average acuteness. It is the ordinary driver exercising reasonable care by which the issue of meeting the standard of care is to be judged together with whether there is an unreasonable risk of harm – road-based – in existence from which the municipal duty to repair arises, and if so, whether there are road-based cues reasonably sufficient to warn of the need for caution.

[140] The notion from *Rider* that the standard for road authorities is to be measured by drivers whose conduct falls below the standard of reasonable or ordinary care is not the law in Canada. *Housen* unanimously re-affirmed the standard of care in highway repair cases in adopting the traditional "general rule" from *Partridge*, *supra* and which Bastarache J. held as equivalent to the rule from *Jennings* in Ontario. The standard of care for road authorities uses as an important factor the ordinary driver exercising reasonable care in using the roads, and it also has regard to the means of the municipality and the location and character of the road, but the fundamental question toward which these factors are aimed is the general negligence standard: the road authority's duty of repair is to prevent or remedy situations where road conditions create an unreasonable risk of harm to users of the road or highway. This standard is founded on the conduct of drivers using reasonable care, including those who may sometimes be mistaken and are of average abilities but are not negligent, and it requires an objective examination of all the road-based circumstances involved in the occurrence in question. The issue is not isolated to whether the trier believes a reasonable driver could pass through the section of road in question in safety. Tort law principles are more flexible and contextual than that. The ordinary person using reasonable care is one factor, an important one, but not the only factor as the majority in *Housen* stated.

[141] Mr. Boggs' analysis provides an important corrective to the reasoning in some trial cases. Reasoning which simply leads from a finding of a road situation which could have been improved, or a finding of a road in a condition of some risk to motorists due to, say the sudden onset of a winter storm or heavy rain, to a conclusion that the road is in a state of disrepair, does not accord with *Housen* or prior appellate authorities. Rather, the court must pay attention as one factor to whether an ordinary driver could, through caution due to obvious visible cues on or beside the roadway such as slippery winter conditions, adjust his or her driving to the conditions by slowing down or keeping a safe distance from other vehicles so as to pass through in safety.

[142] The necessary analysis must include an objective assessment of the road condition, as I have held, and it must include an objective assessment using, as the standard, the ordinary driver using ordinary care, not the perfect driver. The concept of the ordinary driver must have room for those who are inexperienced, elderly, or have only average perception, reflexes and reaction time. They are all licensed to drive, and they may make mistakes of perception and/or reaction and/or judgment in relation to unexpected road-based changes, and they may, without some guidance, miss a subtle cue of potential change in road conditions, amid all the information unfolding as that motorist is driving. The standard of care of road authorities rests on the notion of the ordinary motorist driving without negligence, including those encountering the road for the first time, and the duty of care does not end at dusk each day: e.g. see facts, reasoning and result in *Johnson*, *supra*; *Housen v. Nikolaisen* (S.C.C.), *supra*; *Houser*, *supra*; *Galbiati v. Regina (City)*, [1972] 2 W.W.R. 40 (Sask. Q.B.). It is wrong and bad law to confuse the issue of contributory negligence with the test of the ordinary motorist's ability to proceed through

the section of road safely, using due care. In *Royston, supra,* the court did not have the benefit of the Supreme Court decision in *Housen;* as well, the reference in *Royston* to negligent drivers seemed to confuse contributory negligence with the issue of standard of care. Of course, contributory negligence is not a bar to recovery, but neither is the negligent driver part of the measure of the standard of care for road authorities.

[143] The rule as expressed in *Housen* and most other highway repair cases was applied recently by the Ontario Court of Appeal in *Johnson v. Milton (Town)* (2008), 91 O.R. (3d) 190 (C.A.), rev'g in part [2006] O.J. No. 3232 (Sup. Ct.).It is also instructive in the manner in which it was applied. Counsel on both sides accepts that the Court applied the correct test on appeal in that case. It was the case of a middle-aged cyclist descending a steep hill, at the bottom of which was a bridge, and across the bridge was a very sharp (virtually 90 degree) turn beside an embankment. The hill, turn and embankment were all quite visible to any bicyclist who looked down from the top of the hill. There was a succession of signs before the bridge, including "Curve" and a reduced 50 km./hr. speed limit sign. The trial judge, at para. 80 of his decision, found the following conditions amounted to a finding of a condition of non-repair:

> The section of the Fourth Line immediately to the south of the Glenorchey Bridge had a slope of approximately 18% at its maximum. The slope is in excess of what is generally recommended. The posted speed limit was 50 kilometers per hour. The evidence is that the maximum speed at which a bicycle could negotiate the sharp right hand turn immediately to the north of the Glenorchey Bridge was 28 kilometers per hour. Nevertheless, there was no warning sign in advance of the bridge indicating the sharp right hand turn, nor was there any speed advisory sign telling motorists or cyclists to reduce their speed to permit successful negotiation of the sharp right hand turn. There was a condition on the surface of the road which caused bicycles when traveling northbound down the slope to lose control. It is reasonable to conclude that wash boarding is a condition that occurs on tar and chip roads. It is reasonable to conclude that wash boarding on a road with a down slope of as much as 18% will cause vehicles and, in particular, bicycles to lose control. Immediately to the north of the Glenorchey Bridge is a significant increase in elevation. It would be apparent to anyone that a failure to negotiate the sharp right hand turn to the north of the Glenorchey Bridge could result in disastrous consequences because of the unforgiving rock embankment just to the north of the bridge. In addition, the alignment of the road and the Glenorchey Bridge was such as to require a slight turn to the left and then to the right in order to traverse the bridge.

The trial judge found the municipality responsible for the plaintiff's injuries and attributed no contributory negligence to the bicyclist. The finding that the bicyclist was not contributorily negligent was one of the issues appealed to the Court of Appeal.

[144] The Court of Appeal panel, Moldaver J. writing and Blair and Cronk JJ. concurring, unanimously articulated the *Partridge* test cited in *Housen*, but also found the following:

> [71] The picture that emerges is one of obvious danger -- two inexperienced cyclists travelling down a very steep slope on an unfamiliar secondary road with a single-lane bridge and an embankment in the near distance. The situation clearly called for extreme caution. Regrettably, Mr. Johnson drove the bicycle down the hill at an excessive rate of speed while not keeping a proper lookout. He was negligent in doing so and his negligence materially contributed to the accident. Had he been travelling under 40 kilometres per hour, he would not have experienced "speed wobble" before reaching the bridge and there would have been no reason for him to lose control of the bicycle.
>
> [72] However, it is also clear that the accident would likely not have occurred had Oakville posted better warning signs and taken care to ensure, as far as possible, that the road grades were not excessive and that there were no undulations in the steepest part of the road that could potentially cause a loss of control due to "speed wobble". *In the circumstances, given the location of the undulations on the steepest part of the slope and the fact that they could not be seen or anticipated, they constituted a trap for the unwary. In my view, they were a substantial contributing factor to Mr. Johnson's loss of control of the bicycle and the ensuing accident.*
>
> [73] Given my conclusion that Oakville's failure to keep the road in proper repair was a substantial contributing factor to the accident, I believe that Oakville should bear 60 per cent of the liability and the respondents 40 per cent.
> [emphasis added]

[145] There was no suggestion in *Johnson*, as there would have been had they approached the case as Bastarache J. did in *Housen*, that the ordinary cyclist would have used such additional caution because of the clear visibility of the sharp turn and the embankment from the top of the hill so as to slow down enough to pass over the unseen, unanticipated undulations on the steepest part of the slope, safely. I sense that in *Housen*, Bastarache J. was using the actual driver's contributory negligence as a bar to finding the municipality negligent because the actual driver's conduct fell below that of the standard of the ordinary driver, rather than using the ordinary driver, neither perfect nor negligent, paying attention but not aware of the unseen hazard which was not warned of, to inform the standard of care; Bastarache J. notes that "ordinary driver" does not include a "drunk driver" at para. 135, stating, "Municipalities are not required to post warnings directed at drunk drivers and thereby deal with their inability to react to the cues that alert the ordinary driver to the presence of a hazard." In using the actual driver's contributory negligence as a bar, with respect, his analysis does not represent the law in Canada in this area.

[146] I am NOT in any way advocating some lesser duty of care for certain drivers. To proceed in that way is to start down a slippery slope, and it is not the law in this country. But what I am articulating in less legalistic terms is a better, more informed sense – with the help of properly independent experts in transportation engineering and in human factors – of the standard of care which I believe was misinterpreted and misused by Bastarache J. in his dissent in *Housen*. The traditional expression of the standard of care to juries in negligence cases goes along the following lines – that the standard of care is measured, not by the extraordinarily cautious or conscientious person, but by:

> ... the conduct of the average (person). The law does not define what a reasonably careful person would do in those circumstances - that is for you to decide. You will note that the person whose conduct we set up as a standard is not the extraordinarily conscientious individual, nor the exceptionally skilled one, but a person of reasonable and ordinary prudence.

David Griffiths, J.W. O'Brien & James D. Carnwath, Chapter 4 of Civil Jury Charges: Draft [unpublished] at 1-2 (1998).

[147] I recognize that some professional writing in the field of municipal road liability and repair find the analysis by Bastarache J. in *Housen* to be "an excellent analysis" and "a concise restatement of the existing law of Canada relating to road maintenance", as it relates to standard of care, foreseeability and causation: *The Law of Municipal Liability in Canada*, *supra*, at para 3.111.3. I tend to agree on the latter two points, and certainly the expression of the ordinary driver exercising due care as one factor in the standard of care was correctly stated. It is in the manner of applying the standard of care, its isolation from context and all the road-based circumstances which contributed to the incident in question and in particular, the assumption of above-average perception in, and use of a judge-made artificial conception of, the "ordinary driver", uninformed by evidence of human factors, modern automotive and road technology, and ordinary expectations of human driving behaviour, that I see problems with it, particularly, for instance, where there is a reasonable need for warning and guidance in a trap-type situation at night.

[148] Most of the examples given by Bastarache J. calling for caution are cases of sudden and changing weather conditions. The use of the word "danger" by Bastarache J. is thus coloured by the examples of temporary conditions which raise serious problems for ordinary drivers and for the most careful of municipalities meeting their duties assiduously. The case before me involves a combination of permanent features or conditions of the road at the accident hill where neither a warning is given of the potential need for lower speed to allow safe preview time and visibility, nor any guide to show users where the centre of the road is as they ascend a blind hill where oncoming lights would be sudden and distracting in the circumstances and where, as Dr. Smiley stated, road and human factors analysts expect drivers to tend to drive in a more central location laterally on the road, away from the edge (narrow road, narrow shoulders, night-time conditions, no edge or centre marking).

[149] The word "danger" means "liability or exposure to harm; a thing that causes or is likely to cause harm; the status of a railway signal directing halt or caution": *Concise Oxford Dictionary*, 8th ed. (Oxford: Clarendon Press, 1990) at 292. Snow and rainstorms are

hazards or dangers that are right in the ordinary driver's face as that driver proceeds, and he or she must modify normal driving habits to meet those conditions. An unlit road is an apparent hazard to the ordinary driver, but it is not an apparent hazard when a hill hides oncoming headlights and the course of the road changes by the width of a lane over the hill's crest, extending further down the east side (22 metres west of the crest, 88 metres east of the crest). In my view, where the municipality finds that a road condition that is permanent represents a hazard or danger – in other words, an unreasonable and specific risk of harm – to ordinary users of the road many of whom are not necessarily familiar with the road, and warning of it can be achieved by relatively inexpensive signage or pavement markings or both, the failure to address the danger in a reasonable time may constitute a failure of the municipality to carry out its duty: *Johnson, supra* (Sup. Ct.), at paras. 81-82, aff'd on this point (2008), 91 O.R. (3d) 190 (C.A.); *Galbiati, supra*; *Vokes v. Vokes*, [1988] O.J. No. 2556 (H.C.J.), aff'd [1991] No. 2718 (C.A.), leave to appeal to S.C.C. refused, [1991] S.C.C.A. No. 364; *Watkins v. Olafson* (1984), 28 Man. R. (2d) 271, [1984] M.J. No. 89 (Q.B).

[150] *Galbiati, supra*, a decision of Justice Sirois, is instructive and a solid source of common sense and good law in this area. In that case, a driver was proceeding at night on a city road with which he had no familiarity. The lighting was poor. He could see the lights of an intersecting street that appeared to be a block further on. The problem was that the road that he was driving ended at an unmarked T-intersection before that "intersecting street" ahead. The land beyond the terminus of the street was used as a garbage dump. A police officer who came to the scene within an hour test-drove the street on the route the plaintiff used and he recalled nothing unusual nor did he have any difficulty with the T-intersection. Of course, as the trial judge noted, the officer knew an accident had happened there, knew the intersection, and the plaintiff's vehicle was still right in front of him. The officer said that the lights ahead would not distract you from what your headlights showed "unless you looked straight at them" (para. 8). The trial judge found that this is exactly what the plaintiff did; he was "driving for the lights, knowing that he would have to come to a full stop on Albert Street [the street a block ahead]." (para. 8). The trial judge expressed the applicable law in this area at para. 5, cited in *Vokes, supra*:

> **5** The general rule seems to be that in the absence of a statute so providing, a municipality is not under a duty to the travelling public to place stop signs or other road signs or warning markers on the roads or highways within the municipality, except where there may be a danger or hazard of such a character that it is reasonable to require a notice of some kind to be given to bring that peril to the attention of those using the road. The exercise of any statutory or any other power or authority to erect such signs lies very largely within the realm of common sense and a prudent discretion on the part of the municipal council. Vide: *Lupichuk v. Municipal District of Beaver* (1955-1956), 17 W.W.R. 389.
>
> **6** The failure to erect signs giving warning of an unusual hazard or "trap" may amount to negligence. Vide: *Dymond and Osika v. Government of Manitoba* (1965), 51 W.W.R. 380. ...

> 11 In summary, I am satisfied that the defendant was guilty of negligence in failing to erect a dead-end sign at this misleading and dangerous T intersection. I am furthermore satisfied that the plaintiff was guilty of negligence in that he was operating his vehicle at an excessive rate of speed having regard to all the material circumstances. Furthermore, he drove his vehicle without due care and attention and failed to maintain a proper lookout when driving down a street which he admittedly did not know. I find both parties equally to blame for the accident.

[151] In *Vokes,* McFarland J. (as she then was, now McFarland J.A.), in a case of a 90-degree curve on a two-lane rural road with no banking and a speed limit of 80 km./hr., held that the curve sign in place was inadequate and that the sign should have indicated a sharp curve by an arrow at right angles plus a speed advisory sign indicating that a reduction in speed would be necessary. Her decision was affirmed by the Court of Appeal. The trial judge held that the ordinary driver using reasonable care could not negotiate the curve at 50 km./hr. She followed Sirois J.'s expression of the law in doing so, despite the fact that, though the curve could be seen, its severity was hidden. No doubt if Bastarache J.'s view of the ordinary driver (which he took as established, not newly expressed by him) was followed, the plaintiff could not have succeeded because he should have exercised caution in view of the curve ahead of him.

[152] Another case involving night driving, where a road pattern was established and no warning of a change in that pattern was provided (straight road, unmarked curve) to drivers without knowledge of the road, was *Houser*, *supra*, at para. 9:

> Accepting the findings of the trial Judge, the plaintiff has established that the defendant was in breach of its duty of care to him as a user of the highway. I think it is clear that the failure created a risk of harm, particularly for the night-time traveller who was a stranger to the area, that the curve in the road would be undetected and, if undetected for any reason because of its design, there was a serious risk that it would cause him to drive off the highway at highway speeds and be injured.

[153] The decision in *Doherty v. Lauzon* [2010] ONSC, 1006 (released July 21, 2010) was provided to me by Mr. Boggs subsequent to the trial with the consent of plaintiffs' counsel. Unlike this case, it involved an expected seasonal condition in the early spring – water and puddles on a gravel road in daytime – not a hazardous combination of permanent features not fully visible at night, and the judge used the ordinary driver using reasonable care, coupled with lack of evidence of an unreasonable risk of harm – the proper standard and duty of care in my view – as factors determinative of the case.

[154] In conclusion, I accept what have become the submissions of all counsel that road authorities have a duty to ordinary motorists to keep their roads in reasonable repair, including the type and location of the road. The standard of care uses as the measure of reasonable conduct the ordinary reasonable driver and the duty to repair arises wherever an unreasonable risk of harm exists on the roadway for which obvious cues on or near the road are not present and no warning is provided, subject to the defences of no knowledge

and reasonable steps to prevent and minimum standards compliance. The ordinary motorist includes those of average range of driving ability – not simply the perfect, the prescient, or the especially perceptive driver, or one with exceptionally fast reflexes, but the ordinary driver who is of average intelligence, pays attention, uses caution when conditions warrant, but is human and sometimes makes mistakes.

