reliable witnesses.

[22] Similarly, I prefer the opinions given by Lance Ladan and James Gordon, two experts who testified for Powerland, to the opinions offered by Keith Lalman, who testified as part of the plaintiff's case.

[23] Not only are the qualifications of Mr. Ladan and Mr. Gordon superior to those of Mr. Lalman, they are also more directly related to the issues in this case. It was clear, as well, that Mr. Lalman exhibited more partiality in his testimony than did either of the other two experts, and seemed less familiar with network terminology and process than did Mr. Ladan and Mr. Gordon.

[24] I am satisfied, on the basis of the expert testimony which I do accept, that it is an accepted industry standard to ground oneself to a computer chassis before attempting to work with the motherboard, keyboard or other sensitive components of a computer, and that it is the responsibility of the systems administrator to ensure that proper safeguards are in place to protect the network data. The company is responsible for the data; the technician is responsible for the hardware. I accept the fact also that Powerland took adequate steps to restore the data and applications which, to its knowledge, were on the new server.

[25] I can find no negligence on the part of Powerland, and therefore the plaintiff's claim will be dismissed, with costs to the defendant.

Action dismissed.

Editor: David Weir/ham

Yvonne Madeline Nykorak (plaintiff)
v. The Rural Municipality of
La Broquerie (defendant)
(File No. CI 94-01-85527)

Indexed As: Nykorak v. La Broquerie (Rural Municipality)

Manitoba Court of Queen's Bench
Winnipeg Centre
Smith, J.
January 16, 1997.

Summary:

Nykorak sued the municipality of La Broquerie for damages for injuries sustained in a 1992 single vehicle accident. She lost control of her car when she sped up and went through a dip in the road. She claimed that the accident resulted from poor road conditions and lack of warning signs.

The Manitoba Court of Queen's Bench dismissed the action, as Nykorak did not satisfy the onus set out in s. 153(1) of the Highway Traffic Act. The court provisionally assessed damages as follows: $25,000 in general damages, $7,500 for damages to Nykorak's motor vehicle, $1,366.71 for Manitoba Health and $26,000 for lost income.

Damage Awards - Topic 179

Injury and death - Neck injuries - Soft tissue injuries - Nykorak's prior physical condition was exacerbated by a 1992 single vehicle accident in which she sustained chronic soft tissue injuries - Before the accident, Nykorak was unable to work because of numerous physical problems - She should have returned to work part-time as a maid by September 1994, earning $13,000 annually - The Manitoba Court of Queen's Bench dismissed the action but provisionally assessed damages as follows: $25,000 in general damages;

$7,500 for damages to Nykorak's motor vehicle; $1,366.71 for Manitoba Health and $26,000 for lost income - Nykorak was entitled to two years of lost income - The court made no assessment for future loss of income given Nykorak's prior chronic physical problems, type of employment, age and lack of evidence - See paragraphs 20 to 25.

Municipal Law - Topic 1731

Liability of municipalities - Highways and streets - Dangerous highway conditions - Warning of danger - [See **Municipal Law - Topic 1801**].

Municipal Law - Topic 1801

Liability of municipalities - Negligence - What constitutes negligence - Nykorak sued the municipality of La Broquerie for damages for injuries sustained in a 1992 single vehicle accident - She lost control of her car when she sped up and went through a dip in the road - She claimed that the accident resulted from poor road conditions and lack of warning signs - The Manitoba Court of Queen's Bench dismissed the action - The court held that the accident was solely Nykorak's responsibility due to her careless driving manner and excessive speed considering the road conditions which were well known to her - The lack of signs was not negligence on the municipality's part - Nykorak did not satisfy the onus set out in s. 153(1) of the Highway Traffic Act - See paragraphs 10 to 19.

Cases Noticed:

Thiessen v. Friesen (1996), 112 Man.R.(2d) 191 (Q.B.), folld. [para. 13].

Statutes Noticed:

Highway Traffic Act, S.M. 1985-86, c. 3; C.C.S.M., c. H-60, s. 153(1) [para. 12].
Municipal Act, R.S.M. 1988, c. M-225; C.C.S.M., c. M-225, s. 231(1) [para. 11].

Counsel:

Ross A. Antymniuk, for the plaintiff;
Michael G. Finlayson, for the defendant.

This action was heard before Smith, J., of the Manitoba Court of Queen's Bench, Winnipeg Centre, who rendered the following decision on January 16, 1997.

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[1] Smith, J.: The plaintiff sues for damages for injuries sustained by her as a result of a single vehicle accident which occurred on December 5, 1992 on Vita Road in the Municipality of La Broquerie, in Manitoba.

[2] The plaintiff was alone in her car and driving south on Vita Road towards her brother's farm. The road was straight as she approached Joubert Creek, also known as Davidson Creek, at which point there is a trail which crosses the road at right angles to Vita Road. At that point there is a dip in the road which extends approximately two car lengths. The plaintiff slowed down at the trail and then sped up and went through the dip. She lost control of the car, the car turned on its side and returned to an upright position and ended up turned around facing north in the ditch.

[3] The plaintiff got out of the car, walked about one mile to her brother's farm and later attended at the Vita Hospital.

