

**CITATION:** Wasylyk v. County of Simcoe, 2022 ONSC 4458  
**COURT FILE NO.:** CV-16-216  
**DATE:** 20220729

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
MELINDA WASYLYK, STEVEN	)	
WASYLYK, KIM WASYLYK and	)	
RACHELLE WASYLYK by her Litigation	)	
Guardian STEVEN WASYLYK	)	Mr. D. Romaine, Mr. T. Boland, Mr. M.
	)	Hanton, for the Plaintiff
Plaintiffs	)	
	)	
<b>– and –</b>	)	
	)	
THE CORPORATION OF THE COUNTY	)	
OF SIMCOE, DOREEN G. WOS and THE	)	
CORPORATION OF THE TOWNSHIP OF	)	
BRADFORD	)	
	)	Mr. J. de Vries, Mr. A. Neaves, Mr. S.
Defendants	)	Kirwin, for the Defendant
	)	
	)	<b>HEARD VIA ZOOM:</b> September 20 – 22,
	)	September 24, September 27 – 29, October
	)	1, October 4 – 8, 2021

**REASONS FOR DECISION**

**Casullo J.**

**OVERVIEW**

- [1] Shortly after 10:30 p.m. on January 12, 2011, the plaintiff, Melinda Wasylyk, was on her way home to Bradford after an evening class, travelling eastbound on County Road 88 (“CR 88”).
- [2] Darlene Wos was travelling westbound on CR 88 from Brantford, on her way home from work.
- [3] As she traversed CR 88, Ms. Wasylyk lost control of her car. It went into yaw, meaning it was travelling forward and rotating counterclockwise. While in yaw Ms. Wasylyk’s car crossed the centreline into the westbound lane, and Ms. Wos’ car struck the passenger side of Ms. Wasylyk’s car broadside. Both vehicles came to rest in the westbound lane of CR 88.

- [4] Ms. Wasylyk was catastrophically injured. She has no memory of the collision and was unable to articulate to the court what happened in the moments leading up to the collision. It was clear to the court during her testimony that the injuries Ms. Wasylyk sustained are life changing.
- [5] Damages were agreed between the parties. Thus, the only question to be determined at trial was whether the Defendant, the Corporation of the County of Simcoe (“Simcoe County”), was liable to Ms. Wasylyk for the collision.
- [6] This matter took over 10 years to get to trial. Most witnesses did not have an independent recollection of the events of January 12, 2011, and had to rely on statements given in the days and weeks following the collision. Similar to the task Gordon R.S.J. faced in *Belanger v. The Regional Municipality of Sudbury*, 2015 ONSC 7071, at para. 12, this was “not the ideal atmosphere from which to make important findings of fact.”

### **EVIDENCE AND PROCESS AT TRIAL**

- [7] Ms. Wos and the Corporation of the Township of Bradford were let out of the action prior to trial.
- [8] Lead counsel for each party were experienced lawyers and seasoned litigators. All counsel treated the process, one another, and the witnesses, with a refreshing degree of civility. Joins books of documents were provided to the court, with agreement on the use to which the documents could be put.
- [9] Counsel helpfully provided closing written submissions to supplement their closing arguments, and I freely acknowledge culling certain portions thereof for use in these reasons.
- [10] On the first day of trial Ms. Wasylyk sought an admissibility ruling on the police photographs, discussed in further detail below, which had been enhanced by a certified forensic photographer. I released written reasons that evening, ruling that the enhanced photographs were admissible. The trial proper began the following day.
- [11] A total of twenty-one witnesses gave evidence over the course of this eighteen day trial, eight for Ms. Wasylyk and thirteen for Simcoe County. The complement of witnesses was comprised of lay witnesses, winter maintenance witnesses, first responders, and experts.
- [12] I will begin my reasons with an overview of CR 88 and the collision itself. Following that I will set out the test to be applied when determining liability for municipal highway non-repair. I will then set out the evidence of the witnesses, and conclude with my analysis and findings on the following issues:
- A. The condition of CR 88.
  - B. Whether there was a condition of non-repair on CR 88.
  - C. If so, whether the condition of non-repair caused Ms. Wasylyk’s injury.

D. If it did, whether Simcoe County took reasonable steps to prevent or correct the state of non-repair.

E. Whether Ms. Wasylyk was contributorily negligent.

### **COUNTY ROAD 88 AND COLLISION DETAILS**

- [13] CR 88 is the busiest roadway in Simcoe County. It is maintained out of District 2's Beeton Yard. Its average daily traffic is 18,200 vehicles per day, and its posted speed limit is 80 km/h.
- [14] In 2011 CR 88 was a two-lane highway running between County Road 27 ("CR 27") to the 10<sup>th</sup> Sideroad, bisected by Highway 400. The distance from Highway 400 to the 10<sup>th</sup> Sideroad is 2.2 km, and this portion of CR 88 is defined as a Class 1 roadway. This is the section of CR 88 where the collision occurred. The only other Class 1 roadway in the Beeton District was County Road 4 ("CR 4").
- [15] According to the County of Simcoe Environmental Study Report from 2008, the condition of the road surface on CR 88 was described as "fair to poor" with numerous surface cracks. The average pavement width was 8 meters consisting of two 3.5-meter lanes with 0.5 m gravel emergency shoulders. The solid white fog lines delineating the shoulders from the roadway were faded. One expert described CR 88 as "tired."
- [16] In terms of topography, travelling eastbound on CR 88 from Highway 400 a driver would first encounter flat ground, crest a bit of a hill and travel down into a valley before starting back up again toward 10<sup>th</sup> Sideroad.
- [17] West of the 10<sup>th</sup> Sideroad there were large tracts of farmers fields to the north and the south of CR 88. There were neither snow fences nor streetlights. As will be detailed below, several witnesses testified that given its east-west orientation, CR 88 was exposed to northerly winds and susceptible to blowing snow.
- [18] Between January 11-13, 2011, Simcoe County was battling an ongoing weather event. Snow started at about 10:30 p.m. on January 11, 2011, and continued into the next day. The snow turned to heavier squalls the morning of January 12, 2011. Once the precipitation stopped there was drifting snow to contend with. The patroller's Winter Patrol Report for the evening of January 12, 2011, notes: "snow squall north west area approx. 20:30." The temperature on both days was below zero. At the time of the collision it was -12.4° C.
- [19] The collision occurred approximately 1 km east of Highway 400 and 1.2 km west of the 10<sup>th</sup> Sideroad. The police photographs confirm that there were no crops left standing in the fields in the vicinity of the collision, which might have helped to minimize the blowing snow.
- [20] Ms. Wasylyk was driving a 2003 Ford Taurus equipped with all-season tires. She was wearing her seatbelt and did not have a cell phone at the time.

- [21] Debbie Smith was also travelling eastbound on CR 88 toward Bradford, and was 4 to 5 car lengths ahead of Ms. Wasylyk. Both drivers were travelling approximately 60 km/hr, below the 80 km/h posted limit.
- [22] Ms. Smith testified that through her rear-view mirror she saw Ms. Wasylyk hit the eastbound shoulder, swerve half-way into the westbound lane, correct herself, and then start driving normally. Not 10 seconds later, again through her rear-view mirror, she saw Ms. Wasylyk hit the eastbound shoulder a second time, cross over into the westbound lane, and collide with Ms. Vos.
- [23] Ms. Vos testified that as she came over a hill on CR 88 she was suddenly confronted with Ms. Wasylyk's vehicle and they collided. She could not recall whether she took evasive action.
- [24] Ms. Wasylyk submits that CR 88 was in a state of disrepair. Despite being the highest priority road in the Beeton District it was slippery with ice from compressed snow and refrozen meltwater. It had not been sanded according to witnesses at the scene, an observation which is corroborated by the enhanced photographs.
- [25] Simcoe County submits that there is no evidence of non-repair. The conditions on CR 88 did not amount to a degree of risk to a reasonable driver, evidenced by the fact that no one other than Ms. Wasylyk had difficulty controlling their vehicles, nor did any other driver experience sliding, loss of control, or difficulty stopping on CR 88.

#### **APPLICABLE TEST OF LIABILITY**

- [26] In *Thornhill v. Shadid*, [2008] O.J. No. 372 (Ont. S.C.), at paras. 18 and 26, Howden J. summarized the winter maintenance principles that have evolved through appellate jurisprudence, and described how the *Municipal Act, 2001*, S.O. 2001, c. 25, provides a code on winter maintenance which incorporates the common law tort principles of duty of care, standard of care and causation:

In Ontario, the proposition that municipalities have a duty to keep their public streets and highways in a reasonable state of repair and to pay compensation in cases of default causing damage is codified in the *Municipal Act*, section 284, as of December, 2002. Those provisions now appear in slightly altered form in the *Municipal Act 2001* as section 44. The appellate courts of Canada and Ontario have arrived at certain principles governing the application of this duty to winter conditions of cases, such this one. I have summarized these principles in the following statements:

The duty of care resting on a province or municipality towards its road system consists of protecting users of the highway from unreasonable risks of harm to them. The highway authority is not an insurer.

The duty does not arise in relation to policy decisions made in the exercise of statutory discretions. The duty of care applies to operational decisions of the highway authority, its officials, employees, and contracted operational forces. Liability will result where the highway authority has failed to take reasonable steps to eliminate or effectively reduce a condition of risk (a state of non-repair) within a reasonable time after it became aware, or ought to have become aware, of its existence.

There is no general duty on that authority to sand or salt highways; in other words, the failure to sand or salt will not in itself be a sufficient ground for imposing liability.

It is a question of fact in each case whether a condition of non-repair exists and if so, whether the highway authority's response is reasonable, timely, and reasonably executed.