[155] It is not the law in Canada that the duty of road authorities goes beyond the duty to keep their roads in reasonable repair for the ordinary driver exercising reasonable care, to include drivers who, for instance, do not pay attention, drive at excessive speeds, drive too close to the vehicle in front and who are otherwise negligent. But neither is it the law to reduce the road authority's duty of reasonable repair to permit wilful blindness by them to such factors as hazards on the road not reasonably noticeable to oncoming traffic during the day or night, unwarned changes in the permanent road condition from a prior pattern and expectation, changes in volume and speed and familiarity of users with the road as urban and rural areas impact on each other, and the interaction of such factors on a road historically devoid of any marking, lighting or warning sign. The duty to repair under section 44 should no longer ignore the need in circumstances of pre-design-age roads near areas of urban change and growth to incorporate assessments of safety measures into road rehabilitation and reconstruction projects, for reasons which I will address shortly.

[156] The expectations and expected range of conduct of the "ordinary driver" are factors on which I have heard considerable evidence. That evidence has come from a human factors expert with considerable experience and peer-reviewed writing in this area as it relates to highway design and crash analysis. It also has come from transportation engineers who deal daily with the concept of behavioural expectations in relation to advising road authorities on safety issues. I will turn to that evidence now, before I record my findings on the road repair issue, as all of that evidence informs those findings with respect to the standard of care and whether there has been a breach of the standard of care.

**4. Human Factors in Road Use and Traffic Incidents: The Ordinary Driver**

[157] Dr. Alison Smiley testified in this case for the defendants as an expert witness in the field of human factors in motor vehicle use and accident/collision analysis. She has a Masters degree in System Design Engineering. She is a certified professional ergonomist and past president of the Canadian Association of Ergonomists (human factors specialists). She has contributed to Canadian and American highway authorities, such as the MTO, in the area of traffic signing, road design and crash risk. She is one of the most published of expert witnesses in her field. Dr. Smiley has not only presented peer-reviewed papers on subjects such as the relation between road design and crashes (to be published July 2010 by a respected American highway association, the American Association of State Highway Transportation Officials), road design standards and exceptions, human factors in motor vehicle crashes (Traffic Engineering Handbook, 6th edition, Institute of Transportation Engineers or I.T.E.), studies for MTO on human factors dealing with young drivers, driver expectation and responses ("There Is More To Seeing than Visibility: Human Factors and Accident Analysis", presented at the Detroit Institute of Ophthalmology, 2001), and driver distraction ("What Is Distraction?", Toronto, October 2005). She has conducted many collision studies and analyses. Dr. Smiley has been qualified as an expert witness in superior courts, including this one. She describes her

field as a multi-disciplinary science applying the human sciences to technology, road design and driver expectations.

[158] Dr. Smiley testified in-chief on three issues, being:

(a) impacts of road delineation, such as centre lines, roadside post delineators, and rumble strips;

(b) driver adaptation to centre lines; and

(c) young driver behaviour.

[159] Her evidence was also most relevant in this case to the concepts of causation and the standard of care, including driver expectations in the face of differing road conditions, positives and negatives of warning signs and pavement markings, speed and speed limits, and driver perception under varying conditions. She provided her opinions on human factors involved in and related to the road condition and crash in this case.

[160] First, Dr. Smiley gave the following evidence on the general topic of driver expectations, both in examination in chief and under cross-examination:

- The driving environment generally is rich with new facts and stimulation, and human beings can only take in so much new information at one time;
- The faster one drives, the more likely the driver will want to drive away from the road's edge toward the centre of a two-way road;
- Where a two-way road and shoulders are narrow, the expectation is that drivers will drive closer to centre because they see there is no space off the road for recovery if they were to veer off by mistake;
- The absolute minimum reaction time that a driver should have in order to drive safely is two seconds - if the driver has less, it is difficult to determine road alignment, and the driver will start to wander;
- It is a normal expectation that a driver on a narrow, unlit and unmarked country road at night will use the contrast between the dark newly laid pavement and the lighter-coloured shoulders in order to track the road;
- As the driver proceeds, he or she would be expected to stay on his or her own side of the road by tracking that contrast;
- On low beams, a driver should be able to see the pavement/shoulder contrast 43 metres ahead, meaning that at 77 km./hr., the driver would have a preview time of 2 seconds [21.4metres /second x 2 = 43 rounded], and on high beams the driver could see far enough to have a preview time of 2.8 seconds;
- At 80 km./hr., the preview time to see the edge of the road against the shoulder is under 2 seconds [22.2 m/sec x 1.9 = 43 m], and therefore she agreed with the proposition put to her by Mr. Oatley that this was less than the absolute

minimum safe preview time. This question led Dr. Smiley to conclude that the 80 km./hr. speed limit on Coates Rd. West was too high at night on low beams;

- To Mr. Orlando's question as to preview and a driver going at a speed of 50 km./hr. in a reduced 50 km./hr. speed zone on Coates Rd. West,, she said this speed would provide the driver with adequate preview time;

- In most cases, people drive above the speed limit, and changes in the speed limit have not produced much effect on driver behaviour regarding speed. Having said that, Dr. Smiley said she was uncomfortable with the 80 km./hr. limit on Coates Rd., but she refused to suggest a different one for this road; as I understand her role, she had not been retained to study that discrete subject alone or in depth in order to advise a municipal council; and

- When driving at night, the driver's attention is drawn to street lights or headlights, while remaining aware of the rest of the scene more generally; when a stress-induced reaction occurs, the focus for the driver becomes the source of danger.

[161] Dr. Smiley described Coates Rd. West as a narrow 6 metre-wide road with narrow gravel shoulders and an unmarked speed limit of 80 km./hr. She was asked her opinion of speed on this road as it was in 2004. She said it was unlit, narrow, and had no centre line, and therefore 90 km./hr. was a high speed there. She did not feel comfortable driving at 90 km./hr. on Coates Rd. West, even for purposes of the road test she did in 2009 when there was a centre line. In examination in chief, she said that high speeds such as 90 km./hr. on this road make a proper response difficult. Devices like centre lines reduce driver variability, but they have been found to have negative effects, such as a tendency for drivers to drive faster. Regarding a vehicle's lateral position on the road, the latest study she found with respect to a road with hills indicated to her that there was no significant difference with or without a centre line: Florence Rosey *et al.*, "Impact of Perceptual Treatments on Lateral Control during Driving on Crest Vertical Curves" (2008) 40 Accident Analysis and Prevention 1513. However, rumble strips did make a significant difference in driver location within a lane.

[162] Dr. Smiley testified directly to several hypothetical questions put to her. She stated that where a hill, like the accident hill on Coates Rd. West, provides only 77 metres of available sight distance instead of the OTM-recommended standard of 150 metres, the sudden appearance of the headlights going east toward the westbound driver would be expected to cause a "startle" reaction in the westbound driver. This question included no assumption of perceived overlapping paths of travel.

[163] Dr. Smiley was asked later to consider the following assumptions – a hill allowing no headlight loom before an approaching vehicle crests a hill, two vehicles are going 80 km./hr. approaching each other just over the crest, allowing under two seconds until they crash or pass, and the westbound driver perceived their paths were overlapping. She saw this as a very startling, even terrifying, experience for the westbound driver; in that case, on these assumptions, the ordinary expectation would be for the westbound driver to steer away from the contra flow vehicle. Also, in line with a prior answer, in this situation the westbound driver's focus will be momentarily shifted to the approaching car as the

source of danger, rather than the driver's focus being on the hill or the shoulder contrast. Dr. Smiley agreed that a driver proceeding westbound would not distinguish the deflection or slight curve at the crest of the subject hill from the normally straight alignment up to the crest.

[164] Regarding the reasonable expectations of road authorities where a previously bumpy and narrow road is re-surfaced, that change would be expected to lead to, and is known to result in, higher speeds and higher traffic volume.

[165] Dr. Smiley was asked about whether the addition of a centre line generally is expected to improve road safety. She referred to several studies by others in the field, and said the studies indicated that where post delineators are in place by the edge of the road, drivers tend to speed up, they tend to drive closer to the centre where a centre line is in place and, according to the Rosey study, *supra*, she saw no more than an insignificant statistical difference in lateral position as vehicles proceed over a hilltop, whether a centre line was in place or not, even on two-way rural roads. Another study [by DeLucia and Mork, referred to by Dr. Smiley in her examination in chief [see transcript at pp.33-4], found that the effect of a centre line on driver perception of a collision emergency was statistically significant but the benefit was relatively small at 4%. She described the subject of this study as "people's ability to judge whether they were about to have a head-on collision or not". It was done at different speeds and with and without a centre line, and the result was, according to her, 63% accuracy with a centre line and 59% without it.

[166] Dr. Smiley's conclusion that the Rosey study showed no significant difference in lateral position became a bone of contention. In fact, a distinct difference in distance from the road centre was shown to occur, but only to the extent of 68 mm. – or about 3 inches – further from the centre where a centre line existed. The Rosey report itself nowhere described the difference as insignificant. It should also be mentioned, regarding the applicability of this report's findings and Dr. Smiley's use of 2 seconds for minimum preview, that this study used test sections of 150 metres, which corresponded to a preview time of 6 seconds (5 seconds as safe preview time + 1 second of tolerance), at a speed of 90 km./hr.: Rosey, *supra*, at 1515-16.

[167] A further study entitled "How much Visual Road Information is Needed to Drive Safely and Comfortably," by Dick de Waard *et al.*, (2004) 42 Safety Science 639, was put to Dr. Smiley; it confirmed that speed among younger drivers increased with a centre line, whereas with older drivers, it decreased with a 60 km./hr. limit, and, where the speed limit was 100 km./hr., the speed increased, but remained well under the speed limit. (Fig.3) As to lateral position, a centre line meant that average lateral position was closer to the road edge, whereas without it, the drivers tended to choose a position closer to the road's centre. (Fig. 5). Addition of markers by the road edge and edge lines brought drivers further from the road edge than with a centre line only, but in all delineated situations, drivers drove closer to the road edge than without any marking.

[168] The de Waard study, *supra*, concluded: increasing guidance by adding elements to the road did not always lead to greater speed; average speed was fairly constant over conditions; and adding painted material to the road surface affected position on the road – the addition of a centre line "resulted in drivers driving in their lane, and accordingly more toward the road's edge. It was found that variability in position ... was reduced

when a centre-line was added": de Waard, *supra* at 651. In the Rosey study, the authors accepted de Waard's conclusion that centre-lining resulted in drivers driving in their own lane. They also referred to other studies which indicated that between 20 and 30% of crashes "are related to road layout ... Thus it is often the [road layout] which is primarily responsible for drivers' failures, not drivers' response to it", though human error continues to be by far the predominant contributor: Rosey, *supra* at 1513.From de Waard and Rosey, therefore, there appears to be some difference in viewpoint between the de Waard study and the reference to it in the Rosey study, on the one hand, and Dr. Smiley regarding the benefit of a centre line on a two-way road.

[169] Dr. Smiley has done her own study regarding young drivers. The statistics show that the rate of collisions is three times that of adults. When other young people are accompanying the young driver as passengers, this rate doubles.

[170] Dr. Smiley testified that one evening in November 2009, she went to the scene of the crash with an assistant in two cars in order to perform some test runs on the accident hill in night-time conditions. She was interested in trying to understand the perception, of which Shannon Deering spoke, of overlapping paths with the eastbound vehicle. Shannon said that the eastbound vehicle seemed to be coming right at her as it crested the hill, yet there is no evidence in the police investigation file (Ex. 22) that that vehicle was ever in the westbound lane. Dr. Smiley wanted to see what the effect was, to a westbound driver, of the slight curve or deflection in the road to the north by the width of one lane over a 110-metre distance.

[171] Most of that deflection occurs east of the crest; about 22 metres of it lie on the west side. Dr. Smiley had her assistant drive over the crest of the accident hill eastbound, as Dr. Smiley reached a point approximately 2/3 to 3/4 up the hill. They communicated by mobile phones to time their relative positions. A video camera was mounted onto Dr. Smiley's glasses in order to capture the scene as it unfolded. For the first run, Dr. Smiley had on her high beams, and her associate, approaching eastbound, had on his low beams. For the second run, she had on her low beams. Her highest speed on the first run was 70 km./hr., and on the second, 60 km./hr. Her associate's speed was 60 km./hr. She stated that she was able to track the direction of the road by the shoulder contrast, and she did not have the experience to which Shannon Deering testified. Dr. Smiley said that her eyesight has been tested, and her sensitivity to colour contrast is exceptional for a person over 50 years of age, making her eyesight closer to the sharp vision of contrasts most younger drivers possess. As people age, their appreciation of colour contrasts is said to weaken, according to literature and testing of which Dr. Smiley is aware. No such testing was done on Shannon Deering of which I am aware, so I assume she had the sharp appreciation of colour contrast of most younger persons.

[172] There were two problems with this experiment, to which Dr. Smiley readily admitted: i) the road had a very clear reflective centre line in November 2009, but no centre line was in place in August 2004; and ii) the sudden induced-stress factor was not present because Dr. Smiley and her associate knew that their cars were not going to collide. Under cross-examination, in response to a question as to whether she saw her test as a reliable assessment of Shannon Deering's experience on August 10, 2004, she said that her main point was to see if she could see the shoulder/ curb contrast. She did not try to represent the test as a reliable re-enactment of vehicles approaching at higher speed with less

preview time over this sight-deficient hill which was unmarked in 2004, driven by at least one driver who had not driven Coates Rd. West before.

[173] In examination-in-chief, Dr. Smiley was asked, assuming that Shannon Deering was driving at 90 km./hr., what effect would this speed have on driver perception and reaction. She said that this was a high speed for Coates Rd. West, which is unlit and obviously was unmarked, and the faster a driver goes, the more likely it is that that driver will want to be away from the edge of the road, and the more difficulty a driver will have in giving a proper response to the situation of an approaching car over the hill, which had so startled Shannon.

[174] Mr. Boggs asked Dr. Smiley for her opinion on whether the presence of a centre line would have prevented the crash. She answered that on the one hand, it could have prevented the crash, and, on the other hand, it could have led Shannon Deering to want to drive closer to the centre, and at 90 km./hr., she would have lacked time to move over, resulting in a head-on crash. Taking into account safety of road users generally, Dr. Smiley said that on balance she did not see it as a benefit. Under cross-examination, however, on the assumptions that the westbound driver would see the vehicle paths as intersecting, and that the deflection was imperceptible to drivers but because it was one lane in width the vehicles would in fact be heading toward each other unless the westbound driver corrected for it, Dr. Smiley agreed that the roadway would be a severe hazard and very unusual. She just did not see, based on her own experience during the test-runs, how the driver in question would not track the direction by the shoulder. Finally, Dr. Smiley was asked if the presence of a centre line would probably have prevented this crash, assuming the following facts: the roadway is two-lane and narrow, the shoulders are narrow, and Shannon Deering was trying to stay on her own side of the road. Dr. Smiley answered yes.

[175] Finally, Dr. Smiley was asked how road authorities should regard their duty and standard of care in relation to the age of drivers. She stated that, in her opinion, they should anticipate and consider that drivers of all age ranges, young and older, will be using the roads.

[176] I found Dr. Smiley to be an expert witness in command of the literature within her area. Her evidence as to proven expectations of driver conduct was, on the whole, helpful in appreciating more fully driver expectations of road design and signage and road design-expectations of the ordinary driver. It appeared to me, however, that her conclusions based on the Rosey study – for instance, that a centre line on a road has little or no benefit to lateral position on a two-way road with hills, especially at night – went somewhat beyond the limits of the actual tests on which the studies were based. The Rosey testing used 6-second preview times at 90 km./hr., not times under 2 seconds as we have here, and iterated from another study that a preview time of 5 seconds is suggested for safe travel: Rosey, *supra* at 1515-16). As well, the authors themselves stated that the results of the study, derived from the use of a driving simulator, must "be taken with caution concerning the generalization from a driving simulator environment in the laboratory to a real-life driving environment": Rosey, *supra* at 1521. Road tests were to occur to confirm the good results regarding the rumble strips, but no evidence was presented to indicate the results of those road tests, and the authors did not indicate that the painted centre line result was to be confirmed or not by real-life conditions: Rosey, *supra* at 1522.

