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File No. CI 90-01-45871
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

DALE MARTIN,	)	A. H. Dalmyn and
	)	B. D. Kaminski
Plaintiff,	)	for the plaintiff
and	)	
	)	M. G. Finlayson
RURAL MUNICIPALITY OF	)	D. C. Rogers
ST. ANDREWS,	)	for the defendant
	)	
Defendant.	)	Judgment delivered
	)	December 9, 1997

McCAWLEY J.

The plaintiff, Dale Martin, sues for damages for injuries sustained as a result of a single motor vehicle accident which occurred in the early morning hours of April 24, 1988, on River Road in the Rural Municipality of St. Andrews ("the Municipality"). Mrs. Martin alleges that she lost control of her car due to the failure of the Municipality to maintain and repair the road and to provide adequate signage. The Municipality denies these allegations. This trial deals solely with the issue of liability.

Mrs. Martin was driving home at about 1:30 a.m., after spending a social evening with friends. There was some question about the amount of alcohol she had consumed. I find that Mrs. Martin drank at least two bottles of light beer.

Although the most direct route home was via Highway #9, on this occasion Mrs. Martin decided to take River Road. Highway #9 is a paved and comparatively straight four-lane highway, with a speed limit of 80 km/h. River Road is an oiled gravel road with a posted speed limit of 50 km/h and has no curbs or lights.

Having lived and worked in the Lockport/Selkirk area for many years, Mrs. Martin was familiar with River Road. She knew it to be a winding, scenic, gravel road prone to bumps and potholes, especially in the spring. I find that she had driven on River Road on many occasions although the last time she had taken River Road prior to the accident was in the fall of 1987. She indicated she had no particular reason for taking the River Road route this night.

The night was clear and the moon was bright. Having proceeded south on River Road, past St. Clements Church, Mrs. Martin

negotiated a left hand curve and observed the 50 km/h speed limit sign. It was her evidence that she was travelling 40 km/h and that in all likelihood she had on her highbeams. As she came up to the right hand curve where the accident occurred, she stated she was driving close to the edge of the road in the right hand lane when she hit something that caused the car to fishtail. She pumped her brakes but the car did not respond and she hit some more roughness, apparently in the northbound lane. Then, in her words, the car started to "shake like crazy" and "took off as though it had wings". She realized she was going over the embankment and, afraid she might drown in the river below, Mrs. Martin undid her seatbelt. She lost consciousness and when she awoke found herself outside the vehicle at the riverbed edge just north of her car which was upright and to her right.

Mrs. Martin was able to struggle up the steep embankment, despite a broken pelvis and dislocated shoulder, to a nearby home. Her husband was contacted and arrived about 3:40 a.m. Although shaken, Mrs. Martin initially declined any suggestion that an ambulance be called or that Mr. Martin take her to the hospital.

Mr. Martin took a flashlight and went to see the car and to retrieve his wife's purse. He found the car on the riverbed having obviously rolled down the embankment. On returning, he realized his wife was in considerable pain and called for an ambulance. The Martins arrived at the hospital in Selkirk around 5:20 a.m. on April 24, 1988.

Later that morning Mr. Martin attended the accident scene and took a number of photographs. There is no dispute that the photographs represent the condition of the road at the time.

The issue before me is whether the Municipality was negligent in failing to keep River Road in good repair. There is no question that a municipality has a duty to keep roads under its jurisdiction in a reasonable state of repair. This duty extends to the placing of traffic control signs.

As a result of the Manitoba Court of Appeal decision in Thiessen v Friesen et al, (judgment dated October 10, 1997, as yet unreported) it is now settled law in Manitoba that the test to be applied in determining if this duty has been met is whether the

conditions that existed at the time of the accident presented "an unreasonable risk of harm". Scott C.J.M. (for the court) observed that the test is conveniently summarized in Gould v. County of Perth (1983), 42 O.R. (2nd) 548 (H.C.) at pp. 556-557:

> "... Liability will only result where the situation gives rise to an unreasonable risk of harm to the 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, [(1979), 9 C.C.L.T. 241] it is a question of fact in each case whether a condition of non-repair exists."

On April 24, 1988, River Road consisted of areas of gravel, broken crust, potholes and ruts, some washboard, as well as parts which were smooth. The road was dry and clear of snow and the ground was frozen. It was early spring and heavy machinery could not be brought onto the road to effect repairs without causing damage until the ground had thawed.

These rough conditions were prevalent every spring and were well known to the local residents and frequent users of the road. They also existed from time to time throughout the year, for example, after a heavy rain storm. A councillor for the Municipality from 1986

to 1995 acknowledged that the Municipality occasionally received complaints about potholes and dust but that the Municipality had never received a complaint that the road was dangerous. The road was used regularly by the school bus.

In 1987, the Municipality was responsible for 500 miles of roads, most of which were gravel. Of the 12 employees in Public Works, three were dedicated on a full-time basis to grading roads, looking after culverts and drainage, and taking care of snow removal.