Whether the alleged condition of non-repair is described as a special highly dangerous situation or an unreasonable risk of harm to the public using the road, the duty of care is triggered on notice or constructive notice of a condition of non-repair; this includes a situation of non-repair at a specific place or one that extends across a wide area, such as conditions during an ice or snow storm having wide effect.

...

In my view, section 284 of the *Municipal Act* provides a code on the subject of the duty of care in relation to highways under municipal jurisdiction and the consequences of default where damage or loss results. The case law that has emanated from the *Municipal Act* has subsumed within that code, or co-extends with it to include, the common law tort principles of duty of care, standard of care, and causation where a claim emanates from the condition of a highway or street in municipal jurisdiction and control.

- [27] The determination that a road is in a state of non-repair is contextual and fact-driven. The context includes the “character and location” of the road: see *Municipal Act, 2001*, S.O. 2001, c. 25, s. 44(1); and *Lloyd v. Bush*, 2017 ONCA 252, at para. 69.
- [28] The statutory scheme under ss. 44(1)-44(3) of the *Municipal Act, 2001* on January 12, 2011, was as follows:

#### Maintenance

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.

#### Liability

(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.

#### Defence

(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 to the highway or bridge and to the alleged default and those standards have been met. 2001, c. 25, s. 44 (3).

[29] The four-step test for the statutory cause of action under s. 44 of the *Municipal Act, 2001* was laid out by the Court of Appeal in *Fordham v. Dutton-Dunwich*, 2014 ONCA 891, at para. 26:

1. Non-repair: The plaintiff must prove on a balance of probabilities that the municipality failed to keep the road in question in a reasonable state of repair.
2. Causation: The plaintiff must prove the “non-repair” caused the accident.
3. Statutory Defences: Proof of “non-repair” and causation establish a prima facie case of liability against a municipality. The municipality then has the onus of establishing that at least one of the three defences in s. 44(3) applies.
4. Contributory Negligence: A municipality that cannot establish any of the three defences in s. 44(3) will be found

liable. The municipality can, however, show the plaintiff's driving caused or contributed to the plaintiff's injuries.

- [30] In *Lloyd v. Bush*, 2017 ONCA 252, at paras. 69-71, the Court of Appeal provided guidance for trial judges when considering whether a roadway is in a "state of disrepair." Triers are instructed to incorporate a consideration of "all of the surrounding circumstances" which include the character and location of the roadway, its place within the system, and whether it presented an unreasonable risk of harm to ordinary, non-negligent users of the road:

When considering whether a road is in a state of non-repair, a court must analyze all of the surrounding circumstances. What is deemed to be a reasonable state of repair will depend on the facts of each case. According to the plain wording of s. 44(1), the circumstances that must be considered in determining the reasonably applicable standard of repair includes the character and location of the roadway.

The jurisprudence is clear that a lower standard will apply with respect to the state of repair on a low-traffic rural roadway than on higher-traffic thoroughfares and highways. The character and population of the area are to be considered as well as the amount of traffic using the road: see Ian Rogers, *The Law of Canadian Municipal Corporations*, loose-leaf (2016-Rel. 9), 2nd ed. (Toronto: Thomson Reuters Canada Ltd., 2009), at para. 235.32.

As noted above, for a road to be in a state of non-repair, it must present a hazard that poses an unreasonable risk of harm to ordinary, non-negligent users of the road in the circumstances. As explained in *Docherty (Litigation guardian of) v. Lauzon*, 2010 ONSC 1006, [2010] O.J. No. 5017, "non-repair" is a relative concept and the condition of repair for a rural road does not impose a high standard on a municipality. Rural roadways are, "by their nature, susceptible to the development of adverse conditions. Therefore, drivers have to adjust to these conditions" (para. 206).

- [31] In 2002, the Ontario government introduced the *Minimum Maintenance Standards for Municipal Highways*, Ont. Reg. 239/02 ("MMS"), under the *Municipal Act, 2001*, S.O. 2001, c. 25, prescribing maintenance standards for municipal highways. These standards include provisions for road maintenance in winter conditions.
- [32] The regulation prioritizes roads based on a combination of average daily traffic and posted speed limits. The higher the speed and the more vehicles on average, the higher the priority. The class system ranges from a high priority of Class 1 to a low priority of Class 6.
- [33] The relevant portions of the MMS to the case at bar are as follows:

- Section 3 specifies the patrolling requirements. Given that CR 88 is a Class 1 roadway, a road patrol must be conducted a minimum of three times every seven days. Patrolling includes road conditions, including weather conditions.
- Section 4 sets out the standard for clearing snow accumulation. Again, CR 88's status as a Class 1 roadway required the road authority to treat snow accumulation on the roadway as soon as practicable, and within four hours of becoming aware of snow accumulation of 2.5 cm or greater.
- Section 5 specifies the minimum standard for treating icy roadways. CR 88 was to be treated within three hours of Simcoe County becoming aware of icy road conditions.

[34] There is no provision for winter weather patrolling in the MMS.

[35] Simcoe County's winter maintenance standard recognized the MMS, conforming to the three requirements set out above (road patrols, snow accumulation, and icy roads). Its standards are taken verbatim from the MMS.

[36] In 2004 Simcoe County implemented a Salt Management Plan (the "Plan"), developed in accordance with Environment Canada's Code of Practice for the Environmental Management of Road Salts. There was widespread concern about the adverse impacts salt was having on the environment, and the Plan's purpose was to provide a "policy and procedural framework for ensuring that the County of Simcoe continuously improves the management of road salt used in its winter maintenance operations."

[37] Simcoe County recognized that it would take time to implement the Plan and established a strategy for achieving its goals. By 2011 many of these goals had still not been realised.

[38] At the Plan's inception Simcoe County had only salt and sand in its arsenal to battle winter road conditions. The material application rate for salt was 160 kg/two lane kilometre, however operators were permitted to adjust the settings to address conditions such as black ice and frost. The material application rate for sand (blended with 8% road salt to prevent clumping only), was 550-600 kg/two lane kilometre.

[39] The Plan did not provide guidance or application rates for what was referred to during the trial as a "hot mix" of salt and sand—for example, 50/50 salt-sand mixes. Nor did the Plan indicate that operators had the discretion to choose between salt or sand. Mr. Miele, the Manager of Transportation Maintenance for Simcoe County, would not agree that using a hot mix would be in breach of the Plan, simply because the Plan did not specifically prohibit its usage.

[40] Simcoe County recognized that drifting and blowing snow was a road safety concern. Pursuant to the Plan, Simcoe County's stated goals were to (a) "develop a snowdrift problem area inventory and develop a checklist of annual installations by 2004"; and (b) "keep the inventory of stretches of road with drifting snow problems up to date."



## WITNESS EVIDENCE

### *i. The Plaintiffs' Lay Witnesses*

- [41] **Sergeant Steven Black** was the first emergency personnel to reach the collision. He received the call at 10:42 p.m. when he was west of Highway 400 conducting a RIDE program. He was on the scene three minutes later. He recalls that west of Highway 400 the surface of CR 88 varied from dry to snow-covered. East of Highway 400, however, as he traversed the one kilometre approaching the collision, snow was blowing across the highway, and in the valley before the crest of the hill where the collision happened, CR 88 was snow covered.
- [42] He stopped his cruiser west of the Wasylyk and Wos vehicles, pulling into the westbound lanes to ensure he did not compromise any roadway evidence, and got out to check on the drivers. He found Ms. Wos on the phone and concluded she was not seriously injured. Turning to the Taurus, he noted significant T-bone damage to the passenger side of the car. Ms. Wasylyk was unresponsive, slumped over and bleeding from her nose. Sergeant Black and another witness, Bryce Leib, tried to get to Ms. Wasylyk through the driver's side door, but the door would not open.
- [43] At this point the fire crews were arriving, and Sergeant Black returned to his car to make made some preliminary notes. In terms of the weather and road conditions upon his arrival he noted the following:
- Blowing snow
  - Road slippery
  - Snow covered because of wind
  - Shoulders snow covered
- [44] Sergeant Black described "road slippery" to mean it was difficult to walk; the snow blowing across the road made it "shiny, polished." When asked whether he saw ice, counsel for Simcoe County objected to the question as leading. I overruled the objection, and Sergeant Black answered that one could define the shininess as ice. I did not take this to mean he saw CR 88 covered in ice.
- [45] Sergeant Black was the lead reconstruction investigator of the collision. He understood from training courses on accident reconstruction the importance of looking for evidence at a collision scene, including gouges on the road, debris patterns, tire marks, and grooving. He described how he walked west of the collision, in the eastbound lane, for what he estimated to be the length of three telephone poles, looking for tire marks in an effort to determine where Ms. Wasylyk's car went off the roadway. Using a heavy-duty police flashlight he did not identify any tire marks on either the roadway or the shoulder that he believed were attributable to the collision. Under cross examination he reiterated that he searched very well: "I looked very hard at what should have lined up, and I wasn't able to locate anything."

- [46] He said the conditions of CR 88 west of the scene were variable—in some parts pavement was visible, in others it was covered with snow. He noted CR 88 was slippery and snow covered, and the gravel shoulder was snow covered as well. In some spots he could discern the “dip” where the gravel shoulder met the roadway; in other areas the dip was obscured by slippery snow sections encroaching onto the roadway. He estimated these encroachments to be one-and-a-half to two feet into the roadway, toward the centre line.
- [47] Sergeant Black confirmed that over the entirety of his time on the scene, approaching four hours, the weather was consistent: winds from the north blowing snow over both lanes of traffic.
- [48] Sergeant Black created his Collision Reconstruction Report in the months following the collision. The more pertinent portions of his report are detailed below:

#### Collision Scene

- On arrival the shoulders were snow covered and the roadway was very slippery with a light snow covering.

