

Jake Friesen (plaintiff) v.
The Rural Municipality of de
Salaberry (defendant)
(Suit No. CI 93-01-69389)

**Indexed As: Friesen v. de Salaberry
(Rural Municipality)**

Manitoba Court of Queen's Bench
Jewers, J.
November 22, 1994.

Summary:

The plaintiff lost control of his pickup truck as it was rounding a curve on a gravel road in the defendant municipality. The plaintiff was seriously injured and sued the municipality for damages, claiming that it had constructed and maintained a dangerous curve and should have given appropriate warnings to the public.

The Manitoba Court of Queen's Bench dismissed the action.

Municipal Law - Topic 1731

Liability of municipalities - Highways and streets - Dangerous highway conditions - Warning of danger - The plaintiff lost control of his pickup truck as it was rounding a curve on a gravel road in the defendant municipality - The plaintiff sued the municipality for damages, claiming that it had constructed and maintained a dangerous curve and should have given appropriate warnings to the public - The Manitoba Court of Queen's Bench dismissed the action - The existence of the curve was obvious to the plaintiff, the superelevation was not markedly inadequate, the only defect in the road was a subtle compound curve and the situation generally was not so compelling as to impose a duty on the municipality to erect warning signs.

Municipal Law - Topic 6246

Actions against municipality - Conditions precedent - Notice of action or accident - Excuse for failure to give - The plaintiff sued the defendant municipality for damages arising from a motor vehicle accident in August 1991 - The plaintiff did not give the municipality notice of the accident within seven days as he was required to do - He did not give the notice until April 1992 - The Manitoba Court of Queen's Bench held that the failure to give notice was not fatal to the claim, where the plaintiff was preoccupied with his injuries following the accident, he had limited education, business and legal experience, he did not know about the notice requirement and there was little prejudice to the municipality.

Cases Noticed:

Hupe v. Franklin (Rural Municipality) (1952), 7 W.W.R.(N.S.) 132 (Man. C.A.), refd to. [para. 40].

Lupichuk v. Beaver (Municipal District) (1956), 17 W.W.R.(N.S.) 389 (Alta. T.D.), refd to. [para. 40].

Dymond v. Manitoba (1965), 51 W.W.R.(N.S.) 380 (Man. Q.B.), refd to. [para. 41].

Houser v. West Lincoln (Township) (1983), 29 M.P.L.R. 55 (Ont. C.A.), dist. [para. 43].

Statutes Noticed:

Highway Traffic Act, S.M. 1985-86, c. 3; C.C.S.M., c. H-60, s. 153(1) [para. 37].

Authors and Works Noticed:

Baker, Traffic Accident Investigation Manual, generally [para. 30].

Transportation Association of Canada, RTAC Manual of Geometric Design Standards 1976 Metric Edition, generally [para. 19].

Transportation Association of Canada, RTAC Manual of Uniform Traffic Con-

trol Devices 1976 Metric Edition, generally [para. 19].

Counsel:

D.M. Troniak, for the plaintiff;
M. Finlayson, for the defendant.

This case was heard before Jewers, J., of the Manitoba Court of Queen's Bench, who delivered the following decision on November 22, 1994.

[1] Jewers, J.: The plaintiff, Jake Friesen, lost control of his pickup truck as it was rounding a curve on a gravel municipal road in the defendant municipality on August 28, 1991. He was seriously injured and is suing the municipality for damages on the grounds that it had constructed and maintained a dangerous curve and should have given appropriate warnings to the public. The defendant acknowledges that there were no warning signs on the road, but says that the curve was not dangerous and that, in any event, the accident was solely due to the fault of the plaintiff.

[2] There is also a preliminary issue as to whether the plaintiff gave timely notice of the accident to the defendant.

[3] The plaintiff is aged 37, married with a grade nine education. He has had no special job training other than taking some welding courses. He is employed as a farm worker. He received facial and other injuries in the accident and, as a result, has lost a good deal of the sight in one eye. The issue of damages has been split off from the issue of liability, and I have been asked to deal with liability only.

[4] The following statement of agreed facts was filed.

"1. The population of the RM is 2,985

"2. The RM spends per year:

(a) \$150,000 for gravel

(b) \$ 50,000 for fuel

(c) \$130,000 for salary and benefits all connected to road maintenance.

"3. The RM has two persons employed full time and three persons employed seasonally in connection with road maintenance.

"4. At the material time, the RM operated two graders and contracted out its gravel hauling.

"5. Grass along shoulders was mowed by seasonal operators using the RM's own tractor and mower.

"6. Any sanding required on paved streets was contracted out to the Provincial Dept. of Highways.