[177] I read to Dr. Smiley a conclusion from a study report to which she contributed, the conclusions of which did not agree with her opinion as to the net insignificant benefits of a centre line on a road. This was the National Cooperative Highway Research Program ("NCHRP") Report 518 entitled "Safety Evaluation on Permanent Raised Pavement Markers" ("NCHRP Report"). NCHRP is an American organization which Dr. Smiley described as being funded by the state governments, with the full cooperation of the federal department of transportation, to do road and driving-related research. The NCHRP Report (Ex. 38) concluded that centre lines on roads were beneficial and had reduced accident and crash rates: "Over one-third of the fatal crashes on two-lane undivided highways . . . occurred during dark or unlighted conditions. . . . Pavement markings and other delineation devices provide drivers with information about their position within their own lane and information about which lanes are available for their use, particularly at night": NCHRP Report, *supra* at 3).

[178] As well, the OTM, to which she contributed as one of the consultants, recommends centre-lining the approaches to hills that are deficient in available sight distance and stopping sight distance. Dr. Smiley agreed that this was so, and emphasized that the OTM recommendation was for centre lining of only the approaches to sight-distance deficient hills, not continuous centre lines which were the ones studied in the Rosey study. Yet, even thus limited, she seemed somewhat dismissive of the OTM and the remarks in the NCHRP Report because of more recent studies such as the one by Rosey. Yet when I suggested to her that the NCHRP Report, in concluding as it did that the marking of centre lines brings significant safety benefits, appeared to have taken recent studies into account, she accepted that that was so.

[179] Dr. Smiley is a witness of forthright demeanour and strong opinions. I found her to be independent in her opinions, a true expert witness present to assist the court. At times, I felt she was overly influenced by the challenge, if not the soundness, of new work in her area. Nevertheless, she has, from my observation of her as a witness, rightly earned respect in this area with her prodigious work on human factors in motor vehicle collisions and crashes, and I give her opinions considerable weight when dealing with the concept of the ordinary driver, particularly on issues of expected human reactions to emergencies, and need for guidance, or not, by reduced speed posting, signage, and pavement marking.

[180] Another study by Dr. Smiley herself on factors affecting vehicle speed, entitled "Driver Speed Estimation" (for the Transportation Research Board, January 1999) states at p. 2:

> What is it about the roadway that influences how fast we drive and how does that relate to the perceptual cues discussed above (i.e. peripheral vision, height of eyes above road, lateral acceleration on curves, complexity of visual scene, noise level in car)...In general the more risky the driver perceives the road to be, the lower the speed. Where do drivers lower their speed? They lower it on sharp curves, areas with limited sight distance, crest vertical curves, etc.

[181] One of her conclusions was that advisory direction signs, such as arrow curve signs, have not been demonstrated to affect vehicle speed on curves. No mention was made in this study of signage of reduced speed plus a centre line marking being tested on hills with deficient sight distance.

[182] Regarding her and the engineers' conclusion on what speed people drive and that they do not factor in speed limits, I must mention a fact of which judicial notice can be taken – it is obvious enough daily on the roads - a posted speed limit, plus serious enforcement at speeds above 20 km./hr. over the limit, produces driving, by most drivers, at 10 to 20 km./hr. above the speed limit on 80 to 100 km./hr.-limit highways, including two-lane and multi-lane controlled access highways. In other words, in Ontario, in my view, drivers do factor in speed limits and enforcement policy; they are not ignored, as the transportation engineers seem to believe, though I accept that most drivers on major roads, at least, tend not to drive strictly within those limits.

[183] I should refer at this point, before leaving Dr. Smiley's evidence, to the video-disc she introduced. It allowed for a much more complete understanding of the meaning of a seriously sight-distance deficient hill with a lane-wide curve over its crest. Her videotaped test performed with an associate at night in November 2009 provides the only view of night-time conditions on the disputed section of Coates Rd. West showing vehicles in motion with headlights on. The police video of travel along the road up to and beyond the crash scene was shot in daytime when so many more features were visible.

[184] Without going into unnecessary detail at this point, what impressed me about Dr. Smiley's videotaped test was the virtually total hidden-ness, by the angle of ascent on the subject hill, from any significant preview of a car approaching until just before it crests the hill, perhaps a split-second, before the bright glare comes at the westbound driver for 1 to 2 seconds before it passes. This was so even where both vehicles were going 60 km./hr. On the hill prior to the accident hill, the video-disc shows an eastbound car approaching, and its headlight loom was visible to the westbound driver well before that approaching vehicle reached the crest. For a westbound driver, the approach of another vehicle to the prior hill could be forecast easily by the obvious aura or loom of the headlights several seconds before it crested that hill. The contrast with the lack of contra flow headlight loom on the accident hill was quite evident, even dramatic. The videotape was produced during the cross-examination of Dr. Smiley and is part of the court record as Ex. 42.

**5. Have the Plaintiffs Established That the Segment of Coates Rd. West in Question Was in a State of Non-Repair?**

[185] All counsel on this case accept Justice Shaughnessy's assignment of the burden of proof which he set out in *Roycroft, supra,* at para. 48. The onus of proof lies on the plaintiffs to establish on a balance of probabilities that: (i) the defendants failed to keep the road in question in reasonable repair in all the circumstances, and (ii) the non-repair caused the plaintiffs' loss or damage. Then the burden shifts to the defendants to establish that they come within the statutory defences in s. 44(3)(a) and (b). I agree. Therefore I must now consider whether the plaintiffs have met the burden of establishing to the civil standard of proof that the accident hill on Coates Rd. West was not in reasonable repair on August 10 2004.

**(a) The Transportation Engineering and Road Management Witnesses**

[186] The principal witnesses dealing with this subject were three qualified transportation engineers and the director of public works for Scugog at the material time, Larry Postill.

Mr. Postill's evidence leads into the evidence of two Oshawa witnesses regarding the Coates road project and a signage/pavement-markings assessment which Oshawa was to do. The plaintiffs called Russell Brownlee, qualified as a transportation engineer who has worked, done many road assessments, and trained others, in the areas of road safety and design, and Frank Pinder, a transportation engineer with considerable hands-on experience as a municipal roads engineer dealing with traffic operations in rural areas, road construction projects and road safety.

[187] The defendants called Gerald Forbes, who was qualified in the fields of road design, road traffic operations, and road safety. Larry Maddeaux, who is a traffic field officer for Oshawa, Rhonda Grundy, who schedules road marking, and the Durham Region signs and marking supervisor, Bruce Watson, were called by the defendants regarding the work schedule in the summer of 2004 on the issues of timing and "reasonable steps" under section 44(3)(b). Mr. Maddeaux was also called by the defendant regarding road marking and signage practices Oshawa followed. These witnesses, as well as Mr. Postill, testified as fact witnesses; they were not qualified as expert or opinion witnesses.

[188] Before dealing with the engineering and municipal witnesses, I must refer to two excerpts from the Ontario Traffic Manual. They will be referred to in the following summaries. I will deal with how such guidelines are to be used in civil trials following the evidence review.

> **Ontario Traffic Manual, Book 11** – Pavement, Hazard and Delineation Markings (March 2000, MTO)
> **3.4 Lines**
> *Directional Dividing Lines at Specific Roadway Features*
> Where a continuous directional dividing line is determined to be impracticable or unnecessary, short segments of directional dividing line are required at specific roadway features. These include:
>
> Vertical curves
> ...
> On ... rural two-lane roadways, where the directional dividing line is not continuous, these locations should be marked as follows:
> Along the approaches to the crest of a hill where the available sight distance is less than 150 m.
> ...
>
> **Ontario Traffic Manual, Book 7** – Temporary Conditions (March 2001, MTO)
> **4.3 Temporary Markings and Delineation**
> Temporary Markings
> Adequate pavement markings must be maintained along paved roads in temporary work zones. . . Directional dividing lines should be placed, replaced, or delineated where appropriate before the roadway is opened to traffic.
> . . .

> Permanent pavement markings must be installed on six-lane freeways before opening to traffic. On other roads, if permanent pavement markings cannot be installed immediately, interim pavement markings must be installed, and the permanent markings must be installed within the following time frame, depending on road type:
>
> . . .
>
> Two-lane roads – within 20 working days.

[189] Mr. Postill was responsible for road maintenance and construction for Scugog from 2001 until October 31, 2005. He was the director of public works. Mr. Postill testified about the place of Coates Rd. within the overall road system and road needs of Scugog, his knowledge of the condition of that road in the early 2000s, and his part in the joint road project with Oshawa in 2003 and July 2004. Scugog is primarily rural with a much larger population in summers due to its lakes, related activities and their attraction to visitors and cottagers. Coates Rd. West is a paved rural road about 4 kilometers in length, and is part of 407 total kilometers of roads in the township. There are 187 kilometres of rural local roads like Coates Rd. Most of them are old. Almost half of the total road system consists of rural roads without large traffic volumes. Mr. Postill had 17 employees under him who helped maintain the road system. Half of the rural roads require structural repair, and since Scugog simply lacks the tax base to deal with all of those at one time, it must prioritize with the assistance of its traffic consultants and road engineers. Scugog and Oshawa councils gave priority to Coates Rd. West for rehabilitation as a joint project to start in the spring of 2003.

[190] Apart from the road projects designated each year for rehabilitation or re-construction, Mr. Postill's policy regarding road issues was strictly reactive: if he received complaints, he would refer them to a consulting firm retained by Scugog and ask it to review the matter. He is not by profession a transportation engineer who has made a study of, and applies, road manuals or assesses road conditions. His collection of road manuals is incomplete and his knowledge of them is scant. Although he said he had a civil engineering degree from Ryerson University, when he was asked about his background before becoming head of public works, he emphasized that he had four years in road construction with a large construction company, rather than his engineering background, as the most important qualifier for getting the job with Scugog.

[191] Before this litigation, Mr. Postill did not know there were hills on Coates Rd. West with deficient sight distances, and he did not know of the OTM guideline advising centre-lining on approaches to such hills. He had never asked the consultants who prepared Scugog's roads needs studies for their assessment of road safety, and certainly he did not ask for their appraisal worksheets which were not part of the reports transmitted to the municipality. To him, Scugog simply did not centre-line rural roads.

[192] Mr. Postill agreed under cross-examination that municipalities should keep up-to-date records of volumes of traffic on its roads. But, since Scugog did no traffic counts, he had no idea that Coates Rd. West by 2003 was by then only the fifth road in Scugog with traffic volume over 1000 vehicles per day (v.p.d.). The traffic count by Oshawa personnel was not shared with Scugog, and knowledge of it within Oshawa's own transportation services branch seems to have been limited at best; Mr. Kelly, a senior

transportation engineer within that branch, knew nothing of it. The roads needs studies for Scugog provided no actual traffic count-based annual average daily traffic (A.A.D.T.); the last actual count was done in 1992, showing 265 v.p.d, indicating little more than usage by local traffic from properties accessed via Coates Rd. itself..

[193] Mr. Postill's evidence was that, before the 2003 joint rehabilitation project, the only complaints about Coates Rd. concerned the pot-holes. It had been notorious for its potholes and deteriorating road-bed. He testified that if, at the time of the road construction project, he had known of the sight deficiencies on the Coates Rd. hills, as well as the result of Oshawa's 2003 traffic count, he would have followed up more seriously on Oshawa's commitment to do an assessment of signage and road-marking needs, made at a project planning meeting in late 2002. In any event, Mr. Postill said he had wanted that assessment done in 2003 and assumed Oshawa would do it. When asked if there was urgency to that assessment, he admitted, "perhaps".

[194] Mr. Postill's counterpart with Oshawa in an operations–planning sense was not the Oshawa public works director; it was Peter O'Neill, who was the manager of maintenance operations. Mr. O'Neill reported to the Oshawa public works director and worked within the public works department, like the transportation services branch. During the planning meetings with Scugog about the Coates Rd. project in 2002 and early 2003, Mr. O'Neill agreed for Oshawa that a markings/signage safety assessment would be done by its transportation personnel as part of its contribution to the joint road project.

[195] On December 13, 2002, Mr. Postill sent an email to O'Neill reviewing his understanding to date of the project planning and cost. Beside number 1 is a note about total cost, which also states: "...and the cost of guide wire/pavement markings and signage, which must be determined soon to include in the project." In reply, Mr. O'Neill, by email dated December 13, 2002, sent Mr. Postill a draft "action plan" which called for Mr. O'Neill to involve Oshawa's transportation services branch to do a review of the traffic safety issues of signage and pavement markings in the spring, with timing for installation and cost sharing to be determined. This was item 6 in the draft action plan. Then on January 7 and 8, 2003, Mr. O'Neill involved Mike Bellamy, the head of transportation services for Oshawa, by asking him to arrange for his staff to assess Coates Rd. West for guidewire, pavement markings and warning signs to ensure adequacy of traffic devices, installation to be co-ordinated with the road work. On January 8, 2003, the following email was sent by Mr. Bellamy to Craig Kelly, the manager of transportation engineering in his department:

> The proposed boundary road agreement referenced by Peter (O'Neill) should be executed by March.
>
> We have agreed with Scugog to share the cost of the road rehab from the west city limits to Wilson. Therefore, as suggested by Peter, it will be advantageous for us to identify and correct all outstanding deficiencies with respect to roadside protection in conjunction with the road construction. Our guiderail accounts will not be charged.

You may want to confirm the construction schedule with Peter before assigning this project.

Thanks

Mike Bellamy
Director, Transportation and Parking Services

[196] Mr. Kelly testified. In 2003, he was manager of transportation services under Mr. Bellamy, the director. By May 2004, he became acting director of transportation services in place of Mr. Bellamy. In February 2003, Mr. Kelly saw this assignment from Mr. Bellamy as not urgent because any centre line would be obliterated by the later slurry seal treatment in July 2004. He also stated that Oshawa transportation never becomes involved in road rehabilitation projects; this became a kind of mantra for Mr. Kelly, spoken and unspoken. No such city policy was documented before me. Mr. Kelly said that he first left the assessment to be done after the slurry seal was complete. He said the assessment was then deferred to become part of a roadside review progamme, and when it was not done as part of that programme, it remained undone. He knew nothing in early 2003 about Coates Rd., other than it was an Oshawa road and there were no complaints. He said, in chief, that the traffic field officer, Mr. Maddeaux, told him that a review of the road had been done and all standards were met. I do not recall any evidence to that effect from Mr. Maddeaux.

[197] It appeared to me from an earlier answer in chief that Mr. Kelly simply did not do the assessment. He says that he left it to a time when a new boundary agreement and transfer of maintenance duties for Coates Rd. West to the City might occur, if ever. He neither did what Mr. Bellamy had directed or requested him to do in conjunction with the 2003 road project on Coates Rd., nor did he seem interested enough, despite Mr. Bellamy's direction to him, to even look up the transportation department's own files on Coates Rd., including the traffic study Mr. Bellamy authored and the resulting council policy which had developed in 1999 regarding the centre-lining of all through rural roads in Oshawa.

[198] In fact, Mr. Kelly made clear three things under cross examination:

(i) it was indeed because of the anticipated boundary road transfer that Mr. Kelly did nothing about the field assessment of all deficiencies on Coates Rd. West in 2003;

(ii) he did not know of the OTM's recommendation to put down interim road markings following construction work where permanent markings could not be done yet (he agreed this guideline included centre lines); and

(iii) he did not know the relation in the OTM between sight-distance deficiencies on a hill and the recommendation to centre-line approaches to such hills.

[199] Mr. Kelly admitted, after a good deal of less-than-direct-answers, that by 2004, before the crash on Coates Rd., he had learned a few things about that road:

(i) it had a speed limit of 80 km./hr.; and

(ii) it had significant hills or "vertical curves" which he was aware could restrict a driver's sight distance and stopping sight distance.

[200] Nevertheless, he saw no reason to do the assessment to which Mr. O'Neill and his superior had committed because the road project was to make no change to alignments, vertical or horizontal. He saw Mr. Bellamy's e-mail to him of January 8, 2003 as a suggestion, not as a request or direction to do the assessment Mr. O'Neill had committed Oshawa to do – yet Mr. Kelly did agree that that was a commitment by Mr. O'Neill on behalf of Oshawa. Mr. Kelly never replied to Mr. Bellamy's direction to do an assessment of Coates Rd. signage and pavement markings in conjunction with the 2003 road project, and of course, within the year, he had become the acting director in place of Mr. Bellamy. The matter was simply left to be dealt with at a later time. Mr. Kelly seemed to communicate with no one on this subject, and there is no documentation of any decision made by him about the assessment that I find, without doubt, had been assigned to him. I find that Mr. Kelly made no decisions on timing and deferrals of the safety assessment Mr. Bellamy had given to him. I reject Mr. Kelly's evidence that he did anything or made any decision about the safety assessment expected by Mr. Postill and Mr. O'Neill in conjunction with the road project on Coates Rd. West.