#### Roadway Conditions

- The roadway exhibited varying surface conditions. East and west of the collision the roadway was dry. In the immediate area of the collision scene the roadway was wet with light snow sections, as the snow was blowing across the roadway. Both shoulders at the collision scene were covered in snow.

#### Drag Sled Tests

- Police Constable Jon ELLIS and Rob ENWRIGHT conducted the drag sled tests in efforts to determine the coefficient of friction of the roadway’s surface. The coefficient of the roads [*sic*] surface can be described as the “slipperiness” of the road.
- ...Therefore the coefficient of friction for County Road 88 (E/B, west of scene)  $\mu = 0.51$ .
- ...Therefore the coefficient of friction for County Road 88 (W/B, west of scene)  $\mu = 0.55$ .

#### Tire Examination (Wasylyk Ford)

- The tire tread depths for the tires were  $4/32^{\text{nd}}$  and  $5/32^{\text{nd}}$ . The lowest was  $2/32^{\text{nd}}$  at the wear bar on left rear tire.

### Collision Analysis

- On Wednesday, January 12, 2011 at approximately 10:42 PM, Melinda WASYLYK was operating a 2003 Ford Taurus and was travelling East on County Road 88 in the Town of Bradford West Gwillimbury. The roads were slippery caused by the blowing snow across the open fields. WASYLYK's right side left the roadway and hit the eastbound shoulder. WASYLYK corrected the manoeuvre and continued eastbound. A few seconds later WASYLYK left roadway again with her right side. This time WASYLYK over corrected causing the vehicle to lose control and enter into the westbound lane. When WASYLYK entered into the westbound lane, the vehicle was crossways, facing north/south. When WASYLYK entered the westbound lane, Doreen WOS, operating a 2002 Chev Impala was westbound on County Road 88. WOS crested the peak of the hill and collided with the right side of the Taurus at the "B" pillar. The Impala ceased forward travel coming to rest in the westbound lane. The Taurus rotated in a clockwise manner coming to rest on the westbound shoulder, facing eastbound. (emphasis added<sup>1</sup>)

### Conclusions and Recommendations

- There are a few mitigating factors of the collision. The collision was caused by the Taurus entering the improper lane of travel as a result of the driver losing control after leaving the travelled portion of the highway.
- Although the tread on the tires were a contributing factor, it was not the cause of the collision.

[49] Sergeant Black testified that when he described CR 88 as being dry east and west of the collision, he was referring to west of Highway 400, where he had been conducting the RIDE patrol, and points further east of the collision.

[50] In Segreant Black's opinion, if Ms. Smith's evidence is reliable, then Ms. Wasylyk would have crossed over one of the sections where the snow and slipperiness encroached CR 88 from the shoulder on to the roadway.

[51] As the captain of the East Gwillimbury Fire Department, it fell to **Captain Gary Poole** to ensure the safety of his crew at the scene, as well as ensure any hazards are contained. He had an independent memory of attending the collision.

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<sup>1</sup> Sergeant Black testified that the underlined statements were based on Ms. Smith's statement to police, and not observations he made at the scene.

- [52] Captain Poole echoed Ms. Wos' assessment of CR 88 as one travelled westbound: east of the 10<sup>th</sup> Sideroad CR 88 was wind-protected, but this changed once one encountered the open fields west of the 10<sup>th</sup> Sideroad.
- [53] As the Fire Department's pumper truck travelled westbound on CR 88 it had to travel in the eastbound lane at times given the stopped traffic in the westbound lane, and Captain Poole distinctly recalled the headlights of the pumper truck making the surface of the eastbound lane look "shiny": "it appeared as a glaze type look of how the roadway looked." This glaze was noticeable in the 500 metres approaching the collision scene. He also noted the weather to be "a cold night with wind. Roads were snow covered with a glare from the headlights." He also recalled there was a snowstorm, although it may have been abating at the time of the collision.
- [54] Given the conflux of the winter conditions, the storm that was happening, and the fluids that were leaking out of the two cars, Captain Poole ordered Oclansorb Oil be applied to the road surface. Oclansorb Oil contains fluid spills, acting in a similar manner to kitty litter. As he recalled during cross examination, a fair bit of Oclansorb Oil was needed. While his notes do not reflect whether Oclansorb Oil was used for slippery road conditions as well as the fluid leakage, at trial he said this would have been the case.
- [55] **Andy McDowell** was a volunteer firefighter with the East Gwillimbury Fire Department. His Witness Statement, which he wrote out once he was back at the station, documents that the "Road was slippery and snow covered. Weather was very cold and very windy."
- [56] Police Constable **Robert Enright** was the officer in charge assigned to the collision. He was off-duty on January 12, 2011, and home when he received the call to attend. He first drove to the station to pick up Unit 406, an ambulance converted into to RIDE truck/traffic truck which housed the lighting equipment and generators required to run the total station<sup>2</sup> equipment. He estimates he arrived on the scene about two hours after the collision.
- [57] He had no difficulty driving Unit 406 westbound along CR 88. However, as he approached the scene, in the vicinity of the open fields, he described CR 88 as being "extremely slippery." He described to the court that as he walked about the scene he had to watch where he was walking, or he could end up on his "rump."
- [58] He said it was "freezing" out. The fields on either side of CR 88 were covered in snow, and the winds were blowing snow across the roadway. Shining his flashlight downward "you could see the snow skipping over the highway because the highway was exposed on both sides. Extremely, extremely slippery."

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<sup>2</sup> Total station surveys are a means of mapping accident scenes. The total station instrument is mounted on a tripod and "shots" are taken of relevant points of interest. Collision sites and physical evidence, such as tire marks or gouge marks, can also be measured.

[59] PC Enright pulled the tire for the drag sled testing, and he noted his impression of the surface of CR 88 as “slippery.” After conducting the drag sled testing he and PC Ellis surveyed CR 88 with the total station. As PC Enright walked westbound along CR 88 it remained slippery. He was walking down a bit of an incline west of the collision, and at points he was actually sliding down the road. As he described it during his testimony:

“I don’t know if anyone watches curling, but you, I could push off with my foot, slide for about five feet. So, it was like a curling move if you see them sweep the rocks, that’s what the road was like. And when I was, when I was holding the pole for PC Phillips doing the, shooting the scene, the same thing. I, I quite often found myself putting the pole down and assisting me with coming back if I was going eastbound because it was pretty slippery. Like I said, if, you had to watch yourself because that wind was skipping across the road like no tomorrow. And it was very slippery. But I was sliding all over the place.”

[60] When asked if he saw ice on CR 88 PC Enright said no. But he explained that “there is ice, and there is slippery,” which to him were the same thing. If he could wipe out and fall, then the surface was icy. He said he could have fallen at any time as he walked west of the collision, in either lane. He did not see any sand on the road.

[61] The Motor Vehicle Accident Report described the road surface condition as code 06, or ice. PC Enright chose this descriptor because there was no option to indicate “slippery.”

[62] During cross examination PC Enright remained unshaken in his opinion that CR 88 was slippery and icy. He was there, with boots on the ground, and experienced the road surface conditions firsthand.

*ii. The Defendant’s Lay Witnesses*

[63] The only witness able to testify about the collision itself was **Debbie Smith**. She and her husband were driving home to Bradford after an evening at Georgian Downs. Ms. Smith was the designated driver, and was travelling about 60 km/h on CR 88. She recalled January 12, 2011, being a clear, very cold night, with no snow or wind. CR 88 was bare pavement, and she had no trouble handling her car along any portion of it that night.

[64] As she exited Highway 400 on to CR 88 there were no cars ahead of her. She first noticed a car behind her, which turned out to be Ms. Wasylyk, when she glanced in her rear-view mirror. The car was travelling the same speed, and not gaining on her.

[65] At trial Ms. Smith testified that she saw Ms. Wasylyk first lose control after hitting the shoulder, cross over the centre line and right itself back into the eastbound lane. When asked what that looked might have looked like, Ms. Smith described that the shoulders were gravel, not snow covered, and “when you hit gravel it makes like a dust. So I could see the dust from her hitting the shoulder.” Ms. Smith testified this was easy for her to see

because that section of CR 88, just east of Highway 400 at the Husky gas station, was well lit up.

[66] No more than ten seconds later, Ms. Smith saw Ms. Wasylyk lose control of her car a second time, hitting the shoulder once again and spraying up another large dust cloud of gravel. She estimated about half of Ms. Wasylyk's car travelled onto the eastbound shoulder before crossing the centre line and colliding with Ms. Vos.

[67] After the collision Ms. Smith pulled to the side of the road. She called 911 while her husband ran back to check on the drivers.

[68] Ms. Smith thought the driver was drunk based on the swerving actions.

[69] Ms. Smith does not recall seeing a vehicle with a blue light.

[70] Ms. Smith did not fare well under cross examination. For example, in her statement to police, she reported:

- “While I was driving I was looking in my rear-view mirror and happened to see a car behind me that swerved into the westbound lane. The driver corrected and I just thought it was a drunk driver, so I was cautious and kept looking into my rear-view mirror. In about, I would say, not even ten seconds later, I saw in my rear-view mirror the same car swerve onto the shoulder of the eastbound lane.”
- Testimony: “Just a couple of seconds past the Husky I noticed her first in the westbound lane, then she corrected herself. She had the car under control, then just before Doc's Towing she hit the eastbound shoulder, lost control again, that's when she went across the east and west bound lane facing north to south again.”

[71] However, at trial she said Ms. Wasylyk hit the shoulder twice – once before swerving into the westbound lane, then again on the second loss of control. When this discrepancy was pointed out to her, Ms. Smith said that she told the police she saw Ms. Wasylyk hit the shoulder twice, and it was not up to her what the police include in the statement.