"7. The road on which Jake Friesen had his accident on August 28, 1991, was graded weekly by the RM.

"8. The members of council for the RM annually tour the RM together with the Public Works Supervisor to determine what gravel is needed where. If more is needed in a particular ward the councillor responsible for that ward will approach council with whatever request he or she deems appropriate."

[5] The accident happened on August 28, 1991. According to the Traffic Accident Report (Exhibit 2 Tab 1), the accident happened at 5:45 p.m. It happened on a two lane gravel highway known as the Old St. Pierre Road which goes from Provincial

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Trunk Highway 205 to the Town of St. Pierre in the defendant municipality in Manitoba.

[6] The exact point of the accident was at a curve in the road, not far from the intersection with Highway 205. In his report, the expert witness, Dr. A.M. Lansdown stated that for a west bound vehicle there are two curves to be negotiated in the first 3500 feet of roadway. (The Friesen vehicle was travelling west when the accident occurred.) The first, starting 1500 feet from PR 205 is a rather sharp curve with a deflection left of about 40 degrees and a nominal centre line radius of 654.16 feet. This is the accident or "east" curve. Approximately 800 feet further west, the second, or "west" curve, curves to the right having a deflection (right) of about 21 degrees and a nominal centre line radius of 1822.32 feet.

[7] All of the evidence persuades me that the curves are obvious to westbound traffic and that westbound drivers would have no difficulty in observing and preparing for the curves well in advance of entering them. No traffic signs warning of their presence would be necessary -- at least in daylight -- nor was this suggested in argument.

[8] In August of 1991, the plaintiff lived and worked at Nelson Creek Farms and his brother Victor lived and worked at Joubert Farms. In the afternoon of August 28, 1991, Jake and his wife drove to Nelson Creek to visit Victor and his wife. Both Jake and his brother had consumed some beer that afternoon and it was agreed that between 2:00 to 2:30 p.m. to 4:30 p.m., Jake had consumed two to three "real" beers (as opposed to "lite" beer) but that at the time of the accident, his blood-alcohol level was not at, or over, .08.

[9] At about 5:00 p.m., the two couples left

the farm and travelled west on Provincial Trunk Highway #205 en route to Morden, Manitoba for the weekend. Jake and Victor were in Jake's pickup truck, a 1977 Chevy half-ton truck and Jake was driving. Jake and Victor decided to go into St. Pierre to get some cigarettes and so turned off on the Old St. Pierre Road which they believed was a shortcut. Victor had driven the road once or twice before but Jake cannot recall ever having been on the road prior to the accident. Jake cannot recall anything about the afternoon of the accident, or the accident itself.

[10] It was agreed that as Jake's truck was approaching and going into the east curve, it was travelling at between 45 to 55 miles per hour. The drawing, prepared by Cst. Joyal of the RCMP (Exhibit 2 Tab 14), shows clearly what happened next. Jake had got well into the curve when his truck went from the right (north) side of the road to the left side, then back to the right and then completely off the road, coming into collision with a hydro pole on the right or north side of the road. The plan shows skid marks commencing near a pile of loose gravel on the right side of the road extending 100 yards on the road itself and an additional 34 yards off the road to the hydro pole.

[11] There were several versions as to how the accident came to happen:

[12] Victor said that the truck got caught in loose gravel and started to fishtail.

[13] The police officer who wrote up the traffic accident report, said that Jake "appeared to have been turning a left ... curve with grade a bit too fast and caught the loose gravel on the side, began fishtailing and could not be brought under control ..."

[14] Constable Joyal theorized Jake had simply turned too late, overcorrected and went out of control.

[15] In his report, Dr. Lansdown stated his conclusion as to the sequence of events that took place:

"(a) Mr. Friesen headed northwest into the accident corner at 80 to 90 km/h.;

"(b) Upon reaching the (invisible) transition point on the east curve, he over-shot the tight curve, reaching the right (north) edge of the road;

"(c) Upon hitting the loose gravel on the north edge, the driver overcorrected his steering to the left, and with full superelevation now beneath his wheels, shot to the left (south) side of the road;

"(d) On finding himself suddenly on the left side of the road, the driver overcorrected again, turning right, and now losing control of his car, headed into the north ditch; and

"(e) While out of control in the north ditch, the driver struck a hydro pole, sustaining serious injury."

[16] Mr. A.E. Redwood, the traffic collision reconstructionist who gave expert evidence, stated that the actual speed of the vehicle may have been a factor, but because of the location of the loss of control, it appeared the driver, in fact, had nearly completed the curve and had accelerated rapidly, causing the rear wheels to slip which, in turn, caused the rear end to travel to the right slightly and, in turn, caused the driver to oversteer with the resultant loss of control. (This was in his written report.) At trial, he added the second possibility that Jake had not been paying sufficient attention to his driving, got

caught in the loose gravel, and then overcorrected.