[201] Mr. Kelly stated, without equivocation on this point, that Coates Rd. West would have had a centre line painted on it, together with all the other through rural roads in Oshawa, by 2000, but for it being purportedly maintained by Scugog under the boundary road agreement of 1976. He admitted that he knew, by January 2003, of Oshawa transportation department's earlier assessment of the accident hill as sight-deficient. He then agreed that if he had known in 2003 of Council's policy, decided in 1999, to lay down centre lines on all through rural roads, his decision would have been to do it on Coates Rd. West, and the only issue would have been timing; he refused to link the laying down of a centre line to the road project because the proper timing for dealing with either of these matters regarding Coates Rd. was, in his opinion, after the conclusion of a new boundary agreement. And, of course, in his mind, Oshawa transportation services are never involved in road rehabilitation projects.

[202] At this point, I should refer in more detail to two important processes which have been touched on in the narrative of this decision:

(i) the 2003 traffic count done by unknown persons in the transportation department, purportedly without the knowledge of the person (Mr. Kelly) working under the departmental director, and;

(ii) the 1999 process regarding the Oshawa rural centre-line policy.

**(a)(i) The 2003 Traffic Count**

[203] All that is known to the court about this endeavour is what the court learned from the document which recorded the count figures in Ex.1(2), T.26. No one testified to having performed it or ordered it to be done. It was entered into evidence as part of the joint document brief on consent. Both municipal road and traffic witnesses Mr. Postill and Mr. Kelly accepted it as accurate. The transportation engineer called by the defendants, Gerald Forbes, asserted that this count should be taken seriously as representative of the

daily traffic volume carried by Coates Rd. West in 2003. I accept Mr. Forbes' assertion with one caveat: that because this count was done in the fall, it does not give a full view of traffic volume in the summer when the cottage-related population increases traffic beyond this level (See Mr. Postill's evidence). The count is as follows:

Station Name: Coates Rd. W.

Description: W of Simcoe St. N

City: Oshawa

County:

Start Date/Time: 10/09/03 00:00

End Date/Time: 10/09/03 23:59

| 10/9/2003 | Lane1 (East) | Lane 2(West) | All Lanes |
|---|---|---|---|
| 00:00-00:59 | 4 | 4 | 8 |
| 01:00-01:59 | 4 | 4 | 8 |
| 02:00-02:59 | 0 | 0 | 0 |
| 03:00-03:59 | 0 | 0 | 0 |
| 04:00-04:59 | 0 | 0 | 0 |
| 05:00-05:59 | 3 | 3 | 6 |
| 06:00-06:59 | 17 | 17 | 34 |
| 07:00-07:59 | 45 | 47 | 92 |
| 08:00-08:59 | 33 | 34 | 67 |
| 09:00-09:59 | 28 | 28 | 56 |
| 10:00-10:59 | 33 | 32 | 65 |
| 11:00-11:59 | 39 | 41 | 80 |
| 12:00-12:59 | 8 | 8 | 16 |
| 13:00-13:59 | 32 | 34 | 66 |
| 14:00-14:59 | 54 | 56 | 110 |
| 15:00-15:59 | 39 | 40 | 79 |
| 16:00-16:59 | 50 | 52 | 102 |
| 17:00-17:59 | 67 | 68 | 135 |
| 18:00-18:59 | 49 | 51 | 100 |
| 19:00-19:59 | 21 | 22 | 43 |
| 20:00-20:59 | 15 | 16 | 31 |
| 21:00-21:59 | 10 | 10 | 20 |

| | | | |
|---|---|---|---|
| 22:00-22:59 | 14 | 13 | 27 |
| 23:00-23:59 | 6 | 7 | 13 |
| **Total** | **571** | **587** | **1158** |

[204] The percentage of traffic in either direction was approximately equal over the day. The 2004 roads needs study contained an AADT of 265. The 1999 study used the same figure. Obviously, Totten Simms Hubicki did not do a count for either year. All of the transportation engineers accepted the 2003 count as a fairly accurate indication of the AADT in 2003, though, of course, it is at most a minimal AADT because there is no count for Scugog which includes the summer traffic. I doubt that the evening and night figures would show a significant increase in the summer, but there is no actual count to prove that one way or the other.

**(a)(ii) The 1998-9 Centre Line Studies and Municipal Decision**

[205] Two petitions by local residents came forward in 1998 and 1999, respectively, complaining about the lack of centre lines on the City's rural roads. In response, two reports were prepared under the public works commissioner, but in fact they appear to be the work of the transportation services department; certainly, Mr. Kelly specifically identified the second report as Mr. Bellamy's work.

[206] The first report, dated September 15, 1998, discussed the marking of different classes of roads – i.e. regional and city roads – and the warrants the province developed to establish uniform practices across the province. The warrants are contained in the Manual of Uniform Traffic Control Devices (MUTCD). A field inspection was done in August 1998 to identify locations "where the geometric alignment of the roadway presented a potential hazard to motorists." Traffic volumes were measured at those locations "to help quantify the degree of motorist exposure to the condition": Report, dated September 15, 1998, at 2. Eight locations were identified, none of which were on Coates Rd. The report concluded by adding some of the road locations to the center line painting inventory for 1998, but stated that the other locations could not be justified under the provincial warrant policy.

[207] On February 8, 1999, another residents' petition was brought forward to the city. It expressed dissatisfaction with the City's failure to mark the remaining rural roads. The residents expressed their view in this way:

> [After reciting that some roads had been painted] ... At that time, it became apparent to the many residents on and in the area of Howden Road and Townline Road, that these roads were overlooked ... The residents are no less concerned now than they were in 1998 ...

[208] They complained particularly of fog conditions but they also stated more broadly:

> The topography of the Howden Road area is fraught with hills and blind spots.

> We are once again requesting a solution to the problems created by unmarked roads and if centre lines are not a viable solution, we would settle for the alternative of lighting along the roadway which would assist all who travel Howden Road.

[209] Howden Road[4] is an east-west road in Oshawa, north of Winchester Rd. and Columbus Rd. (the two parallel roads to the south), and south of, first, Raglan Rd., and then Coates Rd. to the north. Each of these five roads intersects with Thornton Rd., which runs close to the boundary between Oshawa and Whitby and parallel to it. The road system forms a rigid grid pattern in this area.(Durham Regional map, Ex.1(4), T.79)

[210] The 1999 report by Mr. Bellamy reviewed the history, the centerline warrant policy in the MUTCD, the higher probability of visibility difficulties on the rural roads than on city roads, and the financial implications of continuous centre marking. It recommended to Council that all through rural roads be centre-lined by 2000. Its principal reasons for so recommending were: weather conditions produce poor visibility throughout the rural area, and not all motorists are familiar with the rural roads. The Bellamy report recognized specifically that the residents have the most familiarity with rural road conditions because not all accidents in the rural area are reported.

[211] The report contains an appraisal sheet for the roads. The segment of Coates Rd. West in question in this case is identified as Coates Road "Thornton to 1100m west of Simcoe". For peak hour (two-way), it reads "16". For AADT, it reads "200". Under "Hills with sight distance (under) 150m?)", the entry is "Yes". The only curve concerns identified are relatively sharp curves of under 180m sight distance, and so the combination on Coates Rd. of a slight curve, which over a 110m distance moves the road north by one lane width (or 3m), is not mentioned. Under "comments", the appraisal reads "Scugog jurisdiction (?) - Rolling". The cost of the centre-lining of Coates Rd. is estimated at $1080. Mr. Postill agreed that this cost was not significant.

[212] On the map attached to the report of the roads to be painted, there is a note over Coates Rd. West. It reads "Coates Rd. under Scugog Twp. Jurisdiction. Painting will be done subject to proposed revision to boundary road agreement." Council accepted this report, and all the through rural roads in Oshawa were painted by the end of 2000, except for Coates Rd. West. As Mr. Bellamy was the author of the 1999 report on centre-lining, he obviously was aware when he emailed Mr. Kelly in January 2003 of the sight-deficiencies on Coates Rd. West and its lack of any markings or signage, and it is why, no doubt, his email speaks of the "deficiencies" to be assessed on the safety assessment which did not happen.

[213] Russell Brownlee was the first of the transportation engineers called to testify. He discussed the road classification and function of Coates Rd. West. To him, Coates Rd. West is a local road functioning more as a rural collector with many more through trips between major highways than simply trips generated by the few farms and estate lots that it services. He compared the actual road dimensions with the Geometric Design manual from TAC, a national road research organization, a manual similar to the Geometric Design manual put out by MTO. He also explained and compared the concepts of

[4] This road name has no relation to Howden J, the trial judge.

available sight distance[5] and stopping sight distance[6] in relation to the guideline for approaches to hills with substandard sight distances in the Ontario Traffic Manual (OTM). These manuals, he said, are all respected guides regularly consulted in the course of transportation engineering decision-making and by transportation engineers in fashioning recommendations to municipalities. He concluded, as a transportation engineer experienced in doing road safety audits or assessments, that the following were serious concerns when assessing the segment of Coates Rd. West in issue, as it was in August 2004:

- sight distances on the accident hill were seriously deficient;
- the horizontal shift or slight curve over the crest would be unexpected on an otherwise straight road;
- given the narrow shoulder width, it is a location where a vehicle is more apt to move away from the road edge due to the narrow margin of error, since drivers unfamiliar with the road tend to move away from the road edge;
- the 80 km./hr. speed limit provides only 1.5 seconds of preview between vehicles approaching each other at a combined speed of 160 km./hr. as the eastbound vehicle crests the hill, not allowing sufficient reaction and stopping time and, together with the lack of centre line, more probably leading to a westbound vehicle swerving to avoid a collision;
- in all the circumstances, this location posed a severe risk to users of the road;
- the lack of a significant reported collision history alone is only one factor in a safety assessment which should be carried out regularly to identify road hazards and signing needs.

[214] Under a lengthy cross-examination by Mr. Boggs, Mr. Brownlee conceded that he had no knowledge of a TAC publication called "3R/4R" which gives alternate criteria to those in the Geometric Design manuals for municipalities which have many roads, like Coates Rd., that predate those manuals. He had not considered those alternate criteria. The 3R4R manual is used primarily to assist municipalities in balancing benefits and costs in the course of determining when re-surfacing, rather than reconstruction which includes realignment and other more costly approaches, should be preferred. It contains criteria to assist municipalities in determining when a safety assessment is recommended. He conceded that none of the recommended criteria for assessment of a vertical alignment (i.e. a hill) by TAC would require a hazard assessment here; for example, there is no intersection near the top of the hill. Mr. Brownlee opined that a transportation engineer

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[5] Available sight distance was explained as a road design guideline representing the distance between the principal vehicle (taken at the average height above grade of the driver's eyes – 1.05meters) and a potential hazard (taken at a vertical height above grade of .38 meters – height off the road of a vehicle tail light). (R. Brownlee evidence; *Geometric Design Guide for Canadian Roads,* part 2.1.3 Vertical Alignment, at 2.1.3.3, p.2.1.3.6 T.A.C.).

[6] Stopping sight distance was explained as a design guideline representing the distance between the point of perception of a potential hazard by an average driver to the point where the vehicle is stopped. Driver's eye height and vehicle tail light are again the objects assessed. Table 2.1.3.2. Stopping sight distance at 80 km./hr. – 139.4 meters; stopping sight distance at 90 km./hr. - 168.7 meters. (R. Brownlee evidence; Geometric Design, *supra,* at para 2.1.3.3, p.2.1.3.6, T.A.C.).

must use his or her own judgment, and as there is a private driveway here (No. 1366), and given the other issues he had set out, he would have assessed it. He conceded that there was nothing in the short collision history of Coates Rd as reported to the police to indicate that the hills in this section were a hazard to drivers, but that there were other factors to be considered which he had outlined during his examination in chief.

[215] I see no need to go through the disagreements between Mr. Brownlee and Mr. Boggs over the application of the manuals to this road. It is clear that the shoulders were quite undersized, as is the case for many old country roads, and it is also clear that Dr. Smiley described Coates Rd. from the point of view of a driver as a "narrow road". As Mr. Pinder said later, its travelled width was close to the minimum width in comparing it with the Geometric Design Manual criteria. However, as Mr. Forbes later pointed out, I do not find it correct for Mr. Brownlee to use collector-road criteria in assessing a local low-volume road like this one, the classification for which is not changed, and its volume as found by the traffic count indicates it is a road in functional transition but is still a local road.

[216] Having said that, Mr. Brownlee's assessment of the sight distance deficiency at the accident hill is important because it relates directly to driver visibility and preview time over a vertical curve and it is a gross deficiency. Insofar as his safety assessment accords with that of Mr. Pinder, I considered it in my conclusions. I do give weight to Mr. Brownlee's evidence pointing out the significance of the transition in function of this road from purely local in 1992 to 2003 when it was carrying more through traffic less likely to be familiar with it. His evidence on this point makes sense in view of the position of Coates Rd. on the boundary of a growing urban centre and the 2003 traffic count by Oshawa's transportation department. I simply found his use of the road's transitional functioning as if it were already a collector road, in place of its municipal classification as a local road for purposes of a manual assessment, to lack proper engineering discipline and to indicate reaching in order to assist his principal. His lack of familiarity with the 3R4R manual, dealing as it does with cost aspects of reviewing aging infrastructure like Coates Rd. West, was regrettable.

[217] Frank Pinder, called on by the plaintiffs, testified to his experience as a long-time road engineer for a county with 90% of its roads in rural areas (Hastings County), as acting director of public works for another rural township, and as a transportation consultant, a position that he currently holds. He said that the rehabilitation project on Coates Rd. West should have included at least a visual assessment to establish the scope of the work before the project work began; this was still a local road but, given the 2003 traffic count, it was no longer used primarily by drivers familiar with it, no signage or line markings existed on it, no work had been done on it since 1992 apart from patching holes, the traffic count had increased from 265 in 1992 to 1158 in 2003 mostly in the daytime, and there was insufficient available sight distance and stopping sight distance on the three hills.

[218] To Mr. Pinder, that assessment should have covered not only road structure – to which Totten Simms Hubicki's reports to Scugog had confined themselves – but also lane and road width, horizontal and vertical curves, sight distance issues, roadside hazards, and signage and/or guide rail needs. The time required would have been insignificant: a visual drive-by, and stopping where required by circumstances for more detailed site-

specific looks, by an experienced road engineer. Mr. Pinder has done many such visual assessments, and an experienced municipal engineer would do it in a matter of hours. In answer to the question on cross-examination of why this assessment should have occurred with a rehabilitation project, he said that the assessment could establish, in this instance, if the alignment could be corrected, and if it could not be corrected, what pavement marking or signage was required. He said that it is risky for municipalities to embark on rehabilitation projects without such an assessment, and it must be done by an assessor who is familiar with the road standards to be used as a benchmark.

[219] On his inspection, Mr. Pinder found the hill in question to have a unique feature - the combination of the sight distance deficiency with the horizontal deflection over the crest of the hill. He found the degree of deflection near the crest interesting, the combination quite unusual in his experience and important to his assessment of this segment of road as having serious safety issues. In his review of the documents, Mr. Pinder found that no assessment took place before or during the joint 2003-2004 road rehabilitation project on Coates Rd. West. Because of this omission, a serious risk to the driving public was left in place – the combination of inadequate sight distance, narrow shoulders, no centre line, and the deflection not visible to a driver approaching the crest. It was a serious risk of harm because westbound drivers traversing a straight road would not anticipate a deflection of the road which directs momentarily the path of an eastbound vehicle toward a westbound vehicle and vice versa as the former crests the hill, and the deflection was a full lane in width.

[220] Mr. Pinder said he would have expected a temporary centre line and edge markings to have been done after the resurfacing in 2003 - if necessary two applications of markings 30 days apart if the asphalt surface hadn't settled enough to retain them after the first one. In 2004, the centre line and edge markings should have been done within hours of the slurry seal application. This work and the scheduling of it should have been in the road contract with Miller Paving, but it was not.