[72] Another discrepancy that came to light during cross-examination is the spot where Ms. Wasylyk first lost control, and the sequence of the landmarks as described by Ms. Smith to police. In her police statement the eastbound geographic sequence is Highway 400, Husky station, Doc's Towing. The actual sequence is Highway 400, Doc's Towing, Husky station.

[73] During examination-in-chief Ms. Smith said Ms. Wasylyk lost control before the Husky station. She did not reference Doc's Towing as a landmark. On cross-examination the location of Doc's Towing was put to her, and she admitted her police statement was wrong, and she had meant to say Ms. Wasylyk lost control after Doc's Towing. She did not clarify this mistake with the police prior to trial, nor did not volunteer the mistake in her

examination-in-chief, although in cross she insisted she told counsel for Simcoe County about her mistake.

[74] I am not prepared to discredit Ms. Smith's evidence as widely as counsel for the Plaintiffs suggests. The fact that she could not recall details such as whether CR 88 had fog lines, or whether the centre line was solid, does not warrant wholesale disregard. However, her evidence does fall short in the following respects:

- She was watching events unfold in her rear view mirror. It was dark. There was blowing snow. There were no street lights. She was approaching a crest and could see lights approaching her in the westbound lane. She could not both drive forward safely and watch what was transpiring behind her.
- She did not tell the police Ms. Wasylyk hit the shoulder twice.
- The spray of gravel she saw when Ms. Wasylyk drove on to the shoulder was not possible. Every witness has testified that the shoulders were snow covered. She could only have seen snow.
- Equipped with a heavy-duty flashlight that lit up the area very well, Sgt. Black walked west along CR 88 for at least three telephone poles in the eastbound lane and found no evidence of gouge marks along the south shoulder. Sgt. Black is trained to look for this type of information when investigating a collision scene. I am satisfied that if there were gouge marks to be seen, Sgt. Black would have seen them. Contrary to Simcoe County's submissions, there was no evidence to suggest the wind blowing from the north was of such velocity that any markings in the shoulder would have been covered up by blowing snow.
- Given the absence of gouge marks on the shoulder, I find Ms. Wasylyk swerved on the snow encroaching onto CR 88, and did not cross over onto the south shoulder.

[75] **Dave Smith's** evidence was brief. He did not see the collision. He recalled running downhill along the shoulder to get to the cars, and he was first on the scene. He had no trouble with traction and did not recall there being snow on CR 88.

[76] After satisfying himself Ms. Wos was fine, he next checked on Ms. Wasylyk. He could not open the driver's side door, but through the "gaping hole" on the passenger side he was able to turn off the car's radio, which was playing loudly. He could not recall whether the car was running or not.

[77] **Bryce Leib** was heading east on CR 88, on his way home from a conference. He described CR 88 being dry asphalt, with snow lightly covering the shoulders. He had no trouble stopping his car as he approached the collision scene, nor did he have any difficulty with traction as he moved between the two vehicles.

[78] As noted in the introduction, **Ms. Wos** was driving westbound on CR 88, heading home after work. She described CR 88 east of the 10<sup>th</sup> Sideroad as being built-up, four lanes

with homes on either side, streetlights, and a posted speed of 50 or 60 km/h. West of the 10<sup>th</sup> Sideroad CR 88 transitions to farmland, narrowing to two lanes. The posted limit increases to 80 km/h, and there are no more street lights.

[79] Ms. Wos testified that from the time she turned on to CR 88, east of 10<sup>th</sup> Sideroad, to the point of the collision, CR 88 was wet. However in her police statement, when asked about the conditions on CR 88, she answered:

“That’s a tricky one because when I, the roads were neither good or bad. It depended on where you were. Some places they were more slippery than others. The roads were slippery.”

[80] Finally, Ms. Wos testified that just before impact she recalled seeing the blue flashing lights of what she took to be a snow plow, far ahead of her in the westbound lane, close to Highway 400.

[81] Staff Sergeant **David Phillips** was a member of the accident reconstruction team. He arrived at the scene around midnight, and recalled that January 12, 2011, was a windy night. As he drove along CR 88 he said the road conditions were variable: dry sections in some areas, and in other areas localized snow drifts, spots where snow was moving across the roadway.

[82] Sergeant Phillips testified that as he walked around the scene on CR 88, it was not like walking on freezing rain, but it was slipperier than dry asphalt. His notes indicate “roadway lightly covered in fine blowing snow.” Under cross examination Sergeant Phillips agreed the snow was like tiny little grains of ice, filling in the voids in the roadway, thereby reducing the friction of the surface. He also agreed that when cars drive over the snow it compresses and makes the roadway more polished, “like packed, hard-packed snow turning to ice,” getting more and more slippery.

[83] Like Sergeant Black, Sgt. Phillips did not find evidence of skid marks or gouges in the shoulders. Nor did Sgt. Phillips note any sand or salt on CR 88.

[84] **Amanda Root** and **Adam Martin** were the paramedics who attended at the scene. Mr. Martin, who drove the ambulance, could not recall the condition of CR 88. Similarly, Ms. Root did not have an independent recollection of the conditions on CR 88. The ambulance call report indicates “good road/flight conditions.” However, this one code describes the totality of the route taken by the paramedics, from the station to the hospital, and CR 88 is only one small portion of the whole.

*iii. Winter Maintenance Witnesses*

[85] As Manager of Transportation Maintenance, **Christian Miele** was tasked with the oversight of road maintenance, including budgeting, reporting, and summer and winter maintenance.



- [86] Mr. Miele confirmed that Simcoe County is the largest county in Ontario. It is an upper-tier municipality, with 1655 lane kilometres of roads to maintain, divided into six different areas.
- [87] According to Mr. Miele, the Plan was an ‘aspirational’ document with an end goal of mitigating salt’s impact on the environment. The Plan was not legislation, and the goals it outlined did not have to be met within a pre-determined timeline.
- [88] As noted earlier, one of the Plan’s directives was to develop an inventory of areas subject to snowdrift problems and develop a checklist of annual installations by 2004. This inventory had not been created by 2011. Mr. Miele testified that Simcoe County’s level of service was not impacted by this failure, as the operators would see the drifted areas and know how to treat them accordingly.
- [89] Mr. Miele confirmed that it was left to the operator’s discretion as to whether they would use straight sand, straight salt, or a combination of the two in any configuration.
- [90] In terms of plow routes and shifts, Simcoe County operated with two: full time staff worked the morning shift from 7:00 a.m. to 3:30 p.m., and seasonal staff worked the afternoon shift from 4:00 p.m. to 12:30 a.m.
- [91] During the day shift five metro plow and sanders (“MPS”) and five plow routes operated out of the Beeton Yard on the following routes:
- Route 1-27
  - Route 1-50-14
  - Route 10-21
  - Route 15-13-5-12
  - Route 88-4-89
- [92] The afternoon shift, however, utilized four MPSs to cover the five plow routes, doubling the length of one route by combining the 88-4-89 route with the 1-27 route.
- [93] Route 88-4-89 was comprised of two Class 1 roads (CR 88 and CR 4). Route 10-27 was comprised of a Class 2 road (CR 27) and a Class 3 (CR 1). Combined they were long enough to warrant their own separate route during the day.
- [94] Mr. Miele agreed that combining the two routes for the afternoon shift effectively resulted in the operator servicing about twice the length of roadway that his day-shift colleagues had to maintain. However, he would not agree that doubling the route doubled the circuit time, and held firm to his view that the route could be completed in three hours in accordance with the MMS.
- [95] No route optimization study was produced for Route 88-4-89 or Route 1-27, either separately or combined.

- [96] With respect to record keeping, operators were required to complete a Winter Maintenance Operations Activity Sheet (“Activity Sheet”). Mr. Miele testified that the Activity Sheets would be completed at the end of the operator’s shift.
- [97] Mr. Miele confirmed that despite learning about the subject collision a few days after it occurred, he conducted no investigation into the circumstances of the collision: he did not interview or obtain statements from the patrollers or operators tasked with maintaining CR 88 on the date of the collision.
- [98] **Charlie Galea** was a Road Patroller for Simcoe County, working out of the Beeton Yard. As a patroller, his main duty was to determine whether the roads were safe for driving. He told the court more than once that Simcoe County’s motto was “if in doubt, call them out;” “them” being in reference to the municipal plows, or the MPSs.
- [99] While on patrol Galea would look out for hazards including, *inter alia*, slippery sections, frost, or snow-covered roads. Ice was not always visible through visible inspection alone, and when necessary he would perform brake tests to check for slippery conditions, although these were not noted in his records.
- [100] His general impression of CR 88 was that its level of safety depended on the weather—it was safe unless there were snow drifts or ice. Mr. Galea confirmed that CR 88 was susceptible to drifting snow. He also confirmed that drifting snow can become compacted and form ice.
- [101] Mr. Galea’s Winter Patrol Record (“WPR”) for January 11, 2011, indicated that snow squalls arrived from the north west around 10:30 p.m. At 11:00 p.m. he called out all four MPSs, noting “spot ice, snow squall.”
- [102] Mr. Galea’s shift on January 12, 2011, began at 2:30 p.m. He recalled there was a strong wind coming from the north, which affected the east-west roads in the district by creating a heavy load of drifting. His WPR establishes that Simcoe County continued to experience a weather event, as he noted “drifting causing slippery sections on all roads.” At 4:05 p.m. Mr. Galea called out all four MPSs.
- [103] On the January 12, 2011 WPR, under ‘Ambient Conditions’ Mr. Galea checked the “snow covered” box, and under ‘Winter Event Condition’ Mr. Galea checked the “drifting” box. Wind was listed as “moderate.”
- [104] Mr. Galea’s Crew Card on the date of loss contains the following notation:
- 4 MPS out. Several hazard conditions due to drifts and ice spots.  
As mentioned above all 4 MPS controlling the hazards on all  
District 2 roads.
- [105] Mr. Galea explained to the court that once he called the four MPSs out at 4:05 p.m., he expected the operators to be working continuously throughout his entire shift, controlling for snow drifts and spot ice. These expectations were confirmed in his WPR, his Crew

Card, and the Patrolman's Weather Report (referenced below), as each of these documents indicated that all four MPSs were out.