Positions Of Parties

[4] The plaintiff submits that the accident was caused due to the negligence of the defendant in failing to keep the road in reasonable repair. Further, the plaintiff submits the condition of the road caused the accident and the injuries which she sustained. In addition, the plaintiff submits there

were no road signs in and around the dip. The depression, which she submitted was 20 to 21 inches deep at its deepest part, was not visible to drivers travelling from the north.

[5] The plaintiff submits that they have proven that this single car accident was not her fault. The plaintiff stated the dip was dangerous, although neither she nor her brothers to whom she spoke immediately after the accident reported to the municipality the hazardous situation or the fact that there were no signs for vehicles driving in a southerly direction. The plaintiff and her brothers gave evidence there were two road signs visible to drivers approaching the site from the south, one stating "Ford Crossing" and the other showing "bumps" and "20 k.p.h.".

[6] The plaintiff contests the credibility of Mr. Lischynski, the grader operator who regularly graded or plowed Vita Road. He indicated that on the 27th of November, when he went by, the signs were properly located. He stated he would have reported missing signs.

[7] The defendant says that as this was a single vehicle accident the onus is on the plaintiff to prove that she was not the sole cause of same. The defendant suggests in regard to causation that even if there was not a sign there was no duty on the defendant to necessarily have signage at the location and that the inspection procedures were adequate.

[8] In short, the defendant says the lack of signs or the condition of the road did not cause the accident. The defendant indicates that travelling 80 km. per hour on the road was too fast under the circumstances, that she was aware of the dip, that she had travelled the road a number of times and that she had also crossed it when it was "Ford Crossing" before a culvert was installed in 1991. The defendant says the plaintiff gave evidence she slowed down and then sped up. It is clear she fishtailed by the tracks in the snow. It is submitted the plaintiff was driving too fast and lost control of the car and that this had nothing to do with the depression or lack of signage.

[9] A number of documents and exhibits were filed by agreement, including a number of photographs taken at various times after the accident. The plaintiff's various descriptions of the photographs, locations, and distances affect some of their reliability as evidence. It is clear from the evidence, particularly of Mr. Tetreault, the administrator of the defendant, that Vita Road at the location of the accident was constructed in 1990 and at that time was a "Ford Crossing". Later a culvert was constructed to carry some of the water crossing the road. It is also clear that late in the summer on some occasions water would go over the road where the culvert and dip were located.

The Law

[10] Two statutory provisions are relevant to this case.

[11] Section 231(1) of the **Municipal Act**, R.S.M. 1988, c. M-225; C.C.S.M., c. M-225, states:

> "Repair of highways
>
> "231(1) Subject to subsection (2), each municipality shall keep in a reasonable state of repair every highway, or portion thereof, that is in the municipality."

[12] Section 153(1) of the **Highway Traffic Act**, S.M. 1985-86, c. 3; C.C.S.M., c. H-60, states:

"Onus on owner or driver

"153(1) Where loss or damage is sustained by any person by reason of a motor vehicle upon a highway the onus of proof that the loss or damage did not arise entirely or solely through the negligence or improper conduct of the owner or driver is upon the owner or driver."

[13] In the case of **Thiessen v. Friesen** (1996), 112 Man.R.(2d) 191 (Q.B.), Morse, J., at page 195, in my opinion, correctly states the law in Manitoba:

"There is no question that a municipality has a duty to keep roads under its jurisdiction in a reasonable state of repair. This is required by s. 225(1) of the **Municipal Act** of Manitoba, S.M. 1970, c. 100 - c. M-225. But a number of cases in Manitoba have consistently held that this duty does not extend to the placing of traffic control signs. See, for example, **Hupe and Hupe v. Rural Municipality of Franklin**, (1952), 7 W.W.R.(N.S.) 132 (Man. C.A.)."

and at pp. 195-196:

"In **Dymond and Osika v. Government of Manitoba** (1965), 51 W.W.R. 380 (Man. Q.B.), Nitikman, J., quoted (at p. 382) with approval, the following statement of Boyd McBride, J., in **Lupichuk v. Beaver (Mun. Dist.)** (1955-56), 17 W.W.R. 389 (Alta.), at p. 392:

'It is common knowledge in Western Canada that roadways and highways are surveyed along township and section lines and that there are dead-end roads and "jogs" where there are correction lines. It is also common knowledge, with increasing traffic of all descriptions, that in any municipal district road allowances hitherto unopened and not in use may be opened up and roads constructed and graded sufficiently to meet the local requirements or a dirt road already opened may be substantially improved and reconstructed to meet increased traffic and eventually proved to the extent that it becomes a district or main highway. That is the familiar pattern in this developing province. However commendable in the interests of public convenience and safety by day and night, I hold that there is no duty owing by a municipal authority to the travelling public to place stop signs or other road signs or warning markers on the roads or highways within the municipality save where there may be a danger or hazard of such a character that reasonably requires a notice of some kind be given of it to bring that peril to the attention of those using the road. The exercise of any statutory or other power or authority to erect such signs in my view lies very largely within the realm of common sense and a prudent discretion on the part of the municipal council.'