[221] Mr. Pinder, under cross-examination, maintained, as did Mr. Postill and Dr. Smiley, who are both witnesses called by the defendants, that re-surfacing of a road brings with it more traffic; yet Mr. Boggs pressed him on this point for reference to a study to support it. Mr. Pinder simply said it was his own experience. He did agree with Mr. Boggs that it is common in Ontario for roads to have deflections or gentle curves, or to have hills. What Mr. Pinder did not concede was the distinctiveness of this curve on the third westbound hill where the vertical curve was substantial, coupled with a deflection and significant deficiencies in stopping sight distance and available sight distance. He could think of only two examples of roads affected to a similar extent as that combination on the Coates Rd. West hill where the crash occurred. He refused to agree with Mr. Boggs' assertion that a westbound driver would show special caution in approaching the third hill; a driver would expect the same straight road, according to Mr. Pinder, and at night no deflection in the earlier two hills would be visible or noticeable. Mr. Pinder did concede that drivers would be expected to adjust their speed as they proceeded through the hills on Coates Rd. West, and that at night, that would include driving at a speed related to what they can see.

[222] On other related subjects, he would not concede his own experience which, he said, showed that drivers do take into account the speed limit on a road when driving; subject

to that caveat, he agreed that most drive at a speed comfortable to them. He agreed that if a road has a low collision rate, it is reasonable for a municipality to accept that it is reasonably safe, barring other factors, and such factors are present here. To him, collision rate is only one of the factors to be considered in assessing road safety. He conceded that his suggestion of a "Keep Right" warning sign, made during his examination in chief but not thought through, was not in his report. He had to admit that he could not suggest, without a site visit, where such a sign should be placed. This suggestion was not mentioned again by him or recommended by anyone else. It was the one issue where I found Mr. Pinder reached to grasp at a point more to help his principal than the court.

[223] When confronted with the question of what factors (apart from lack of prior accidents) should require centre and edge lines where none had been in place before, Mr. Pinder replied that in addition to his findings indicating the dangerous and deceiving condition of the road particularly at night near and at the top of the hill, the rapid growth in traffic from a measured 265 in 1992 and an estimated 265 in the 1999 roads needs study to 1158 in 2003 was a very significant change for a rural road. This large proportionate increase in road usage showed that Coates Rd. West was, by 2003, carrying traffic well beyond levels generated solely by the properties abutting it. More and more, motorists unfamiliar this road were using it for the sort of purpose Shannon Deering chose to use it on August 10, 2004: as a through route to the major north-south routes to the west of Regional Rd. 2. As a traffic engineer of long experience in rural counties in southern Ontario, Mr. Pinder found this change in use and users indicated by the 2003 count to be tangible notice that the accident hill on Coates Rd. West was posing a significantly increased risk to motorists.

[224] The final transportation engineering witness was called by the defence. Gerald Forbes was a compelling witness and, together with Mr. Pinder regarding rural road standards, practices, and road rehabilitation issues, probably the most forthright and informed witness in this field. Mr. Forbes is now a consultant in private practise in the field of transportation engineering. He has a background in municipal construction projects for the Regional Municipality of Hamilton-Wentworth and with the City of Hamilton. He joined the same firm as Mr. Brownlee, Synectics. There, Mr. Forbes worked as a project engineer for municipalities and the Province of Ontario with Mr. Brownlee under him. He described Mr. Brownlee's expertise as being more in operations and planning than road design, though Mr. Brownlee did not agree with this attempt to pigeon-hole him when Mr. Boggs questioned his qualifications.

[225] Mr. Forbes taught a course in geometric road design dealing with use of the TAC manuals, the MUTCD, the OTM and land use issues. He has done much work on the TAC materials, including his time on TAC standing committees and consulting assignments developing, with others, the 3R4R manual. He has done many road safety audits which he described as reactive to existing problems, occurring after the road has been in service, where collision history, speed limits, truck volumes, related political and public complaint issues become involved. He has, in his resume, an impressive list of publications and subject variety in the transportation engineering field, and in the past he has been qualified as an expert witness in this court.

[226] Mr. Forbes divided his evidence in chief into three areas: pavement marking, signage and geometric design. However, to respond to Mr. Brownlee's evidence, he began by discussing the classification of Coates Rd. and its function in Scugog and Oshawa. He disagreed with Mr. Brownlee's use of manual standards for collector roads in assessing Coates Rd. and his opinion that Coates Rd. was functioning as a rural collector. Coates Rd. remains classified by the Scugog Official Plan as a local road, and the fact that it now carries significantly more through traffic than the time of setting its classification and establishment of its AADT in the early 1990s does not change its road classification. According to the 2003 count, its peak two-way hour shows 135 vehicle trips (between 17:00 and 18:00). Mr. Forbes agreed with Mr. Brownlee's opinion that Coates Rd. is now carrying more through traffic – that is, traffic from Simcoe St. to Thornton or Brock Rd. – rather than traffic to and from the uses along Coates Rd. itself. This is a mathematical determination using well-recognized home and business-generated factors, and I did not understand there to be any disagreement that the 2003 count enabled that conclusion to be reached. All Mr. Forbes is saying, as I understood him, is that neither the unfamiliarity of most users with a road, nor a change in its predominant use necessarily changes the road classification by which it is to be assessed. Coates Rd. West continues to serve the adjacent properties having uncontrolled access to it, and its traffic volume, though greater and more of it through traffic, continues to be low.

[227] Mr. Forbes then turned to the design manuals and their proper intent and purpose for transportation engineers. The important evidence he gave on that subject comes down to this: the manuals provide general guidelines, without a particular site context, and therefore they are advisory as compendiums of best practices to assist road designers and his own profession in doing their work. Most rural roads do not fit within the manual standards for reasons already mentioned in the Overview. For those roads, the roads needs study should be used to identify issues requiring attention, but generally municipalities leave the geometry in place and assess whether there are problems disclosed by collision rate or otherwise.

[228] Later, Mr. Forbes testified to an important point, in my view, on the matter of the use of manuals with which the foregoing must be read. He said under cross examination that, for instance, where a manual such as the OTM says "should", it represents a recommendation that is "good practice in most situations", but it is always subject to the judgment of the transportation engineer within that engineer's particular programme context and circumstances in which he is working. I put to him the question whether what he was really saying is that "should" in a respected road manual means that it should be followed unless there are valid reasons to a transportation engineer not to do so. He agreed that that was what he was saying.

[229] As to the condition of Coates Rd. West at the accident hill in August 2004, Mr. Forbes conceded that the available sight distance and stopping sight distance for drivers over the crest of the hill were deficient. The sight distance standard in the O.T.M. uses the average height of vehicle tail-lights. He recalculated it using the height of the headlights of an approaching vehicle, but even as recalculated, it came to a range of 62 metres to only 77.5 metres, which is half the recommended sight distance in the OTM. He also concluded that the shoulder width was too narrow, but that neither it nor the sight-distance deficiency represented a serious risk to the ordinary driver. He concluded, however, that as a transportation engineer, he would have recommended to the

municipalities to place a centre line on the approaches to the accident hill on Coates Rd. West. The only issue for him was timing of the placing of the centre line.

[230] The OTM used "should", not "must" in this case – meaning, in his view, the OTM is not making a centre line mandatory. However, as I noted above, Mr. Forbes took the position there should be a centre line on the approaches to the accident hill. He saw no good reason not to recommend it as suggested in the O.T.M. He simply saw its implementation as a question of timing and he saw no reason not to await the safety assessment that Oshawa's transportation services department was to do at some point.. He considered two rationales for not recommending a centre line: (i) they are covered by snow at times, and rain makes them fade, and; (ii) the *Highway Traffic Act* requires all drivers to stay to the right of centre. He then dismissed them out of hand. I should note here that neither of these rationales is site specific. They apply everywhere in Ontario, and yet the OTM, with that knowledge, recommends, as an advisory best practice approach, centre lines on sight-deprived hills obviously because, below 150 metres, the preview time and reaction time of a driver to an emergency is more and more limited depending on both the level of available sight distance below 150 metres and, of course, speed. Therefore, one wonders why a transportation engineer of Mr. Forbes' obvious ability would raise these rationales except to provide some potential cover for the defendants not following the OTM recommendation where he found no valid reason not to do so.

[231] Under cross examination, he agreed that Coates Rd. West should have been centre-lined in 2000 when Oshawa council had decided that all through rural roads were to be centre-lined. Oshawa officials simply neither told Scugog of the decision, nor took any action to apply its decision to Coates Rd. West.

[232] Mr. Forbes concluded that traffic control devices must always be considered using the engineer's best judgment, and not simply following a manual like the OTM which contains guidelines, not rules. Mr. Forbes was a member of the team that developed the OTM. According to its criteria, and considering Coates Rd. as a rural local road, there is no need to consider a continuous centre line to be added.

[233] Mr. Forbes found that the decision to rehabilitate Coates Rd., rather than to reconstruct it, was reasonable. I agree. He also saw leaving Coates Rd. without line markings or new signage following the joint road project as reasonable. I will deal with his and Mr. Kelly's evidence on timing of remedial measures in more detail in the statutory defences section later.

[234] Mr. Forbes discussed the 3R/4R strategy, which he suggests is the proper manual to use for Coates Rd. and other similar rural roads in Ontario; in this, he disagreed with Mr. Brownlee's use of geometric design standards in assessing this road. The 3R4R approach and criteria suggest that the roads needs studies by Oshawa and Scugog, and their conclusions to re-surface and not reconstruct parts of the road in 2003 and 2004, were reasonable. Under re-examination, Mr. Forbes stated that using the 3R/4R criteria, neither the width nor the shoulders of Coates Rd. are too narrow. The sparse collision history of Coates Rd. amounted to under one collision reported per year, and his assessment that it has a low crash risk (using the TAC assessment called "In Service Guide", issued in 2004) indicated to him that it was an acceptably safe road in August 2004. His risk

assessment calculation was entered as Ex. 59 and it will be referred to again shortly in these reasons.

[235] The strategy that Mr. Forbes favours for old rural paved roads was summarized by him as follows: conduct a roads needs study, identify geometric substandard conditions, assess if those conditions cause an undue safety hazard, and if they do not cause an undue safety hazard, fix the road structure problems. What he omitted to say, as he gave his opinions to this point, was that while there was some assessment of road deficiencies during the 1999 and 2004 roads needs studies, neither Mr. Postill nor Scugog council saw the work sheets of Totten Sims Hubicki appraising those road design deficiencies before this litigation. Therefore no such safety assessment was done by or for the municipalities.

[236] The July 2004 sheet identified by Mr Postill at trial contains the following for the subject segment of Coates Rd.: "Vertical Alignment" - "27. Substandard S.S.D."[this refers to stopping sight distance]; and there were point ratings substantially lower than normal for vertical alignment and for shoulder width. (Ex. 1, Jt. Doc't. Brief (4), T.C1).No similar appraisal sheet was found for the 1999 roads needs study. Mr. Postill stated that Scugog never asked for those reports of road deficiencies; the consulting engineers apparently concluded that the municipality had no interest in such assessments, only in structural needs. Because the Scugog roads needs studies reported to Scugog only structural problems and because Oshawa did not assess the need for warning signage or markings in conjunction with the rehabilitation project as it had committed to do, no assessment was made by Scugog or Oshawa as to whether the gross deficiency in available sight distance and stopping sight distance ("S.S.D.") on the hills coupled with the horizontal deflection at the crest of the accident hill and the shoulder deficiency formed undue safety hazards, prior to the road being re-opened to the public in 2003 and again in July 2004. In other words, for purposes of what markings or signage should have been placed post-construction and the OTM (Book 7, para. 4.3) as to what would be "appropriate", there was no assessment to inform the requirement of "appropriate(ness)" of pavement markings or signage.

[237] Mr. Forbes stressed the low collision history, as reported, in order to conclude that the decision of Scugog and Oshawa to do no more than rehabilitate the road was reasonable. That history amounts to two collisions in the three-year period from 2000 to 2003 somewhere in the segment of road between Thornton Rd. and 1100m west of Simcoe Street; the history from the Region neither identifies the exact place nor does it identify the causes. In any event, Mr. Forbes found this to be a low collision rate and that this rate contributed to his conclusion that the crash risk that was not undue.

[238] The factors Mr. Forbes considered in doing his analysis of risk were *potential severity*, which he said would be high, but it was outweighed by the very low *collision rate*, and low *probability* of a collision occurring. He approached exposure or probability by looking first at the volume per day (1158), divided equally between east and westbound vehicles. He found that the chances of two vehicles moving in opposite directions on the crest of the accident hill came to .09% – meaning that 99.01% of the time, the road is either empty, or two vehicles would not meet over a distance of 50 metres on either side of the crest of this hill. The chance of two vehicles meeting at this hill overnight is even lower because of the very low volume of traffic at night. The municipalities must set priorities, and he found that using the roads needs study for the purpose of setting

priorities to be reasonable in these circumstances. That opinion did not take into account that neither municipality did the "undue hazard" assessment that he himself stated was his strategy when rehabilitating old roads like Coates Rd. West.

[239] Under cross-examination, Mr. Forbes stated that user safety always is a necessary component of operational decisions on roads, and that Oshawa's practice of not linking transportation safety with rehabilitation of rural roads is not consistent with the engineering principles he espouses. He agreed that the OTM, in dealing with sight-deficient hills and centre lining their approaches, did not make its advisory conditional on high collision rates. As for the OTM advisory (at p. 66 of Book 7) that no road should be re-opened until a temporary dividing line is "placed, replaced, or delineated where appropriate", Mr. Forbes said that there is no doubt that that is what it means. He added that where a manual mandates something by using "must", its character as a collection of guidelines representing best practices does not change; the engineer still must use his judgment in not following it where there is valid reason not to do so. Mr. Forbes continues to accept, as he wrote in 2008, that, in most cases, there is a public interest in decisions of this kind where manual guidelines recommend certain practices, as they do represent best engineering practices regarding issues of public safety on the roads: Gerry Forbes, "Practicing What We Preach: The Case for Evidence-Based Road Safety" (2008) 78:6 ITE Journal on the Web 69 (Ex. 57). Nevertheless, they are all subject to best engineering judgment in the context of the road conditions being considered.

[240] Mr. Boggs, in re-examination, had Mr. Forbes answer whether, for purposes of the temporary marking guideline at para 4.3 of Book 7 of the OTM, Coates Rd. was a construction project at the time of the August 10, 2004 crash. He answered no, stating that the guideline only dealt with construction zones or temporary work zones, and, at the time of the crash, Coates Rd. was neither of those. I should note here that the question and answer completely ignore the issue whether proper engineering judgement was used or even considered when, before its construction zone status ended, the decision was made to re-open the road without centre and/or edge lines on the hill approaches, and without any reduction and posting of the reduced speed limit.

**(b) Use of Road Manuals in Civil Trials**

[241] Before making my findings of fact, I must set out my approach to the use of the road manuals that have been referenced. I found Mr. Forbes' evidence on this subject to be the most informed and helpful, while maintaining respect for the law and the role of the court. I consider the manuals as a source of "good practice" guidelines or recommendations requiring informed judgment in their application. As Mr. Forbes stated, where the particular recommendation or guideline is expressed as "should" be followed, generally it should be followed unless the transportation engineer or the road authority finds a valid engineering reason not to do so. The definition of "should" which was in place in August 2004 is contained in the O.T.M., Book 1 at 84:

> **Should –**
> Indicates an advisory condition. Where the word "should" is used, the action is advised recommended but not mandatory. This term is meant to suggest good practice in most situations but also to

> recognize that in some situations, for good reasons, the recommended action cannot or need not be done. (Ex.60)

Mr. Forbes' explanation of the meaning of "should" is reflected in this definition.

[242] At Book 11 of the O.T.M. entitled "Pavement, Hazard and Delineation Markings of the O.T.M. at 11 (issued March 2000), the word "must" is defined:

> **Must** indicates a mandatory condition. Where "must" is used to describe the design or application of the device, it is mandatory that these conditions be met in order to promote uniformity where delineation complements legally enforceable regulations. ("Must" replaces the expression "shall" in previous versions of the Ontario MUTCD).