[106] Mr. Galea confirmed in cross-examination that his crew was expected to plow both sides of a road, and place material down the centre middle of the road. He also expected all operators to apply the same material, a salt/sand mix.

[107] Road patrollers also complete a Patrolman's Weather Report, documenting what they observe on the road. A recitation of what each road patrol operator documented confirms that on January 12, 2011, the Beeton Yard was in the midst of a snow event:

- At 6:20 a.m., patroller S. Mitchell noted the following conditions:
  - Precipitation: 5 to 10 cm
  - Snow: trace, light, medium and heavy
  - Visibility: good, fair, poor, light drifting
  - Road Surface: centre bare, slushy, snow packed/covered, slippery sections
- Specific Problems: flurries turned to heavier squalls
- Equipment: 4 MPS out until 3:00; 5 MPS called in at 3:00

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- At 2:30 p.m. patroller D. Bell noted the following conditions:
  - Snow: trace
  - Visibility: good, light drifting, medium drifting
  - Road Surface: bare, centre bare, slushy, wet
- Specific Problems: N/P
- Equipment: 5 MPS out

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- At 5:35 p.m., patroller Galea noted the following conditions:
  - Visibility: good, medium drifting
  - Road Surface: bare, wet, slippery sections
- Specific Problems: 4 MPS out
- Equipment: 4 MPS out

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- At 10:44 p.m. patroller Galea noted the following conditions:
  - Visibility: good, fair, heavy drifting
  - Road Surface: bare, snow packed/covered, slippery sections
- Specific Problems: heavy drifting, strong winds
- Equipment: 4 MPS out

[108] Mr. Galea clarified that circling "bare" meant that when there is drifting, there are also bare parts, and even slushy parts. And around the drifting areas there would be slippery sections.

[109] **Gary Payne** was the snow plow operator assigned to CR 88 the night of January 12, 2011. Based on experience he was aware that CR 88 experienced drifting snow in areas bordered by open fields. When faced with drifting snow, his practice was to plow one side of the road, turn around, plow the other side back, turn around again and spread material in the areas of drifting.

- [110] Mr. Payne had no independent recollection of January 12, 2011. His evidence at trial was based on his interpretation of his Activity Sheet, informed to some degree by his normal routine. He advised the court his practice was to complete his Activity Sheet every time he came to a stop or turned around. In other words, he made his notes continuously while out on his route, as opposed to at the end of his shift as Mr. Miele understood the operators to do.
- [111] Mr. Payne's original Activity Sheet for January 12, 2011, was lost, and the court only had the benefit of a photocopy. Analyzing the original may have provided insight as to whether the Activity Sheet was completed on the road as Mr. Payne testified, or back at the yard where Mr. Miele understood the forms were filled out.
- [112] In any event, the Activity Sheet shows Mr. Payne reported on shift at 4:00 p.m. and loaded his unit with a 50/50 salt/sand mix. Mr. Payne confirmed he left immediately based on Mr. Galea's call-out. He told the court he would have loaded his MPS to capacity, or thirteen tonnes, as was his custom. He knows that he used a total of six tonnes (the amount of material noted on the Activity Sheet) because when he returned to the yard he "spun off" seven tonnes of the 50/50 mix. However, this is purely conjecture on his part, as his Activity Sheet is silent in this regard, and the records of the other operators shows that no one else loaded with thirteen tonnes on January 11 or January 12.
- [113] Mr. Payne's Activity Sheet outlines the route he took on his first run: 1-27N-89-4-88; 27S-10-1-Yard. As he explained during his examination in chief:
- I travelled CR 1 east to 27. And from 27 north to 89, and from 89, 89 to CR 4 which is going east, and then from CR 4 down to 88, which is south. West on 88 to 27 south. And 27 south. That's where I ended.
- [114] Once he got to CR 27, at the intersection of Highway 9, Mr. Payne was off route. Based on his estimate this was between 5:15 p.m. and 5:30 p.m. He then travelled west on CR 9, going north on CR 10 to refuel the MPS at F&S gas station located on CR 10. After refueling he continued north along CR 10 to CR 1 and ended his route in the yard. This timeline adds another 30 to 45 minutes that Mr. Payne was not servicing his route
- [115] There is no notation on the Activity Sheet about getting gas, and Mr. Payne has no working memory of that night. When asked how he could say he got gas simply by reading his Activity Sheet, Mr. Payne surmised that the only reason he would be on County Road 10 was to get gas. He had no explanation for why he did not note traversing CR 9 on his Activity Sheet.
- [116] Mr. Payne recalled encountering drifting snow and a bit of ice build up on his first run. He knows he was treating the roads, but could not remember whether he plowed on this run.
- [117] Mr. Payne testified he used a 50/50 mix of salt and sand on his first run because it was not very cold out, and the high volume of traffic between 4:00 p.m. and 6:00 p.m. would act

as a heat source to help to melt the ice that had already built up, before the temperature dropped.

[118] His first run serviced the route by travelling in one direction over each roadway before he went off route at CR 9.

[119] From 6:00 p.m. to 9:00 p.m. or 9:30 p.m.<sup>3</sup> Mr. Payne remained at the yard where he performed maintenance on his truck (checking blades, tires, hydraulic oil). Mr. Payne also spent time cleaning inside the shop: “the floors, the lunchroom, stuff like that.” It is difficult to understand this choice, as the other three operators working the afternoon shift on January 12, 2011, were continuously treating the roads as Mr. Galea instructed them to do.

[120] After his three-hour (or three-and-a-half hour) break, Mr. Payne loaded his truck with straight sand and went back out on the following route: 1-27N-89-4-88-88-88-27S-1-1-1-1-Yard. According to his Activity Sheet he used 10 tonnes of sand. The rationale he provided for using straight sand was to cover up any ice that remained on the road and provide traction for vehicles.

[121] Mr. Payne described the three passes on CR 88 for the court. On the first pass he was westbound from CR 4 to Highway 27, and on the second pass he was eastbound from Highway 27 to CR 4. During these two passes Mr. Payne plowed the snow drifts. On his third pass, westbound again from CR 4 to Highway 27, Mr. Payne was laying down material on CR 88. It appears Mr. Payne was only spot sanding on this last pass.

[122] Mr. Payne estimated that his third pass on CR 88 was between 10:00 p.m. and 11:00 p.m., and there was no collision when he drove past the locale of the collision.

[123] Mr. Payne’s evidence left me with more questions than answers, and for the following reasons I can not say with a reasonable degree of confidence his evidence is credible:

- In 2017, the plaintiffs were advised that the only memory Mr. Payne had of the night in question was there was drifting in some spots. Simcoe County also advised that the route information contained for the 2100 start time was incorrect—Mr. Payne took CR 27 north, not CR 27 south as indicated. On September 30, 2022, in the midst of trial and after the plaintiff had closed their case, Simcoe County advised that Mr. Payne had changed his mind once again, and he in fact did take CR 27 south as his Activity Sheet initially indicated. Mr. Payne was cross-examined on this point, with counsel suggesting that taking CR 27 north (his 2017 explanation) would mean he missed that section of his route, and he changed his answer again so it didn’t appear that he failed to treat CR 27 south his entire shift. Mr. Payne disagreed, and said he must have forgotten to enter CR 27 north as he

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<sup>3</sup> Mr. Payne’s Crew Card on January 12, 2011 indicates he spent three-and-a-half hours at the yard. This time caption was added by someone other than Mr. Payne, and the discrepancy was never rectified during the trial.

headed back to CR 1. How is this discrepancy possible if Mr. Payne actually completed his form each time he came to a stop or turned around?

- Mr. Payne travelled west on Highway 9 but failed to note this on his Activity Sheet. Again, this does not accord with his evidence that he filled in his sheet contemporaneous with performing operations.
- Mr. Payne had no credible explanation for spending at least three hours at the yard during his January 12, 2011 shift. He could not recall with certainty what he did. Given the passage of time, this is understandable. Mr. Payne thought he checked the blades, the oil and the tires on his MPS. But how long could this possibly take? Surely not three hours or more. And if he had to make repairs or replace parts, one would assume a record would have been created, but nothing to this effect was forthcoming by Simcoe County. Moreover, the crew card for January 11, 2011, puts all four afternoon shift operators in the yard for five hours. One could not be faulted for assuming that any significant maintenance required would have been carried out at that time.
- Mr. Payne also vacillated on how he learned of the collision. He initially testified that he had a clear vision of Patroller Mitchell informing him at the yard, after he had completed his Activity Sheet. However, Mr. Mitchell's records indicate he was out patrolling the north-west section of District 2 at 12:30 a.m. (on January 13, 2011) and not in the yard at all. When confronted with this information, Mr. Payne retracted and said he was not 100% sure how he heard about the collision.
- County Roads 88, 89 and 1 are similar roads in that they run east and west. CRs 88 and 89 are bounded by fields. The topography along CR 1 was not discussed at trial. CR 88 is a Class 1 road, CR 89 is Class 2, and CR 1 is Class 3. Mr. Galea's testimony, and his records, show that all east/west routes were facing drifting conditions from the north wind. On his second run, Mr. Payne only ever went eastbound on CR 89. Rather than admit he failed to plow CR 89 to the west, Mr. Payne told the court that CR 89 was not snow covered. Moreover, Mr. Payne's decision to do four runs on CR 1, the lowest class of roadway he was responsible for, before returning to the yard, is simply incongruous.
- Finally, without being too critical, the entries on Mr. Payne's Activity Sheet are too uniform, and do not look as haphazard as one might envision if he had made each entry separately, while out in his a truck, maintaining his route. Instead, their precision, or consistency, suggests more that the sheet was completed in one sitting. An examination of the original Activity Sheet may have alleviated this scepticism.