The plaintiff called an expert witness, Dr. Lansdown, who gave evidence to the effect that the sudden change from dry, sound pavement to loose gravel, in addition to potholes and a washboard surface posed a "hazard" in that the surface did not provide enough traction for safe driving. He testified that the frictional resistance of a gravel road (or coefficient of friction) could drop by as much as 60% when one moved from smooth pavement to loose gravel. He likened the condition of the road to that of small ballbearings on a hard surface, and suggested that the coefficient of friction was between .10 and .15 - in other words that the road was more slippery than ice. In his opinion, if repairs could not have been effected immediately, the

Municipality should have posted warning flags. It was also his view that minimum standards of road signage would require a sign marking the curve and that a barrier along the riverbank should have been erected.

The Municipality called an experienced accident reconstruction engineer, Mr. Keith, who disagreed with this opinion. Mr. Keith referred to the published tables of coefficient of friction of Fricke, which he cited as authoritative and widely relied on in his area of expertise. It was his opinion that the coefficient of friction at the accident corner was at least .4 and that the road provided sufficient traction for safe driving, not only at the posted speed but at significantly higher speeds. I accept his evidence in this regard. I also accept his evidence that the critical curve speed at the accident corner, ignoring the existing superelevation, was 93 km/h, well beyond the 50 km/h posted speed, which I find to be appropriate, and Mrs. Martin's stated speed of 40 km/h.

In so doing, I note that Mr. Paul Kouri, a retired RCMP staff sergeant from the area, had driven the road a number of times while on duty at 75-80 km/h without difficulty. Although Mr. Kouri was

trained to drive at high speeds, Mr. Keith testified that frictional resistance does not depend on driving ability. It is also noteworthy that Mrs. Martin's husband agreed that it was possible to drive 50-55 km/h on the curves and 70-75 km/h on the straightaways on River Road without incident.

When asked about the lack of signage at the accident curve, Mr. Keith admitted he was unfamiliar with the standards set by RTAC (RTAC Manual of Geometric Standards for Canadian Roads). However, the videotape evidence he presented showed a gentle curve which could be driven at speeds far in excess of the 50 km/h posted speed. It also demonstrated that the curve was clearly visible day and night. Mr. Kouri and the former municipal councillor both testified that they were unaware of any accidents occurring at this corner, either before or after Mrs. Martin's, nor were they aware of any complaints received that the curve was unmarked or dangerous.

Even if I were to find that the Municipality was imprudent in not posting a sign or warning flags, or erecting a barrier, which I do not, the condition which existed did not pose an unreasonable risk of harm, nor was it the proximate cause of the accident. Mrs. Martin

was familiar with the road condition and knew there was a curve there. Furthermore, I accept Mr. Keith's evidence that from the time Mrs. Martin first hit the roughness in the right hand side of the road and when she went over the embankment, she had sufficient opportunity to stop. Mr. Keith's opinion was that she could have come to a complete stop, then accelerated to a speed of 40 km/h and stopped again safely.

Although there is no doubt that the road conditions at the time were rough, I find that they reflected the normal break-up which took place every spring and which could be found elsewhere in the Municipality and did not present an unreasonable risk of harm such that the Municipality was negligent in failing to repair the road or in failing to erect a barrier or warning signs or flags.

Having found that there was no unreasonable risk of harm by virtue of the conditions that existed at the time, it is not necessary for me to consider whether the risk was reasonably foreseeable or to consider the issue of contributory negligence.

Since it was argued before me, I find that Mrs. Martin has not met the requirement of section 153(1) of The Highway Traffic Act C.C.S.M. c. H60 which places an onus on the driver in a single vehicle accident to prove that the accident did not occur entirely through his or her own negligence or improper conduct.

I accept the evidence of Mr. Keith that the accident could not have occurred the way Mrs. Martin recollected it. The car could not have "taken off" as a result of hitting the potholes on the right side of the road. According to Mr. Martin, the shocks and springs of the 1979 Pontiac Grande Prix which his wife was driving worked properly and the tires were properly inflated. Mrs. Martin had ample opportunity to stop her car between the rough area she said she first hit and where she went over the embankment. Mr. Kouri, who visited the scene of the accident the next day, and is trained in accident analysis, stated firmly that there was no evidence of braking and none is seen in the photographs taken by Mr. Martin.

There is no doubt that Mrs. Martin was involved in a serious accident on River Road that night. Whether she was driving faster than she thought because she was in a hurry to let her daughter

in the house, whether her brakes failed, or she inadvertently hit the wrong pedal, whether impairment due to fatigue, alcohol or inattentiveness contributed to the accident, or whether it was a combination of any number of these factors, I need not decide. I do conclude, however, that she has not demonstrated that the accident did not occur entirely through her own negligence or conduct.

For the foregoing reasons, I dismiss the plaintiff's action against the defendant Municipality, with costs. If counsel are unable to agree as to costs, the matter may be spoken to.

D.J. McCauley J.