[243] Where a manual guideline cited in a civil trial is expressed by "must" or "shall", its nature as a guideline is not changed; the application of the guideline remains subject to engineering judgment as Mr. Forbes suggests. But in my view, where a road manual is one respected within the road engineering community as the O.T.M. is, and the guideline in question uses the word "must", the court should approach it in the sense that there should be some compelling reason not to follow it in the circumstances and context within which the transportation engineer is working. This approach would provide some distinction from a guideline reading "should". As Mr. Forbes stated, most road decisions contain an important element of protection for the motoring public, and I am quite aware that today's vehicles are capable of much greater speeds, manoeuvrability and potential for damage, even if a mistake is made without negligence, than the vehicles referred to in cases from the 1930s and before. I accept that manual guidelines are always subject to informed judgment in their application. I also accept that they are not intended to be used to impose civil liability. In that regard, I adopt the words of S.J. McNally J. in *Richard v. New Brunswick*, 2008 NBQB 221, [2008] N.B.J. No. 250 at para 35, aff'd 2009 NBCA 40, 345 N.B.R. (2d) 209:

> Irrespective of their stated intention, it is clear that any assessment of the professional standards involved in the geometric design of roadways and their signage will necessarily involve consideration of these guidelines, particularly in cases where civil liability is the issue.

**(c) Findings on the Road Repair Issue**

[244] The defendants submit that the test for whether a condition of non-repair exists is not whether the road could have been made safer, or whether an accident occurred on the roadway in question. It is not sufficient to suggest that failure to follow a guideline in a respected road manual amounts to non-repair. Furthermore, the defence submits that there is no obligation on road authorities to erect warning signage unless a possible hazard exists which is not signalled to drivers using ordinary care by the road alignment or other circumstances visible to them. I prefer the language of Lauwers J. in *Greenhalgh* and Sirois J. in *Galbiati* as being more consonant with the *Municipal Act* duty and

standard of care, i.e. that the focus of the inquiry under the *Municipal Act* is whether a danger or hazard existed of which notice to drivers should reasonably be required.

[245] Where the municipality, as the road authority, does not erect signage, this municipal decision not to do so should not be lightly second-guessed: *Greenhalgh, supra*, at para 67. In *Greenhalgh*, Lauwers J. refers to "a decision" by the municipality not to erect a sign. I am not dealing with that case. In this case, Scugog did not make a municipal decision regarding signage, and Oshawa simply did not carry out the road assessment that it committed to do and on which Scugog was depending regarding pavement marking and signage requirements as part of the rehabilitation project. As well, in this case, Oshawa had studied the issue of marking through rural roads, and in fact decided to mark all rural through roads with a centre line. Again, Oshawa failed to tell Scugog of its 1999 study recommendation or of its decision to centre-line rural roads like Coates Rd. West.

[246] The defendants submit that if there had been a safety issue on Coates Rd. West, the consultants Totten Sims Hubicki would have raised this issue in doing the roads needs reports of 1999 and 2004. I see no basis for drawing that inference. No one from Totten Sims Hubicki testified, and therefore no reason has been given for their failure to provide the appraisals of the township roads to Mr. Postill or to the municipal council in their report. Only during this litigation did Mr. Postill become aware of those appraisal sheets. The only appraisal sheet available now for Coates Rd. was done in 2004 before the subject crash, and it records that there are hills on Coates Rd. that have a deficiency in sight distance. The seriousness of the deficiency from the standard of 150 metres in the OTM is not at all apparent, and no mention was made of the horizontal deflection at the crest of the hill and how those deficiencies plus the narrow road and deficient shoulders would be expected to impact drivers, particularly at night. I do not accept that anything other than structural deficiency was the focus of the consultants, certainly not the kind of safety assessment of potential hazards that Mr. O'Neill, Mr. Forbes and Mr. Pinder felt was necessary as part of the road rehabilitation of this previously unmarked, unlit and unsigned local road in functional transition.

[247] The defendants further submit that neither Mr. Pinder nor Mr. Brownlee considered that the shoulder and road surface of Coates Rd. was not unreasonably narrow according to the *3R/4R Guide for Cost Effective Geometric Improvements*. I have reviewed this guide and heard Mr. Forbes' evidence regarding its purpose. The 3R/4R manual, published by TAC, is intended for use in identifying road projects for rehabilitation or reconstruction, having regard to cost savings where realistically possible. In this case, Scugog council had accepted, as did Oshawa council, that Coates Rd. needed rehabilitation because of its notoriety for potholes, according to Mr. Postill, and because the roads needs study of 1999 recommended it. Because this road had not been assessed since the last construction work in 1992, and because of the expected increase in traffic volume and speed after re-surfacing of such a road - and by 2003 it was one of only five roads in Scugog with over 1000 vehicles per day usage - Mr. O'Neill and Mr. Postill agreed, as did Mr. Pinder as a former municipal road engineer, that an assessment of the need for markings and signage was a necessary component of the 2003-2004 road project. Mr. Forbes accepted that an assessment of potential hazardous conditions should have been part of the project and that the future transfer of maintenance responsibilities was no reason to default in doing it. There was no need to consult the 3R/4R Guide in this case because the balancing of road, type of work required, and cost of rehabilitation versus

reconstruction was already identified and decided in favour of rehabilitation. This is a case of failure to do the necessary assessment when the one opportunity the municipalities had to do so in 2003 passed without inquiry or more than mild concern by Mr. Postill. It is not a case of how to identify whether the road required rehabilitation or reconstruction, and so the 3R4R Guide has little relevance to this case.

[248] I have considered all of the evidence and submissions bearing on the condition of Coates Rd. West at the accident hill and the following represent my findings.

[249] There is no doubt that Scugog had a duty to keep Coates Rd. West in reasonable repair under section 44 of the *Municipal Act, 2001*, and was acting as if it was under such a duty that was in effect in law. In view of my conclusion that the 1976 boundary road agreement was no longer in effect, both municipalities having jurisdiction over Coates Rd. West had a corollary duty to maintain it in reasonable repair. Even if I am wrong in so finding, there is no doubt that the rehabilitation project on Coates Rd. West was a joint project by both municipalities, which resulted in the improved road being opened without any markings or signage, and without any assessment or even thought for whether a hazard may exist at night or day on the accident hill, the one with the most obvious and serious deficiency in available sight distance and stopping sight distance.

[250] In approaching the duty of reasonable repair under section 44, prior cases are helpful as to the approach and principles referenced, particularly those from the appellate courts. They indicate that the issue about whether the road segment in question was in a state of non-repair or not is an issue of fact to be determined on all the relevant evidence in the particular case. Prior cases rarely have a sufficient similarity in fact to be useful, and even where they have similar facts, the trier of fact must still face the issue on the evidence in the particular case, bearing in mind that it is for the plaintiff to prove that the defendants failed in their statutory duty on a balance of probabilities. Again, the standard of care that a municipality must meet in fulfilling its duty to keep the road in a state of proper repair is one of reasonableness for use by the motoring public, assuming that those users of the road do so exercising ordinary care, and taking into account the circumstances including the road character and location: see section 44(1), *Municipal Act, 2001*; *Partridge*, *supra* at 558-59, quoted with approval in *Housen*, *supra* (S.C.C.) at para. 38; cited in *Johnson, supra*, at para 35; also see *Jennings, supra*, at 537. The duty of road authorities is to maintain their road systems in such condition that ordinary users of the roads and highway, exercising ordinary care, are protected from unreasonable risk of harm. *Gould*, supra; *Thornhill*, supra; and *Frank*, supra.

[251] In my view, the hill where the crash occurred in this case was, in August 2004, the scene of an accident waiting to happen, for the following four reasons. First, the accident hill represented a virtually unique source of danger to ordinary drivers, particularly at night, due to its combination of features likely to create an emergency situation with little or no preview time for westbound drivers to deal safely with it. I accept Mr. Pinder's assessment of the accident hill. Unlike the prior hill, where a westbound driver can see the approach of headlights well before the eastbound vehicle reaches the crest, the accident hill provides little or no preview of an approaching vehicle. Dr. Smiley's videotaped test illustrates this fact dramatically because it shows a car approaching the prior hill from the east, and its headlights noticeably announce its approach several seconds before it appears. The contrast with the accident hill is striking. Second, the

deflection of the road to the north is simply not at all noticeable at night; Dr. Smiley attested to this fact, as did Shannon and Erica Deering. Dr. Smiley also attested to the corresponding fact that the road is straight prior to the accident hill. The deflection extends from 22 metres west of the crest, and continues over the crest and down 88 metres east of the crest – meaning that when a westbound vehicle is about 2/3 of the way up this 190-metre upgrade, the driver will be struck momentarily by bright headlights that appear to be coming straight at that driver virtually without any preview time due to the short sight-distance and steepness of the hill. Third, the speed limit was left at the statutory limit of 80 km./hr., without thought for a reduced speed advisory or reduced speed limit. Fourth, the road comes within Dr. Smiley's opinion of a narrow road with narrow shoulders on which a driver would try to stay away from the road's edge and drive towards the centre, but the actual centre is unmarked. The ordinary driver would simply not have the minimum preview time of 2 seconds at the speed limit, or even at 70 km./hr. Say the westbound driver is proceeding at 19.44 metres per second (a speed of 70 km./hr.) at about 2/3 up the hill (i.e. about 70 metres from the crest) where the deflection directs the other vehicle's lights at the westbound driver, and the eastbound vehicle is proceeding, say, at 70 km./hr., which is the speed of Dr. Smiley's vehicle in her first test. Together, they are approaching each other at almost 39 metres per second, and will collide or pass within 1.8 seconds, allowing under 2 seconds of preview of an approaching vehicle's headlights initially pointed at the westbound driver. Therefore, due to the hill's configuration and sight shortcomings for drivers at night, the safe range of speed at which to approach this hill would be 50 to 60 km./hr., and not 80 km./hr.

[252] In addition to the above scenario for the ordinary westbound driver, the westbound driver's attention would be focused on the stress-induced source – i.e. on the contra flow headlights – not on the shoulder-pavement contrast: see Dr. Smiley's evidence in the section of these reasons entitled Human Factors: The Ordinary Driver. A similar point regarding the focus of a driver's attention was made by Justice Sirois in *Galbiati*, *supra*, another night-time driving case, not involving a stress-induced situation but instead one where, due to the lights ahead, a driver unfamiliar with the area focussed on the lights of a street ahead and ran out of road into a garbage dump where no sign was in place to indicate that the road ended. I find that a similar emergency situation and loss of control would likely await an ordinary driver, including one inexperienced and unfamiliar (as a driver) with the road but paying attention, who would drive on Coates Rd. West at a speed 5 to 15 km./hr. **under** the limit due to the hills, the unlit road, and no centre line marking.

[253] I accept the evidence of Shannon Deering, borne out by Erica Deering's testimony, that Shannon perceived the approaching vehicle as coming straight at her. I find that that perception was caused by the deflection one lane in width over the crest of the accident hill and unseen especially at night. With slightly under two seconds preview time when the eastbound vehicle crested the hill, I accept Dr. Smiley's opinion that this would be not just a startling experience, but also a terrifying one for an ordinary driver. Putting this in a more appropriate context than the absolute minimum preview time, the study on which Dr. Smiley touched on most as one of the recent studies questioning prior "human factors" assumptions (i.e. the Rosey study of the effect of various markings or traffic control devices on lateral position on the road) used five seconds of preview time for safe

travel. This hill afforded only about one-third of that time to the ordinary driver ascending the accident hill.

[254] Of course, I understand that it was not Dr. Smiley's own experience that her attention was drawn away from using the shoulder/pavement contrast to track the road. She admitted that she was not subject to the stress-induced focus on the approaching vehicle's headlights and away from the shoulder; she knew perfectly well that her associate was not going to collide with her. As such, she focussed on the shoulder line knowing no collision would occur. The videotape illustrated to me vividly how an ordinary westbound driver, perhaps from inexperience and unfamiliarity with the road, while exercising due care, could mistake what was happening in those 1 to 2 seconds when the approaching vehicle crested the hill, and think that those headlights were going to continue right into her vehicle. As Dr. Smiley conceded, if that were the case, the westbound driver would be expected to steer away from the danger, as Shannon Deering did initially.

[255] I find that at the accident hill, Coates Rd. West was not just another country road as the defendants allege. I accept that this hill is remarkable, as Mr. Pinder stated, and similar to only two other vertical curve configurations that he has seen in Ontario over his many years of road experience. I accept Mr. Pinder's conclusion in that regard, which was never shaken, that the configuration of the accident hill is severely deficient in available sight distance and stopping distance to which is joined a slight curve or deflection in direction at the crest not noticeable and not expected by an ordinary driver on this otherwise relatively straight road, and particularly hidden from view in night-time conditions. The deflection provides the sudden illusion to the westbound driver about 2/3 to 3/4 of the way up the hill (i.e. some 50 to 70 metres from the crest) that the approaching eastbound vehicle's path, as it suddenly appears over the crest, overlaps that of the former.

[256] I find that there was a danger to motorists exercising due care as they drove the accident hill on Coates Rd. West at night in August 2004, not merely a possibility of a hazard as Bastarache J. termed it in *Housen*. Neither a public notice nor a sign signalled that dangerous condition, and there was not even a centre line to assist the ordinary driver where he or she would be most likely to be driving on this two-way road close to the centre, according to Dr. Smiley. In this, Coates Rd. West was alone among all through local roads in Oshawa, for a reason which Mr. Forbes, the transportation expert called by the defendants, saw as invalid. This condition - on an unlit road, allegedly inspected regularly, which the 2003 count indicated was being used more and more as a through route by drivers unfamiliar with it, where inexpensive alternatives in the form of speed reduction and centre and edge line marking on the approaches to the hill were available before the road was opened to traffic after the road project in both the fall of 2003 and after July 20, 2004 - falls below the standard of reasonable care. Accordingly, I find that Coates Rd. West at the accident hill was in a condition of non-repair for which both municipalities were responsible.

[257] In addition, I accept Mr. Pinder's opinion as an experienced municipal engineer that as part of the road project in 2003-2004, good engineering practice required that an assessment should have been carried out, in 2003 or before, of safety issues and any remedial measures that may be required, costed and installed in conjunction with the road

project. Mr. Forbes also agreed that, as part of this road project, good engineering practice required that an assessment of potential hazardous conditions should have been done. In Mr. Pinder's opinion, a centre line and edge lines should have been installed. I infer from these answers that, had the assessment been done by a qualified road engineer, as it should have been, the centre line would have been reasonably expected to be recommended and installed in conjunction with the road project. In Mr. Forbes case, I understand his opinion is that there was no urgency, as Coates Rd. was "acceptably safe" and installation would be subject to the timing and priorities of the municipalities. It was the timing of the installation of the centre line which he saw as the main issue, not the centre line installation itself which he agreed should have been done at some time.

[258] The problem with Mr. Forbes' conclusion for me is that the safety assessment he saw as necessary was never done for reasons that are clear from the above summary of evidence. Oshawa had undertaken to do it as part of, and contemporaneous with, the pre-work planning for this rehabilitation project regarding any guidewire, signage and pavement marking that may be required. That job was assigned to Mr. Kelly by Mr. Bellamy, his superior, who was well aware of his own study in 1999 of the sight-deficient hills and no warnings or pavement markings on Coates Rd. West, and who had to also be aware of Oshawa's finding in 1999 that through rural roads like Coates Rd. should be centre-lined. It is a reasonable inference that, for these reasons, Mr. Bellamy saw the road project as the time when all deficiencies would be addressed as part of that road project. I have rejected as nonsensical Mr. Kelly's supposed explanations for doing nothing. The message to him from Mr. Bellamy was quite clear, and if there was any issue as to its status, no doubt the defendants would have called on Mr. Bellamy to explain it, but the defendants did not do so. This was part of the plan which Mr. O'Neill had proposed to Scugog, and which Mr. Postill had accepted, and that plan included, as Mr. Forbes and Mr. Pinder stated it should have, a limited safety assessment to ascertain undue hazards and what low-cost measures may be required as part of the project. This project was the only time since 1992 that any real assessment was to be done regarding the safety of motorists using this road. I agree and accept Mr. Pinder's opinion that such assessments are, and should be, part of any road rehabilitation or reconstruction projects of previously unmarked and unposted roads.

[259] In Oshawa's case, the 1999 study of through rural roads had been done, and but for Coates Rd. West being maintained by Scugog, Oshawa would have centre-lined it too then. I accept the effect of Mr. Forbes' view in this regard that Oshawa failed in its duty as one of the municipalities with jurisdiction over this road in not causing a centre line to be painted in 2000 merely because it was a boundary road. In Mr. Forbes' opinion, which I accept, negotiating a new boundary road agreement was not a valid reason for not carrying out the recommendation of the Oshawa study and council's decision.

[260] Regarding the failure to signal the need for special caution at the accident hill by reducing speed, Dr. Smiley said that because of the lack of preview time afforded the westbound driver of an approaching vehicle, especially at night, she was "uncomfortable" with the speed limit at 80 km./hr. She agreed with Mr. Orlando that a speed of 50 km./hr. would have provided ample preview time in order to compensate for the sight-distance deficiency, the narrow road and shoulders, and the unexpected deflection near the hill's crest.