*iv. Police Photographs*

Motion to Determine Admissibility

[124] PC Williamson took photographs of the collision scene. Many were so dark that very little was visible in the foreground. Others had a well-lit foreground but a black or near-black

background. To remedy this, the plaintiffs retained a certified forensic photographer, Ret. First Lieutenant D. Eric Johnson, to brighten the photographs to reveal detail in the dark areas. His mandate was not to make the road surface more visible, nor was it to identify objects or the condition of the road surface.

- [125] Lieutenant Johnson testified at the admissibility motion referenced at the outset of these reasons. Simcoe County objected to their admission on the grounds that the alterations appear to make the surface of the roadway more reflective, which might lead one to surmise that CR 88 was covered in ice.
- [126] Certainly, the alterations could be said to make the surface of the roadway more reflective. For example, in its enhanced state photograph DSC\_2500 shows a bright surface that could be construed as ice. However, enhanced photograph DSC\_2531, depicting the same location but from the opposite direction, does not show the roadway having a similarly bright surface.
- [127] **Eric Plaxton**, certified forensic video analyst, was retained by Simcoe County to provide an opinion, although he was not called to give evidence. In his report Mr. Plaxton conceded that Lieutenant Johnson achieved the “stated purpose of clarifying the content in the dark areas of the images” without obscuring details in other areas, including the highlights.
- [128] I ultimately ruled that the photographs were admissible. There was no prejudice to Simcoe County, as a determination of the roadway’s surface would be made based on the evidence at trial, not on the basis of photographs.
- [129] The photographs, taken at least an hour after the collision, depict CR 88 as lightly snow-covered in spots, with the shoulders fully snow-covered and encroaching onto the asphalt. The fog lines, if there at all, are obscured. There is debris to the east of the cars, in the eastbound lane, where the impact occurred.
- [130] Simcoe County argued that the pictures, whether enhanced or not, might not accurately render the condition of CR 88 at the time of the collision, given that the blowing winds and freezing temperature persisted throughout the police investigation, which lasted a number of hours.
- [131] However, photograph 2436, taken from the westbound lane and looking eastbound toward the two cars, tends to belie this notion. When Mr. Martin, the ambulance driver, was shown this picture, he agreed that the thin tracks on the snow-covered westbound shoulder were likely made by the gurney, as they were in the same location where Ms. Wasylyk would have been extracted from her car. The ambulance arrived on scene at approximately 10:47 and departed 15 minutes later. Photograph 2436 was captured after midnight. If the thin tracks of the gurney were still visible at least 90 minutes after the collision, despite the winds continuing to blow, then I can only conclude that the photographs accurately depict CR 88 at the time of the collision.
- [132] The photographs do not depict the most important, and missing, piece of the puzzle: the condition of CR 88 in the location where Ms. Wasylyk lost control of her car.

v. *Expert Evidence*

[133] Five expert witnesses testified at trial: two accident reconstructionists, two versed in winter maintenance standards, and one human behaviour analyst. Each was qualified on consent.

Accident Reconstruction

[134] Ms. Wasylyk's vehicle was not equipped with an event data recorder, colloquially known as a "black box." Nor was there any physical evidence in the form of roadway markings. Consequently, there is no way to reliably understand Ms. Wasylyk's steering or braking inputs immediately before the collision.

[135] The accident reconstruction experts worked from the same fount of information, including the MVAR, witness statements, police photographs, the police reconstruction report, weather reports, Ms. Wos' black box information and, most importantly, the impact location and final orientation of both cars.

[136] On behalf of Simcoe County, **Craig Wilkinson** was retained to assess the collision, and in particular the speed of the vehicles, as well as the level of friction available on CR 88. After loading the available data into PC-Crash (a collision and trajectory simulation tool that enables analyses of collisions), Mr. Wilkinson determined that Ms. Wasylyk lost control of her car after entering the south shoulder and then made a hard left steer, in keeping with Ms. Smith's evidence.

[137] However, for Ms. Wasylyk's car to travel as it did and rotate close to 90 degrees, Mr. Wilkinson found that there had to be sufficient friction between her car's tires and CR 88. As he explained to the court, a car needs traction between its tires and the road to generate the lateral forces required to turn in such a manner. In other words, a car that is sliding on a slippery surface would tend to travel in a straight line, even when rotating. In Mr. Wilkinson's opinion, the road friction was most likely consistent with wet to dry roads (0.6 to 0.8), and not an icy road under light snow (0.2).

[138] Mr. Wilkinson concluded that:

- Ms. Wos was travelling at 74-82 km/h at the time of the collision, and 82 km/h in the seconds prior;
- If Ms. Wasylyk braked as the loss of control began, her car was travelling at least 70 km/h as it entered yaw;
- Ms. Wasylyk's car was still in motion at the time of impact, most likely sliding sideways between 5 to 20 km/h;
- The speeds and location of the impact are consistent with Ms. Smith's evidence that Ms. Wasylyk lost control after entering the south shoulder; and
- Ms. Wasylyk's loss of control and impact orientation was not consistent with ice covered road conditions.



[139] The plaintiffs retained **Jamie Catania** to review Mr. Wilkinson's report, in particular his conclusion that only a high friction situation could result in Ms. Wasylyk losing control and travelling as she did, in yaw, to the impact orientation. Mr. Catania's mandate was not to determine the friction on the roadway. Also using PC-Crash, Mr. Catania concluded that it indeed was possible for Ms. Wasylyk to lose control of her car and get to the impact orientation on a low friction surface.

[140] In Mr. Catania's opinion, there were many possible combinations of vehicle movement and driver inputs that would result in the impact conditions (Ms. Wasylyk in yaw, but travelling in an easterly direction).

#### Human Factors

[141] **Dr. Campbell** was retained to provide a human factors opinion with respect to the left-hand steer maneuver posited by Mr. Wilkinson in his reconstruction report, namely 160° at 320° per second, and 200° at 667° per second. In his view, the extent of steering that was assumed by Mr. Wilkinson would be expected to occur in less than 1%-5% of the population in a real-world scenario.

#### Conclusion on Accident Reconstruction Evidence

[142] There were failings by each of the reconstruction experts. Mr. Wilkinson modelled CR 88 as homogeneous, wet and dry, with a high friction value. But this flies in the face of the evidence of those first on the scene, including Captain Poole, Sergeant Black, and Andy McDowell. And for his part, Mr. Catania made incorrect assumptions (that Ms. Wasylyk swerved for ten seconds before crossing over the centre line, leading him to believe there was one long sequence of loss of control, but this was contrary to Ms. Smith's evidence that the second loss of control happened "not more than" ten seconds after the first).

[143] With respect, the opinions of Mr. Wilkinson, Mr. Catania, and Dr. Campbell are of limited utility. Without the black box data there are too many unknowns at play. It is impossible for either Mr. Wilkinson or Mr. Catania to determine with scientific accuracy the driver inputs made by Ms. Wasylyk. Given the competing findings that Ms. Wasylyk could end up at the final impact orientation on both a low and high friction surface, it appears to the court that the data could be manipulated to render a simulation that fit within either expert's reconstruction theory.

[144] The accident reconstruction evidence distracted from the fact-finding process, and consumed a disproportionate amount of judicial and court resources, not to mention expense to the parties, with little-to-no return on investment.

#### Winter Maintenance

[145] The plaintiffs retained **Timothy Leggett** to comment on the adequacy of Simcoe County's winter maintenance operations leading up to the collision. Mr. Leggett examined winter road maintenance procedures, policies, and practices in effect as of the date of the collision.

- [146] Mr. Leggett explained that the options available to Simcoe County prior to the collision to maintain safe conditions on its roads included proactive and reactive operations involving the application of salt as an anti-icer (preventing the bond of ice on the road's surface) and a de-icer (breaking the bond once formed), or sand, which provides traction on a slippery surface.
- [147] In his view, the use of salt in blowing snow and drifting conditions was poor practice, ill-advised because the moist brine created by its application would act as a magnet, attracting the blowing snow where it would stick instead of simply blowing across the roadway. With lower temperatures, the risk of refreeze increased. Refreeze due to the dilution of salt is a well-known phenomenon in the winter maintenance industry.
- [148] Further, once the decision to apply de-icing chemicals is made, (in this case, salt) operations and reapplications should have been continuous to avoid a refreeze.
- [149] The more appropriate response by Simcoe County would have been to patrol and plow and apply sand as necessary. When the roads warmed in the afternoon, Simcoe County could have continued with this approach, or switched to straight salt. If this was the choice, then circuit times would have needed to be short, particularly if the ambient temperatures were in the process of dropping.
- [150] Once Mr. Payne chose to apply salt on CR 88, he should have been on alert to prevent a refreeze. This would have included monitoring the temperatures and any incoming precipitation, returning to CR 88 to check the roadway within a reasonable period, and reapplying salt if necessary.
- [151] With respect to the efficacy of combining two routes into one for the afternoon shift, Mr. Leggett made the following observations:

Morning Shift: Route 88-4-89

- The day shift for Route 88-4-89 was 72 km in length, including 20 km of deadheading on CR 1 and CR 27, and 3 km of deadheading on CR 88 while travelling through Bradford West Gwillimbury.
- The records show this route was generally completed within a circuit time of 2 to 2.5 hours, coinciding generally with accepted industry standards of a 2-hour circuit time, particularly given that the route included a Class 1 roadway.