"And in **Montani v. Matthews** (1996), O.J. No. 1974 (Ont. C.A.), Moldaver, J.A., stated the duty of a highway authority to maintain and keep highways in repair as follows (para. 44):

'... as the majority decision in **R. v. Côté**, [1976] 1 S.C.R. 595, establishes, a "special and highly dangerous condition" must exist before the Ministry's duty to take remedial steps is triggered.'"

[14] Considering all the evidence and exhibits filed by consent of the parties, I make the following findings of fact:

1. The plaintiff was familiar with the road, grew up in the area where the road is

located and travelled it a number of times since it was initially constructed in 1990 and upgraded in 1991. Although most of the time she travelled the road from the south, there were a number of times when she approached from the north.

2. The evidence including the photographs presented indicated the dip in the road at or near Johnson Creek, also known as Joubert Creek, was approximately two car lengths in length.

3. The plaintiff's own evidence indicated that she had applied her brakes as she was coming towards a trail that crossed Vita Road. As she approached she saw that there were no vehicles on the trail, and she therefore sped up. I find as a fact that the cause of the accident was her excessive speed. This caused her to go into the ditch after sliding first to the left and then to the right, turning over on the side of the car breaking windows and then returning on its wheels facing north.

4. At the time of the accident there were no signs on Vita Road when approaching the intersection in a southerly direction. Coming from the south to the north there was a rough road sign indicating 20 miles per hour. There was also an older sign prior to that which read "Ford Crossing".

5. There had never been an accident at this location on this road prior to that date nor since that date.

6. The dip, in essence, was not a dangerous trap or something that the plaintiff did not know existed. In fact, she slowed down as she approached this spot.

[15] In his evidence one of the plaintiff's brothers clearly indicated that he travelled the road often. He could do so safely at the creek at 40 kilometres per hour. I also find that neither the brothers nor the plaintiff advised the municipality that the signs were down or that the road was dangerous. On the evidence of the grader driver and the administrator of the defendant I find that the road was properly inspected and a procedure to deal with problems was in place.

[16] In my opinion, the lack of signs going south on Vita Road at the time and location in question was not negligence on the part of the defendant.

Decision

[17] I find the plaintiff has not proven her case on liability nor satisfied the onus set out in s. 153(1) of the **Highway Traffic Act** of Manitoba.

[18] I find the accident was solely the responsibility of the plaintiff due to her careless driving manner and excessive speed considering the conditions of the road which were well known to her.

[19] The plaintiff's claim is dismissed with costs to be taxed if not agreed upon.

Contingent Assessment

[20] Had I given judgment in favour of the plaintiff I would have assessed her damages as follows:

General damages	$25,000.00
Damages to motor vehicle	$7,500.00
Account with Manitoba Health	$1,366.71
Loss of Income	$26,000.00

[21] In dealing with general damages there is no doubt her prior condition was exacer-

bated by the accident in which she sustained chronic soft tissue injuries similar to a whiplash.

[22] In dealing with loss of income it is clear she earned approximately $13,000 per year. The plaintiff's own evidence is she did not commence part-time work until the spring of 1996.

[23] I also find that before the accident the plaintiff was under doctor's care and was unable to work because of a number of physical problems. No date was estimated by her doctor as to when she would return to work. There is evidence from a Dr. Arneja that the plaintiff should be able to work part-time at her old job as a maid by September 1, 1994. It is difficult to assess loss of income under the circumstances but in my opinion she should be entitled to two years of loss of income.

[24] Considering the above and the nature of the plaintiff's pre-accident chronic physical problems, type of employment, age, the lack of evidence from the plaintiff as well as her employer, and other contingencies of life, I would make no assessment for future loss of income.

[25] Interest would run on the nonpecuniary damages in accordance with Part XIV of the **Court of Queen's Bench Act**, C.C.S.M., c. C-280, from the date of issuance of the statement of claim.

Action dismissed.

Editor: Jocelyne M. Caissie/ham

Cindy Whiting (plaintiff) v.
Winnipeg River Brokenhead
Community Futures Development
Corp. (defendant)
(Suit No. CI 95-01-87212)

Indexed As: Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.

Manitoba Court of Queen's Bench
Winnipeg Centre
Dureault, J.
January 17, 1997.

Summary:

The plaintiff alleged that her dismissal from her job was wrongful and caused her to suffer mental distress. The plaintiff sued the employer.

The Manitoba Court of Queen's Bench held that the plaintiff was wrongfully dismissed and entitled to six months' salary in lieu of notice. The court also awarded $15,000 nonpecuniary damages for mental distress and $60,000 for loss of opportunity to earn income.

Master and Servant - Topic 7502

Dismissal of employees - What constitutes dismissal or discharge (incl. constructive dismissal) - The plaintiff was a manager with a community development corporation - After six years' employment, the plaintiff was placed on four months' probation because of alleged interpersonal skill problems - The plaintiff tried unsuccessfully to get written details of the alleged problems - The plaintiff found the situation stressful and went on sick leave - The corporation terminated her sick leave pay - The plaintiff sued the corporation - The plaintiff had severe stress related problems which rendered her unemployable for the two years before trial - The