[261] Because she, as well as the transportation engineers and Mr. Postill in part, agreed, and Mr. O'Neill actually observed in the fall of 2003, after the re-surface work was finished, it was to be expected that the re-surfacing of a formerly very bumpy road would bring with it higher traffic volumes and faster speeds. Scott Agnew, the owner of 1360 Coates Rd. West, observed this to be the case. This is not an expectation unknown to road designers and transportation engineers and road managers (like Mr. Postill). Yet, despite this observation by Mr. O'Neill and common knowledge in the road industry that the likely result of the road project would bring higher traffic volumes and more speed, no one took note of it, other than the operations manager Mr. O'Neill and the head of Oshawa transportation services. The road was re-opened in 2003 without a temporary centre line, and after the slurry seal was laid down on July 20, 2004, it was again re-opened with neither a centre line, temporary or permanent, painted on the approaches to the accident hill, nor any sign to warn of the unexpected hazardous condition on this hill directed to those ordinary drivers who increasingly were using this road and would be unfamiliar with it, including a warning sign reducing speed to 50 to 60 km./hr. at the accident hill.

[262] On the matter of speed and the evidence in this case, I must touch on one aspect of the engineering and human factors evidence which troubled me in order to prevent any misunderstanding of my reasons for judgment. Dr. Smiley indicated her opinion, as did Mr. Brownlee, that most drivers drive above the speed limit and tend to drive at a speed comfortable to them without regard for the speed limit. If I have misstated this, I apologize, but that is how I understood her and Mr. Brownlee regarding speed expectations of drivers. This evidence should not give comfort to what should be expected of a driver on a road like Coates Rd. West. In my conclusions, I do not accept that an ordinary driver, exercising reasonable care and unfamiliar with this road, would be expected to drive above the speed limit, let alone at 90 to 95 km./hr. at night. In finding that the conditions on the accident hill represent an unexpected hazard, I am assuming that an ordinary driver would be proceeding under the speed limit on this unlit road with two hills prior to this one and knowing that there is the possibility of vehicles coming in the opposite direction. But even at 70 km./hr., which means 19.44 metres per second, with two vehicles approaching each other at a combined speed of 140 km./hr. depending on the speed of the approaching driver and (due to the deflection) pointing at each other at first, there is too little time to react appropriately. Of course, at night, to a first-time driver on Coates Rd. West, that driver would not see the sight-distance deficiency or the misleading deflection in the road until it is too late.

[263] In all the circumstances, I find that the road condition on this hill on August 10, 2004 provided an unreasonable risk of harm to motorists using ordinary care, and as such, the duty to keep the road in reasonable repair was simply not met. This was a road-based condition which was particularly perilous at night. As the road was neither closed nor restricted to one direction at night, without a sign reducing the speed to 50 to 60 km./hr. and a centre line on the approaches to the accident hill, it represented an accident waiting to happen, and as such, completely unacceptable as a reasonably safe road to those unfamiliar with it. In so finding, I accept Mr. Pinder's solid and mature opinion as to the severity and uniqueness and unexpectedness of the risk to the public, and I accept Mr. Forbes' view that it was reasonable for the road authority here to have required a centre

line on the approaches and, implicitly from his own reasoning, that there was no valid reason for that safeguard not to have been provided.

[264] I do not accept Mr. Forbes' view that simply because of the low collision rate and low probability of vehicles meeting at night near the crest of the accident hill, the segment of Coates Rd. West in question was acceptably safe, for the reasons given. The small number of reported collisions is consistent with the low night-time use of this road and the low percentage chance that two vehicles would meet. He found that the chances of two vehicles moving in opposite directions on the crest of the accident hill came to .09% – meaning that 99.01% of the time, the road is either empty or two vehicles would not meet over a distance of 50 metres on either side of the crest of this hill. As Mr. Forbes admitted, many decisions of road authorities and engineers have a public interest component to them, and I refuse to condition my finding of non-repair of this road on that kind of numbers game where it is clear on the evidence that a severe crash was likely here at some time, especially after the re-surfacing project and the expected change in usage and speeds on this road. There need only be a real or substantial risk of harm, even if it were only one chance in a hundred: Linden & Feldthusen, *supra,* at 131. I find that that was so here.

**6. Have the Plaintiffs Established Causation?**

[265] The test of causation, even where there may be more than one cause for a tragic occurrence, is the 'but for' test: *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. The Supreme Court of Canada in *Resurfice* held unanimously at paras. 21-23 that:

> **21** First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.
>
> **22** This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, *per* Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant". Similarly, as I noted in *Blackwater v. Plint*, at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."
>
> **23** The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, *per* Sopinka J.

[266] There are special circumstances where the test of "material contribution" can be applied. Those circumstances involve exceptional cases where it is impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test, and therefore it would offend basic principles of justice to apply the "but for" test: *Resurfice*, *supra* at para. 25. Neither counsel for the plaintiffs nor for the defendants in this case submit that this is such a case. I agree.

[267] In this case, there is no doubt in my mind, having regard to all the evidence, that but for the non-repair of Coates Rd. West at the accident hill – the gross sight-deficiency plus narrow shoulders, marginally acceptable road width, and the deflection across the crest – as well as the negligence of Shannon Deering, this crash would not have occurred. I will deal with Ms. Deering's contribution to causation later. Shannon Deering had driven through the two prior hills without incident. I accept that she was trying to stay on the right side of centre, though in saying this, she was admitting that, like most drivers on a road like this one – unlit, narrow, and with narrow shoulders - she was driving closer to centre than to the shoulder side of the road, and may have crossed centre by a small amount, as Mr. Correia indicated she did, both before she braked and on her later leftward steer in a yaw condition. I also accept that she was over-driving her headlights and speeding on a road that required some caution, but I find that but for the failure of Scugog and Oshawa to provide remedial signing and pavement marking to alert drivers to the need for caution due to the unique combination of factors there, Ms. Deering would have had the chance, which I find she probably would have taken, to decrease her speed and correspondingly increase her preview time, despite the hazard provided by this vertical curve. I use that term advisedly because, to my mind, this is similar in loss of sight distance to the situation in *Housen*, *supra* and in *Vokes*, *supra*, where horizontal curves lacking sufficient warnings were involved.

[268] The evidence of Dr. Smiley on this issue is decisive to me. She stated that the minimum preview time for drivers to track the road by view of the shoulder line is two seconds. Coates Rd. West had an unposted limit of 80 km./hr. which does not permit that minimum time.

[269] Page 14 of Book 11 of the OTM, in an excerpt relating to centre lines at night, states:

> 2.1 Functions of Markings and Delineation
> Pavement markings and delineation devices fulfill an important guidance function for drivers, especially at night. They provide drivers with information about their lane position and which lanes are available for use. They provide drivers with a preview of upcoming changes in the roadway, including curves, lane drops, lane narrowings, intersections, crosswalks and the beginning and end of passing zones.
>
> 2.3 Delineation and Driver Requirements
> Drivers require long range guidance information about the roadway ahead, including the presence of curves or lane drops. . . According to some studies, markings and delineators should be visible for a minimum of two seconds preview time, since driver

> control of lane position begins to deteriorate below a minimum of two seconds of preview distance. . . Other studies have determined that a minimum of three seconds is required. At 50 km/hr, three seconds' preview distance would be 42 m and at 100 km/hr would be 83 m. Further studies have recommended five seconds of preview time for optimum driver comfort. It is generally recognized that surface markings typically are sufficient to provide two seconds of preview time, while longer preview times require the use of roadway pavement markers or post-mounted delineators.

[270] Mr. Forbes agreed with the need for centre lines on the approaches to this accident hill. The manual's recommendation was an advisory one, but Mr. Forbes could see no valid reason for not meeting the standard in the OTM, one of the manuals to which he had contributed and had approval authority over its content. While he felt that this hill remained "acceptably safe" in August 2004 despite his position on the centre line issue, his reasoning was affected by his risk analysis where he had given the low collision rate on Coates Rd. substantial weight and insufficiently high importance to the probable severity of a crash or collision on this unmarked road. In my view, his reasoning on risk analysis is flawed by failure to appreciate, as Mr. Pinder understood, the significance of the 2003 traffic count by Oshawa and its proportionately large increase from prior counts and estimates in the roads needs studies, meaning the probability of use in 2003 by drivers unfamiliar with the road. Mr. Forbes also did not account for Oshawa's failure to do the safety assessment contemporaneous with the road project as its officials undertook to Scugog to do, in relation to the Book 7, OTM guideline on road marking/signage appropriateness. Finally, his reasoning does not consider the analysis in *Housen*, para. 67. Though this portion of *Housen* relates directly to an issue I have not yet addressed and will, that of the knowledge of the municipality under section 44(3), it also provides a cautionary position to all transportation engineers engaged in road risk assessments. Iacobucci and Major JJ. wrote the following in *Housen*, *supra*:

> 67 As well, although the circumstances of the prior accidents in this case do not provide strong evidence that the municipality ought to have known of the hazard, proof of prior accidents is not a necessary condition to a finding of breach of the duty of care under s. 192 of The Rural Municipality Act, 1989. If this were so, the first victim of an accident on a negligently maintained road would not be able to recover, whereas subsequent victims in identical circumstances would. . . [I]t is not sufficient for the municipality to wait for an accident to occur before remedying the disrepair, and, in the absence of proof by the plaintiff of prior accidents, claim that it could not have known of the hazard. If this were the case, not only would the first victim of an accident suffer a disproportionate evidentiary burden, but municipalities would also be encouraged not to collect information pertaining to accidents on its roads...

[271] Dr. Smiley's evidence bears heavily on causation. She was asked by Mr. Oatley, assuming Shannon Deering was trying to stay to the right of the unmarked centre on what

Dr. Smiley regarded as a narrow road with narrow shoulders, whether a centre line would have prevented this crash. Dr. Smiley answered yes. She also, as I mentioned earlier, agreed with Mr. Orlando that if the posted speed had been reduced to 50 km./hr., it would have provided adequate preview time. While drivers tend to drive over speed limits, particularly on smooth pavement, as she pointed out, the reduced speed would have provided a safe margin for error – even if the westbound vehicle was proceeding at 60 km./hr. – by extending the preview time, and together with reflective centre lines to the approaches to the accident hill, the ordinary driver unfamiliar with the road would then know that reduced speed and special attention to lateral position to the right of the marked centre on this narrow and unlit road was required at this hill.

[272] I find on a balance of probabilities that, but for the non-repair of Coates Rd. West on the accident hill on August 10, 2004, this crash would likely not have occurred. I do not for a moment wish to imply here that the negligence of Shannon Deering did not also play a significant part in causing this crash. I will come to her conduct shortly. However, I do not find her conduct to be the sole cause. The defendants argue that, statistically, young persons cause a disproportionate number of accidents, particularly due to excessive speed and inattention to driving. This fact is tragically true. However, I am dealing with this one case now, not a statistical or moral discussion, and statistics are no answer to evidence that points to more than one cause of this crash.

[273] The defendants argue that but for the sole negligence of Shannon Deering, this accident would not have occurred. They submit that she was speeding, that she drove carelessly and without due attention, that she failed to keep to the right of centre, that she was inexperienced as a driver, and that her negligence was the sole cause. In my view, but for the conditions at the crest of this hill of which there was no warning to reduce speed and no guidance to drivers unfamiliar with it by means of a centre line, Shannon Deering would have been warned by signage of the need for reduced speed and guided by a centre line marking to decrease speed to 50 km./hr.; even at 60 km./hr., she would have had the preview time to negotiate the accident hill despite the subtle directional change causing oncoming headlights to point - and the vehicle to appear to be heading - right at the westbound driver. Suffice to say that there is no evidence, other than Mr. Correia's opinion based on no physical evidence on the road, that Shannon was across the centre prior to her braking and loss of control by over-steering right.

## 7. The Municipal Defences

### (a) Whether the Municipalities had Actual or Constructive Knowledge of the Non-Repair Condition – s. 44 (3)(a)

[274] We now come to the possible defences open to the defendants. These defences are only of benefit to the defendants if they can prove, on a balance of probabilities, that they apply from the evidence in this case.

[275] The defendants submit that they neither knew nor should they reasonably have known of the condition of non-repair at the accident hill on Coates Rd. They rely on:

- low collision rate;

- a hill like many sight-distance limited hills in Ontario;
- visible shoulders and newly rebuilt road surface;
- no report of hazard by the weekly road patrols;
- no hazard flagged to Scugog council by Totten Simms Hubicki's people who did the 1999 and the 2004 roads needs studies;
- low volume road with very low volume night usage; and
- no potential hazards identified by using the 3R4R manual (TAC) for a vertical alignment (or hill) are present, except for its "limited" available sight distance.

[276] In summary, the defendants' counsel, Mr. Boggs, argued forcefully that "there is nothing about the history of this road, its operation, or its layout that should have triggered in either municipality a concern about its safety for reasonable users before this accident", and the fact of the crash having occurred cannot by itself form the foundation for a finding against the municipalities.

[277] The plaintiffs countered this submission by basically attacking the defendants' position as a mischaracterization of the roads needs studies, and an over-simplification of the several factors to be considered in determining road safety by reducing them to two – i) collision history, and ii) just another hill of many of the thousands of kilometres of roads in Ontario – while ignoring the uniquely hazardous combination of factors on the accident hill.

[278] In my view, the following factors – Oshawa's knowledge of the rural road complaints of "blind hills" and of the difficulties in the northern rural area of the city; its own decision to centre-line all through rural roads in 2000; its knowledge of the change to the usage of Coates Rd. reasonably expected to occur, and which was later observed in 2003 to have occurred, by reason of the joint road project in 2003; and its abject failure to communicate relevant information to Scugog (as a co-authority responsible for this road), coupled with Scugog's failure to insist on Oshawa living up to its commitment to the joint road project before the road was re-opened; and the resultant opening of a rehabilitated road lacking any safety assessment and therefore any possibility of complying with the OTM's direction to put in place appropriate pavement markings, as well as signage reducing speed – all supported by the evidence, defeat the defendants' claims. Both municipalities either knew, or should reasonably have known, of the dangerous condition on the hills portion of Coates Rd. West, the most dangerous being the accident hill, observably the highest and most affected by the serious shortage of stopping and available sight distance.

[279] In addition to their knowledge of the condition on the accident hill, the failure of the municipalities, in this case, to look at relatively inexpensive devices to alert drivers to the special hidden nature of the hazard on the accident hill particularly at night – given the evidence I have referred to by Mr. O'Neill, Mr. Postill, and Mr. Kelly, and the aborted assessment of safety device needs directed by the transportation director of Oshawa in

2003 – amounts, in my view, to wilful blindness on their part." Wilful blindness" is defined as a deliberate failure to inquire where a duty to do so is shown because the party does not want to know the truth. Knowledge may be inferred in cases of wilful blindness. The following – the decision of Mr. Postill and Mr. O'Neill to proceed on the basis that Oshawa would do a safety assessment of the need for traffic devices as part of its contribution to the project; Mr. Bellamy's direction to Mr. Kelly to determine all deficiencies in conjunction with the rehabilitation project on a road he knew from his 1999 study had sight-deficient hills and no pavement markings or signage; the failure of Oshawa transportation and Mr. Kelly to determine said deficiencies; and Mr. Postill's virtual acceptance of this abdication despite his admission that that assessment "perhaps" was important to the road project and safety of the public – indicates to me an intention not to inquire and not to know. How could these municipalities possibly carry out the duty they had to the public not to re-open this road at the end of the project until appropriate signage and markings were in place to guide reasonable drivers unfamiliar with the road – now that it was re-surfaced for up to 80 km./hr. usage – without the assessment Oshawa officials agreed would be done in late 2002 and early 2003? I accept Mr. Pinder's opinion as to the need and the probable findings of this never-done assessment (provided it would have been assigned to a competent and knowledgeable road engineer) with respect to the accident hill.