Morning Shift: Route 1-27

- Route 1-27 had a travel distance of about 60 km, with a general circuit time of 2 to 2.5 hours.

Afternoon Shift: Route 88-4-89-1-27

- The combined route, with no deadheading, was approximately 112 km/h, representing an increase of 55 percent. The operator would be required to return to Beeton Yard to reload in order to treat the entire distance, resulting in an inability to maintain the route in the same circuit time.
- The combined route included multiple road classes, requiring various levels of service, and the combined theoretical circuit time would be closer to 4 to 5 hours, depending on what operations were being carried out.
- With a maximum spreading speed of 40 km/h, and a maximum plowing speed of 60 km/h, Mr. Payne would not have been able to maintain a two-hour circuit time for the Class 1 highway, CR 88, where the collision occurred.

[152] Simcoe County did not produce any documentation to support the theoretical circuit time or the recommended order in which to treat the combined afternoon shift route.

[153] Mr. Leggett also found that the enhanced photographs, particularly 2527 and 2500, showed a visible glare, which he concluded was ice.

[154] **Brian Malone** was retained to opine on the winter maintenance provided by Simcoe County leading up to the collision. He provided helpful guidance in terms of the uses and drawbacks salt and sand can have.

[155] For example, salt dissolves when it comes into contact with moisture, either in the form of water or snow. Once applied salt takes about 30 minutes to dissolve and create a brine on the road surface. Sand, on the other hand, is effective as soon as it is applied to the road surface.

[156] While Mr. Leggett was of the view that using a 50/50 salt-sand mix was unsuitable, Mr. Malone confirmed for the court that such mixes were part of standard industry practice in 2011, and are still being used in some locales.

[157] Mr. Malone believed that Simcoe County's general winter maintenance practices were consistent with the prevailing standards of other Ontario municipalities in 2011. In his view Simcoe County was actively engaged in monitoring the weather conditions leading up to the collision, and actively performing road patrols in accordance with industry best practice, the latter pursuant to its obligations under the MMS.

[158] In terms of combining Routes 88-4-89 and 1-27, Mr. Malone believed that winter maintenance on the afternoon shift could be completed within the appropriate timeframe allowable under the MMS. During cross-examination, Mr. Malone was challenged on his failure to include any evidence supporting this assumption, either in the form of calculations, or any analysis at all.

[159] Mr. Malone did not agree with Mr. Leggett's conclusion that industry practice dictated Mr. Payne should have been monitoring the roads, plowing drifts and spot sanding slippery sections rather than applying salt on his first run. While he agreed with this generally in drifting conditions, he felt Mr. Leggett failed to take into account other weather events occurring in the same general timeframe.

## ANALYSIS AND FINDINGS

### *A. Condition of CR 88*

[160] Between January 11 and January 12, 2011, Simcoe County was in the midst of a weather event. Snow squalls were noted at 10:42 p.m. on January 11, 2011. The four afternoon MPSs worked overtime, and were out maintaining the roads until 3:00 a.m. on January 12, 2011. The morning shift operators were called in early, at 3:00 a.m., to deal with snow covered and snow packed roads. Snow squalls were recorded again at 6:20 a.m., and the records indicate the five MPSs were still out maintaining the roadways at 2:30 p.m.

[161] Mr. Galea began to note drifting conditions on his January 12, 2011, patrol as early as 4:40 p.m., and at 6:00 p.m. he recorded there were snow covered sections on the roadways. At 5:35 p.m., Mr. Galea noted it was -6° C, with no precipitation but drifting snow. The roads were bare to wet with slippery sections. At 7:00 p.m. Mr. Galea was heading westbound on CR 88. The roadway was snow covered and drifting conditions continued. On his patrol card he logged hazardous conditions due to drifts and ice spots. He understood that all four units were out controlling these hazards until at least 10:44 p.m., the time of his last entry.

[162] Operator Andrews was responsible for Route 88-4-89 on the January 12, 2011, morning shift. His first run on CR 88 started at 3:30 a.m., his second at 5:30 a.m., and his third at 7:30 a.m. On these three runs he used a 50/50 sand/salt mixture. On his fourth and final run, which lasted from 10:00 a.m. until 3:00 p.m. according to his Activity Sheet, he applied straight sand.

[163] Mr. Andrews' choice of material was appropriate to the weather conditions during his shift. When he applied the 50/50 salt/sand mix on his first three runs, the temperature was below zero, but still moderate enough for the salt to remain effective during the snowstorm. His last run of straight sand in the face of decreasing precipitation and variable levels of drifting snow was also appropriate.

[164] Mr. Payne left for his first run at 4:00 p.m., applying a 50/50 sand/salt mixture. The records reveal he treated only the westbound lane of CR 88 on this first pass, contrary to Mr. Galea's expectation that his operators maintain both sides of their assigned roads. Once his first run was over Mr. Payne spent the next three (or three-and-a-half) hours at the yard, while his workmates were out servicing their routes.<sup>4</sup> During this time Mr. Galea understood all four MPSs were out servicing District 2's roadways.

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<sup>4</sup> To be clear, Mr. Sproule, operator on Route 10-21, was in the yard for two hours during his shift, but this was broken up into one hour (7:00 p.m. to 8:00 p.m.) when he had to change plow units, and a second hour at the end of his shift

- [165] Mr. Payne's choice of a 50/50 salt/sand mix was not, however, appropriate, in light of the falling temperature and high winds. I agree with Mr. Leggett's opinion that this application "most likely contributed to deteriorated traction whereby slippery sections developed due to the salt acting as a magnet for the blowing snow and subsequently forming a re-freeze which caused ice to form on the roadway."
- [166] The purpose of applying salt is to aid in the removal of material. Mr. Payne applied salt, but he failed to go back and plow CR 88 after its application. With the prevalence of blowing snow throughout the afternoon and into the evening, Mr. Payne's decision to not check on the brine the salt created had dire consequences for Ms. Wasylyk.
- [167] Mr. Payne did not start his second run until 9:00 p.m. (or 9:30 p.m.), heading eastbound on CR 1 loaded with straight sand. At the intersection of CR 1 and CR 27 he had two choices: continue a short distance south to CR 88, the highest priority roadway in Simcoe County, or treat CR 27, a Class 2 roadway. Mr. Payne chose the latter option. By the time he reached CR 88, the conditions had deteriorated to such an extent that three passes were required in succession: the first two to scrape away the accumulated snowdrifts, and the third to spot sand. The only other road on which he did this many passes was CR 1, a Class 3 roadway, where he did four passes at the end of his shift.
- [168] The photographs depict that snow was encroaching onto the roadway. Coupled with the evidence of witnesses at the scene trained to look for problem areas when investigating and/or attending at a collision scene (Sgt. Black, PC Enright, Captain Poole and firefighter Andy McDowell), I find that CR 88 was variable and slippery in the vicinity of the collision. Mr. Leggett's theory of a refreeze is in keeping with this evidence.

*B. The Condition of CR 88 Amounted to a State of Non-repair*

- [169] CR 88 was in a state of non-repair if drivers, exercising ordinary care, could not traverse it safely. The concept of non-repair derives from *Housen v. Nikolaisen*, 2002 SCC 33, at para. 38, where the Supreme Court of Canada defined a municipality's duty of repair as "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."
- [170] A municipality's duty of repair does not extend to negligent drivers, and road based risks that are posed solely to negligent drivers cannot constitute non-repair: *Fordham v. Dutton-Dunwich*, 2014 ONCA 891, at para 49.
- [171] The condition of CR 88 was not the result of unforeseen circumstances. Simcoe County was at the tail end of a severe winter event that saw all available MPSs out treating and maintaining its roadways in the twenty-four hours leading up to the collision.
- [172] The forecast called for north winds, drifting snow and a low of -13°. The conditions required for the formation of ice, moisture and subfreezing road surface conditions were

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(11:30 p.m. to 12:30 a.m.). Another operator, Mr. Fuller, was at the yard between 4:00 p.m. and 4:30 p.m. although why is unclear.

expected. Simcoe County was aware that CR 88 was vulnerable to drifting snow and its hazards in the vicinity of the farmers fields.

- [173] Mr. Payne was responsible for CR 88. Mr. Payne understood the effects of salt application. He knew that salt melted and created a brine. He knew that in the right circumstance, such as a drop in temperature, that the brine could refreeze. He applied a 50/50 salt/sand mix on his first run at 4:00 p.m. Instead of continuing to maintain his route as his colleagues did, he chose to remain at the shop in the Beeton Yard for at least three hours.
- [174] I cannot reconcile Mr. Payne's Activity Sheet with the condition of CR 88 as described by the first responders at the scene. Had he plowed in both directions (east and west) and spot sanded as he testified, drifts would not have been encroaching onto the roadway. Further, sand would have been visible. Every witness who was asked did not see any sand: Sgt. Black, PC Enright, Sgt. Phillips, Captain Poole. Nor is sand visible in the police photographs, which I have deemed to be an accurate representation of CR 88 at the time of the collision. I acknowledge that Ms. Wos recalled seeing a flashing blue light up ahead of her on CR 88, but this is not persuasive evidence that it was Mr. Payne. Ms. Smith, on the same stretch of roadway at the same time, testified she did not recall seeing a snow plow. And if it was Mr. Payne, then where was the sand?
- [175] I accept from those witnesses who were well-versed in collision investigations that CR 88 had patches of snow encroaching from the shoulder on to the roadway. These patches had become compacted by vehicles driving over them, creating the slippery conditions over which Ms. Wasylyk was unable to maneuver safely.
- [176] As Gordon R.S.J. held in *Belanger v. The Regional Municipality of Sudbury*, 2015 ONSC 7071, at para. 60:
- I have little difficulty finding that the condition of the road amounted to a state of non-repair. Roads are not meant to be slippery. Although a snow-covered and slippery road may be safely travelled by many, it poses a significant risk to all users because it renders them less able to make the many adjustments required for safe driving. Braking takes longer, steering corrections are less effective, and driving becomes more difficult.
- [177] I am not prepared to make a finding as to whether Simcoe County's use of a 50/50 salt/sand mix was an appropriate choice for a Class 1 roadway. Although these "hot mixes" have been discontinued, their use was common practice in years past, though less prevalent in 2011, before more effective solutions (ie: pre-wetted salt) were conceived.
- [178] The efficacy of combining two afternoon shifts is another issue I need not determine given the facts. Had Mr. Payne been out servicing his assigned roadways his entire shift, as anticipated by Mr. Galea, my analysis would of necessity included an examination into whether the operator could effectively treat CR 88 in accordance with the MMS.

*C. The Condition of Non-repair Caused Ms. Wasylyk's Injury*

[179] The Supreme Court of Canada restated the test for causation in *Clements v. Clements*, 2012 SCC 32, at para. 8, holding that the question of causation does not involve merely identifying which causal factors were involved in a particular event, but rather calls for a determination of what causal factor(s) were necessary to a particular event:

The test for showing causation is the “but for” test. The plaintiff must show on a balance of probabilities that “but for” the defendant’s negligent act, the injury would not have occurred. Inherent in the phrase “but for” is the requirement that the defendant’s negligence was *necessary* to bring about the injury – in other words that the injury would not have occurred without the defendant’s negligence. This is a factual enquiry.

[180] Ms. Wasylyk lost control of her car not once, but twice, on a roadway that was described by emergency personnel at the scene as slippery, on a section of CR 88 known for drifting snow hazards. The operator responsible for CR 88 had left it unattended for four to five hours after treating it with a 50/50 salt/sand mix earlier in the day. Had Mr. Payne maintained his route as his superior envisaged, the roadway would not have posed a risk to Ms. Wasylyk.

[181] In my view, the connection between Simcoe County’s default and Ms. Wasylyk’s injuries is obvious, and the plaintiffs, on a balance of probabilities, have established that the condition of non-repair on CR 88 caused Ms. Wasylyk’s injury.

*D. Simcoe County Did Not Take Reasonable Steps to Prevent State of Non-repair*

[182] Given that the plaintiffs have proven both non-repair and causation, the onus shifts to Simcoe County to avail itself of any one of the three statutory defences in s. 44(3) of the *Municipal Act, 2001*, set out below for ease of reference:

- (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 to the highway or bridge and to the alleged default and those standards have been met.

[183] Section 44(3)(a) can be summarily dealt with. The patroller on shift testified that he saw slippery sections and ice spots on all roads throughout his shift on January 12, 2011. Simcoe County thus had actual knowledge of the condition of CR 88 and cannot rely on s. 44(3)(a).

[184] Section 44(3)(b) is also not available to Simcoe County. During his day shift, Patroller Bell recorded that the roads were snow-covered, with drifting and slushy sections. When

Mr. Galea was patrolling that afternoon, there was drifting and spot ice. Thus, the refreeze had started no later than 4:00 p.m., when Mr. Galea ordered all four equipment operators out.

- [185] Mr. Payne applied salt in blowing conditions, on ice, then left his route untreated for hours while the salt diluted and refroze. All while peak traffic with commuters heading east into Bradford was compressing the snow along CR 88, and specifically the eastbound lane that was left unplowed from Mr. Andrews' last pass. Even assuming Mr. Andrews' last pass over CR 88 was at 2:30 p.m. as he headed back to the yard (his shift ended at 3:30 p.m.), the eastbound lane of CR 88 was left unplowed for 8 hours until Mr. Payne's ostensible pass at 10:30 p.m. This is unreasonable in the face of the conditions on January 12, 2011.
- [186] Simcoe County had a system of patrolling in place. It was an effective system. During the entirety of his shift Mr. Galea noted conditions equating to a state of non-repair, and called out all of the operators available to him. This response is precisely what the MMS contemplated.
- [187] Unfortunately, Mr. Payne's failure to treat CR 88, the largest Class 1 roadway in District 2, for as long as he did can only be viewed one way: Simcoe County did not do all that was reasonably required of it.
- [188] Finally, Simcoe County did not meet the MMS standards, which provides a series of reaction times and repair standards for a variety of specified highway conditions. The relevant standards to this action being patrolling, snow removal, and treating ice.
- [189] Simcoe County met the patrolling frequency standard: 3 times every 7 days (there is no specific frequency standard during the winter season).
- [190] Although not addressed in any significant detail, the minimum standard for snow removal would also have been met, as the MPSs were out maintaining the roadways during the snowstorm.
- [191] However, Simcoe County did not treat the icy roadways after becoming aware there was ice within the 3 hours the MMS calls for. Given Mr. Galea's comments that he saw ice spots on all roads throughout his shift, this means he saw ice spots on CR 88 when he travelled along CR 88 between 6:40 p.m. and 7:00 p.m. Accordingly, Simcoe County had actual knowledge by 7:00 p.m. at the latest, and constructive knowledge even sooner, as according to Mr. Galea all roads had drifting and ice spots. Accepting for a moment that Mr. Payne sanded CR 88 at 10:30 p.m. as he testified to, this is after the expiry of the 3-hour timeframe under the MMS. As the plaintiffs point out, if the icy conditions are measured from the time Simcoe County had constructive knowledge (5:55 p.m.), then Mr. Payne was in the yard for the entirety of the 3-hour remedial window (6:00 p.m. to 9:00 p.m.).



*E. Ms. Wasylyk was Not Contributorily Negligent*

- [192] Simcoe County maintains that Ms. Wasylyk was driving negligently because she lost control of her car not once but twice. Further, loud music playing on her car's radio, and coffee spilled all over the interior of Ms. Wasylyk's car, points to distracted driving.
- [193] In reality, there is no evidence to support that Ms. Wasylyk was anything a prudent driver exercising reasonable care before losing control of her car on a slippery roadway. Her car was mechanically fit. She was not impaired by drugs or alcohol, and she was wearing her seatbelt. She did not have a cell phone at the time. She was travelling 20 km/h under the posted speed limit. Ms. Smith testified Ms. Wasylyk was not driving impatiently, she was not tailgating, and she was not trying to pass her.
- [194] Ms. Wasylyk's car was equipped with all-season tires. Although they were somewhat worn, Sgt. Black measured and confirmed her tires met the applicable standard set by the Ministry of Transportation. Sgt. Black did identify the worn tires as a causal factor in the collision, but no evidence was led by Simcoe County to substantiate that the tread depth caused or contributed to Ms. Wasylyk's loss of control.
- [195] Simcoe County also suggests that because no one else lost control of their vehicle on CR 88 that evening, Ms. Wasylyk was a negligent operator. In answer to this I can phrase it no better than Gordon R.S.J. in *Belanger*, at para. 111, who stated:

The operation of a motor vehicle involves the continuous application of conscious and subconscious decisions, actions and adjustments. Not all drivers will traverse the same stretch of road in the same manner even though they may all pass safely over it. To say, without more, that because no one else lost control of their vehicle Ms. Belanger must have been negligent ignores that the accident could just as easily have resulted from a decision, action or adjustment made by Ms. Belanger that was perfectly reasonable but which was not undertaken by anyone else. Given the slippery road conditions that existed on November 22, 2000, in the absence of some evidence of an overt decision, action, or adjustment by Ms. Belanger that would result in the loss of control of her vehicle, that loss of control is as consistent with normal and safe operation of her vehicle as it is with some act of negligence on her part.

- [196] It is a generally accepted rule that where a driver crosses the centre line of a roadway and a collision occurs, there arises a rebuttable presumption of negligence on that driver's behalf (see *El Dali v. Panjalingam*, 2013 ONCA 24, at paras. 17-20).
- [197] There is no evidence to suggest Ms. Wasylyk was anything other than a prudent and reasonable driver as she traversed CR 88 the evening of January 12, 2011. She was not driving at an excessive rate of speed. She was not driving negligently. She was on a straight section of road, not a corner. She lost control because of the conditions of the roadway, not the way she was driving.

[198] On all of the evidence, Ms. Wasylyk has rebutted the presumption of her negligence. I am satisfied that she did not contribute to the cause of the collision.

### CONCLUSION

[199] County Road 88, a Class 1 roadway, is a high-traffic throughfare to Highway 400 and points beyond. In the vicinity of the collision, CR 88 was susceptible to adverse conditions caused by blowing winds and drifting snow. This information was well within the ken of Simcoe County. Yet, it took insufficient steps to address those conditions when they appeared on CR 88 on January 12, 2011. When Ms. Wasylyk drove along CR 88 that night, she was an ordinary, non-negligent driver. Considering all of the surrounding circumstances, Simcoe County is responsible for Ms. Wasylyk's injuries. The plaintiffs are therefore entitled to their damages at the agreed upon amount.

### COSTS

[200] As the successful party, the plaintiffs are presumptively entitled to their costs.

[201] In the event the parties are unable to agree on costs, the plaintiffs may make written submissions (no longer than five pages, exclusive of a bill of costs) within twenty days. The Defendant's written submissions (no longer than five pages, exclusive of a bill of costs<sup>5</sup>) are to be made within twenty days thereafter. Reply submissions (no longer than two pages) shall be made within ten days.



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Casullo J.

**Released:** July 29, 2022

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<sup>5</sup> Relevant to the issue of the expectations of the unsuccessful party when considering costs: r. 57.01(1)(o.b).