[280] Even more to the point, in 1998 and 1999, Oshawa had the first opportunity to look at Coates Rd. in the context of concerns expressed by the public of "blind hills" and other visibility difficulties on the rural roads caused by lack of line markings, at least on the approaches to sight-distance-challenged hills. Its transportation department did two reports. I understand, to an extent, Mr. Boggs' impatience about this point because the two citizens' petitions did not mention Coates Rd. specifically. However, his concern is not well placed in this case because, first, the citizens' 1998 petition, the only one we have, was from persons resident primarily in the Howden Rd. area, and therefore they mentioned Howden Rd. and one other nearby road specifically as part of their generalized request to centre line rural roads in Oshawa. Their petition actually took in all of the rural through roads in Oshawa; that is, as I understand it, rural roads which lead to higher-classified roads with collector and arterial functions of delivering higher speed higher volume traffic to the urban areas. Second, the final report by Oshawa's transportation services branch looked at all of those rural roads, including Howden Rd. and Coates Rd. That study by Oshawa's own professionals in the traffic field made the following findings:

- centre lines can be an aid to motorists in keeping their vehicles on the right side of centre when visibility is poor, especially for those not familiar with the roads;

- weather conditions like fog or blowing snow limit visibility, and the rural area has a higher frequency of these conditions than in the southern area of Oshawa;

- most single-vehicle accidents go unreported on these rural roads and so it is not possible to relate accident patterns to these conditions – the residents' familiarity with the area is recognized;

- all continuous through roads in the rural area of Oshawa are to be centreline-painted, excluding only short dead-end sections of road serving only the abutting properties. This is to be accomplished in 3 stages, the first having already been done and the last two in 1999 and 2000;

- repainting is to occur every second year, not every year;

- the additional cost is to be absorbed in the department's operating budget, and if not, it will be an over-expenditure.

[281] All the rural through roads in Oshawa were provided with centre lines. Only Coates Rd. West was excluded, because, as Mr. Kelly accepted, it had not been transferred then to Oshawa's maintenance responsibility under a new boundary road agreement.

[282] Then, in 2003, the Oshawa transportation services department caused the traffic count of Coates Rd. West to be done. This count showed an increase in traffic usage of four times the previous count. To any traffic engineer, this increase meant more through traffic and more traffic by motorists unfamiliar with the unlit road, the seriously deficient sight distance on the accident hill, the narrow shoulders and marginally narrow road, and the deflection across the crest a full lane in width not perceptible at night.

[283] Finally, in 2003 and early 2004, Oshawa and Scugog had the third opportunity to assess this road and to deal with appropriate pavement markings and speed signage. Oshawa simply did not do the assessment, when it was obvious to any reasonable observer that Scugog was relying on Oshawa to do it and thus to know the appropriate markings and signage to put in place when the project ended. In the fall of 2003, Mr. O'Neill told the Oshawa transportation services officials of higher volumes and higher speeds on the re-surfaced Coates Rd. West. As knowledgeable transportation officials, they are taken to know what Mr. Brownlee, Mr. Pinder and Mr. Forbes knew to expect – higher speed and greater volume, meaning more use by those unfamiliar with the road rather than adjacent landowners using it daily or weekly. Oshawa failed to pass on the traffic count information to Scugog, which was therefore deprived of the opportunity to have its own engineers assess the count and the nature of the road itself. Coates Rd. West remained totally unmarked and unlit, with an unexamined speed limit, and with no speed reduction warnings. Mr Forbes testified that the reason for the failure of Oshawa to remit information pertaining to this boundary road to the maintaining municipality, Scugog, in 1999-2000 and again in 2003, and Oshawa's failure to carry out the safety assessment it had been committed to doing, are unacceptable. In my view, they represent a failure to act or to share relevant information affecting a boundary road over which both have jurisdiction and thus both have a duty of care to ordinary drivers on this road. Scugog was a party to the re-opening of the road without any safety assessment, and without appropriate warnings to the motoring public regarding the hazardous condition on the accident hill.

[284] I find both municipal defendants have failed to meet the defence under section 44(3)(a) of the *Municipal Act, 2001*. They knew of, or remained blind to, the condition of non-repair on Coates Road West; they refused to use their best efforts to remedy it; and in particular,

they failed to do what was appropriate in signage and pavement markings before re-opening the road to traffic in the fall of 2003 and in July of 2004.

**(b) Whether the Defendants Took Reasonable Steps to Prevent the Default From Arising – s. 44(3)(b)**

[285] The defendants submit that, due to the low collision rate and the re-surfacing on Coates Rd. West, it was reasonable for the municipalities to deal with any issue of pavement marking or signage in due course, whenever municipal forces would be available to do the work. For centre-lining, this would include the availability of the Region's forces. No urgency was required.

[286] The defendants rely on the evidence of Mr. Maddeaux, Oshawa's transportation field officer, Bruce Watson, Durham Region's signs and marking supervisor, and Peter Linton, manager of surface treatment for Miller Paving ("Miller") in 2003.

[287] Mr. Linton's evidence was basically that Coates Rd. West was a common country road in Ontario without pavement markings. Miller did not do centre-lining for Durham municipalities in the normal course of events; the Region usually did it for local municipalities. He said if Miller had been contracted to centre-line Coates Rd. West, he would have put down a temporary marking within a day or two or a week in 2003, and if the 2004 slurry seal obliterated a centre line, if contracted to do it, Miller could have centre-lined it sooner than that. When I asked Mr. Linton if all this meant was that if Miller were contracted to put down pavement markings, it would have done it when and as required, he said yes.

[288] Neither Miller nor the Region was ever asked or contracted to do any line painting on Coates Rd. West, despite the following: Oshawa's knowledge through its traffic count in 2003, after the re-surfacing, that more through traffic was using Coates Rd. West; that Oshawa transportation engineers should reasonably have known (as Mr. Pinder and Mr. Forbes stated was common knowledge to such persons) that a resurfaced road, previously badly pot-holed, would result in higher traffic usage and speed; that Oshawa had seen the need to centre-line all through rural roads five years before; and, through its public works people post-project, such as Peter O'Neill, that traffic speed and volume did increase. In fact, as I have found, the person who was assigned to do a safety assessment of Coates Rd. West contemporaneous with the 2003-2004 road project, Mr. Kelly, did nothing because of the anticipated new boundary road agreement. In so finding, I have accepted the evidence of Mr. Forbes and Mr. Pinder in that regard that the boundary road negotiation was no valid reason to delay such an assessment.

[289] According to the meteorological conditions and the evidence of Ms Grundy, Mr. Maddeaux and Mr. Watson, once the slurry seal was put down by July 20, 2004, due to a number of factors including vacations, the need for a set number of personnel and equipment, and the existing painting schedule, Coates Rd. West would not have been centre-lined by August 10 in the ordinary course. That may be true, to a point. But as all the circumstances point to, Coates Rd. West was to have been lined in 2000 and was not. It was to have been assessed for necessary pavement and signage in 2002 and 2003 during the joint road project and was not. I find that an engineering assessment then would reasonably have shown the need for a centre line on the approaches to the accident

hill, recommended without hesitation by Mr. Forbes and by Mr. Pinder, as well as shown the need for a posted speed reduction, in view of the deficient preview time and its effect testified to by Dr. Smiley. There was a reasonable expectation that following construction more traffic at higher speeds would be passing over a seriously sightline-deficient hill with a lane-width deflection across its crest.

[290] I find that Scugog relied on Oshawa to do the promised safety assessment as part of the joint road project, and Oshawa did nothing to ensure that the road was not re-opened to the public without the safety/traffic control device assessment and necessary installations that should reasonably have flowed from it being put in place. When the determination was made to centre-line Coates Rd. West after this crash, it was done by the Region within only one day, according to Mr. Watson's diary entry and the work order one day later on November 9, 2004 (Ex. 1, Jt. Doc. Br.(4), T.76 and 78). In sum, I find that this defence cannot be made out by these municipalities. It is not an issue of reasonable steps; they took no steps to remedy the condition of non-repair. On the evidence, there is, in my view, no evidential base for a defence under section 44(3)(b).

**8. Contributory Negligence - Shannon Deering**

[291] Shannon Deering had never driven on Coates Road West before August 10, 2004. Her ride through it as a passenger the day before had given her only a vague idea of the road conditions. Despite this lack of knowledge and experience of the road, she was paying no attention to her speedometer as she drove on August 10, 2004. She thought she was going about 70 to 80 km./hr. leading to the crest of the accident hill. We now know she was proceeding at 90 km./hr. at least on the ascent, and I have little doubt, as I have found, that her speed down the prior hills was more than that. She was proceeding at the rate of 25 metres per second, meaning that as she came to the point she spoke of, two-thirds or three quarters up the accident hill – an ascent of 190 metres from the prior valley, according to the survey entered in evidence – she would have no vision beyond 50 to 70 metres ahead because that is where the crest was.

[292] I have no reason to find that she was across centre at this point, and there is no physical evidence to place her vehicle across centre at this point. She testified that she was consciously trying to stay on the right side, which is consistent with a driver on a narrow-shoulder, narrow road driving close to the centre. She knew, or she should have known, that this was a two-lane road and that other approaching traffic was a good possibility; yet I heard not one word from her indicating the obvious need for caution as she neared the crest when one should anticipate the approach of contra flow traffic, small though it was in volume on this road at night. Though of course I understand that no one is measuring preview time as one drives, one has a sense as a driver of speed and the time it is going to take to reach the crest where another vehicle could be approaching. At her speed and position on the hill, Shannon was close to the absolute minimum preview time in which to perceive an approaching vehicle and to react when the contra flow vehicle appeared. And when you factor in another vehicle's speed at, say, the speed limit, one is talking about slightly more than only a second. On a dark narrow road with hills limiting one's vision and no lighting other than one's headlights, which Shannon was over-driving, there is no doubt in my mind that her speed was a significant cause of this crash.

[293] I conclude that Shannon Deering was conscious of time being tight, and that Amanda Davey was also conscious of time being tight because she gave Shannon the idea to take Coates Rd. West to avoid the time waste of stops at traffic lights. I find that Shannon was driving at an unreasonable rate of speed, without due regard for her safety or that of the others in her vehicle, as well as other motorists to be expected on a two-way rural road. Her speed gave her very little time to perceive correctly, and react, to another vehicle coming over that hill, without the risk of over-steering and loss of control. It is one thing to submit to me, as the plaintiffs have, that drivers are known to exceed the speed limit by 10 to 20 km./hr. commonly – but in this case, we are not talking of an arterial road with wider lanes, lane markings, street lights or a divided highway; this was a road she did not know, unlit, of marginal width and with undivided two-way lanes. I find that the speed of 90 km./hr. approaching the crest of a hill, in those circumstances, falls well below the actions of a driver driving with due care.

**9. The Unidentified Motor Vehicle-Proof of Negligence**

[294] Both Shannon and Erica Deering testified that when they saw the eastbound vehicle's headlight loom and sudden appearance over the crest, it appeared to be coming right at them. Shannon said she thought it was on her side of the road, and so she swerved to the right. As the animation photograph and the projected south limit of Coates Rd. West show (Ex. 2, tabs 3 and 11), there is a deflection or horizontal shift over the crest of about one lane in width which would provide a perception to the westbound driver, travelling at 80 or 90 km./hr., of the paths of the eastbound and westbound driver overlapping.

[295] Mr. Correia rightly pointed out that there are no tire striation marks on the road indicating that the eastbound driver had to make a sudden turn to stay on his or her side of the road. Coupled with the fact that no impact or even sideswipe occurred as the two vehicles passed near the hill's crest, there is no evidence that the eastbound vehicle was ever anywhere but on its own side of the road. There is no evidence indicating excessive speed or any action by it which contributed to this tragic crash occurring, other than the fact that that vehicle was proceeding eastbound on Coates Rd. West with its headlights on in its proper lane, as its driver had a right to do. I find that no negligence is proven to the civil standard of proof on the unidentified driver. I find on the evidence before me that the eastbound vehicle's speed was probably close to the limit, about 70 – 75 km./hr. The causes of this crash were (i) the emergency situation created by the combination of road factors that I have found existed at the crest of the accident hill amounting to a trap for the unwary at night, (ii) the lack of any line marking or posted warning to reduce speed, and (iii) the excessive speed of Shannon Deering's vehicle that left her unable to maintain control of her vehicle.

**10. Apportionment of Liability: *The Negligence Act***

[296] Sections 1 and 3 of *The Negligence Act,* R.S.O. 1990, c.N.1, deal with the situation where more than one party has been found at fault for the damages claimed, and the parties at fault include one of the plaintiffs, Shannon Deering.

> 1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and,

> where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent. R.S.O. 1990, c. N.1, s. 1.
>
> 3. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively. R.S.O. 1990, c. N.1, s. 3.

[297] I have found that the negligence of both municipalities and Shannon Deering caused the crash and the injuries and loss attributable to this crash. In my view, the greater degree of fault lies with the defendants and I find them responsible to the extent of two-thirds. Shannon Deering's negligence was a causal factor to the extent of one-third. In my view, the serious deficiency in sight distance, together with the narrow shoulder, no speed-reduction warning, and lack of any centre line to guide a driver at night through the slight but nevertheless deceiving and misleading horizontal deflection, created a situation where a serious accident was going to occur here. It was only a matter of time until August 10, 2004.

[298] I agree with and accept Mr. Pinder's evidence, corroborated by that of Mr. Brownlee and to a large extent by Mr. Forbes and Dr. Smiley, that the condition on the accident hill was a hidden danger requiring remedial action by way of line markings and speed reduction warnings. Absent such control devices, the foreseeable meeting of two vehicles travelling at speed was going to happen, and then, the potential likely severity of the result should reasonably have outweighed the low probability of its happening. The risk of harm was going to become reality at some time. Mr. Forbes calculated less than a .09% chance that two vehicles would meet on this road, but at the same time he and Mr. Kelly acknowledged a centre line should have been in place. The joint road project ended with neither municipality having assessed the need for, let alone installing, a temporary and then a permanent centre line and speed reduction in order to alert a driver of the need for caution and to guide a motorist unfamiliar with this road over the hill safely. There was no valid reason for the OTM guidelines in Books 7 and 11 not to have been followed in 2000, and again in 2003-04 at the time of the road rehabilitation. Accordingly, the defendants should bear the larger responsibility. I conclude for these reasons that fault should be divided: two-thirds against the defendants and one-third against Shannon Deering.

## CONCLUSION

[299] For the reasons given, I have found as follows:

(i) that the condition of the accident hill on Coates Rd. West was not in reasonable repair on August 10, 2004;

(ii) that but for the non-repair of the segment of Coates Rd. West in question, the crash in the late evening of August 10 2004 would probably not have occurred and therefore the condition of non-repair was a significant cause of the plaintiffs' yet-to-be-determined loss and damages;

(iii) that the defendants have failed to establish on the evidence in this case a defence under section 44(3) of the *Municipal Act, 2001*;

(iv) that Shannon Deering, one of the plaintiffs, was contributorily negligent and her negligence was also a cause of the crash on August 10, 2004;

(v) that pursuant to *The Negligence Act*, the defendants are found responsible in law to the extent of two-thirds of the plaintiffs' loss and damages, and Shannon Deering, one-third; and

(vi) that the 1976 Boundary Road Agreement between the defendants was no longer in force in 2004 by reason of the statutory time limit of 10 years in the governing provisions of the *Municipal Act 1970* which applied to that agreement; therefore the defendants are jointly liable for their share of the loss and damages to be assessed.

[300] I thank counsel for their never-failing courtesy to me, their respect for the court, and their diligence in assisting the court as well as providing their clients with excellent representation in a hard-fought case. I am aware of the heavy duty and pressure under which all counsel have been labouring. Therefore, my appreciation is all the more important to express.

[301] The second phase of this trial is to occur at an as yet unknown time in the future. Counsel should contact the trial coordinator in Barrie in order to have the date fixed for the damages phase as soon as they can be prepared to proceed.

HOWDEN J.

**Released: October 5, 2010**

## APPENDIX "A"

| Seconds Before AE | Vehicle Speed (MPH) (KM./HR.) | | Engine Speed (RPM) | Percent Throttle | Brake Switch Circuit Status |
|---|---|---|---|---|---|
| -5 | 47 | 76 | 1472 | 0 | ON |
| -4 | 41 | 66 | 4352 | 76 | OFF |
| -3 | 43 | 69 | 4800 | 0 | OFF |
| -2 | 29 | 47 | 2176 | 0 | OFF |
| -1 | 2 | 4 | 832 | 0 | OFF |

| | BRAKE DATA | | BRAKE STATUS (As translated by CDR) | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| CASE | Hex # in Row $27 Column 4 | Converted to Binary | -1 sec before AE | -2 sec before AE | -3 sec before AE | -4 sec before AE | -5 sec before AE | -6 sec before AE | -7 sec before AE | -8 sec before AE |
| Deering v. Scugog | 0F | 00001111 | OFF 0 | OFF 0 | OFF 0 | OFF 0 | ON 1 | ON 1 | ON 1 | ON 1 |