[17] In cross-examination, Dr. Lansdown acknowledged that one theory of the accident could be that Jake had suddenly accelerated in the loose gravel.

[18] Dr. Lansdown inspected the accident site in August 1993, January 15, 1994 and again on October 1, 1994. He filed a written report and gave evidence at trial. He is a highly qualified expert in the field of road design and safety. He is a professor of civil engineering at the University of Manitoba with some thirty years experience in his field. His evidence is entitled to a great deal of weight and respect and I accept it generally, particularly with regard to his evidence as to the curve being a "compound" curve. I am not, however, as persuaded by his evidence with regard to the critical curve speed or coefficient of friction for reasons which I will go into.

[19] In his written report dated April 30, 1994 (Tab 7 Exhibit 2), Dr. Lansdown stated:

"(d) Curvature and Superelevation.

"The writer observed that the west curve (Defl. = 21 19'30"; Centreline Radius = 1822.32 ft.) was properly aligned, and was superelevated for approximately 80 to 90 km/h. driving. However, serious problems were observed in the geometry of the east curve. Although nominally a simple curve of centre-line radius of 654.16 ft., the curve was in reality two adjacent curves of approximately equal length -- an easterly segment of approximately 1200-ft. or more radius, and a westerly segment of less than 600-ft. radius. Of course, the centre-line alignment of the road has wandered from that in the engineering

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plans, to produce this compound curve.

"It is well known that a compound curve can be disconcerting, or even dangerous, to a driver, since the eye cannot readily pick out the change in curvature (in contrast to the eye's ready ability to discern a transition of tangent to curve, or curve to tangent). Compound curves should not be employed in roadway alignment, for this reason. But where they do exist, (several have been built into the Winnipeg street system, for example), they must be marked carefully with speed control signs at the point of change of curvature.

"In addition to there being a compound curve at the accident site, there is a problem in the superelevation provided. Each of the segments of the curve have been superelevated correctly to approximately equilibrium at 80 to 90 km/h., but at the junction of the curves, there is confusion. For a westbound vehicle (the case of the Friesen vehicle), the first part of the curve (R > 1200 ft.) presents no problem; but where the radius suddenly drops to less than 600 ft., the superelevation is, for a short distance, appropriate for a much larger radius. Thus, for a short stretch, the westbound driver finds himself suddenly travelling at a speed well beyond equilibrium for the changed horizontal curvature. By the time the vehicle reaches the part of the 600-ft. radius segment where the superelevation is appropriate, driver confusion can have set in, which could lead to serious discomfort or disaster.

"3. Comments

"It is the writer's belief that the eastern (accident) curve on the roadway in question, as presently constructed, constitutes a serious potential hazard to westbound drivers. The speed limit is 90 km/h., with

an implied safe speed of 100 to 110 km/h., (Ref. [2]). In actual fact, a radius of around 600 ft. on a road of this nature implies a maximum design speed of 70 to 80 km/h., and should be posted with signs WA-3 and WA-7 at 70 km/h. (Ref.[13]), after the compound curve has been changed to a simple curve of radius 654 ft. In the meantime, good practice calls for orange warning signs WD-A3 plus WD-A7 with a temporary speed limit no greater than 50 or 60 km/h. at the curve, for westbound traffic. Three black and orange chevrons (WD-A9L) should also be placed at the point of confusion, for westbound traffic."

(Superelevation means the degree of tilt of the roadway to make it easier to turn; for example, the north side of the curve for westbound traffic would be higher than the other side. The references in the report were to RTAC Manual of Geometric Design Standards 1976 Metric Edition, Ottawa and Uniform Traffic Control Devices 1976 Metric Edition, Ottawa, both published by the Transportation Association of Canada.)

[20] This compound curve is not obvious in the photographs taken by the police and by Mr. Redwood.

[21] Mr. Redwood inspected the site on a number of occasions commencing on June 23, 1994. He filed a written report dated August 30, 1994 and gave evidence at the trial. He is a person with great experience in accident investigation and reconstruction, having spent some 29 years in the RCMP. His evidence, too, is entitled to a great deal of weight in his field of accident reconstruction. In his written report, he gave some support to Dr. Lansdown's evidence in that he said that the curve "may not be a perfect arc or a constant radius" and he also agreed

with Dr. Lansdown's conclusion that the centre-line alignment of the road has wandered from that in the engineering plans. On the other hand, he concluded that it "does not appear to be a dangerous curve".

[22] At trial he stated flatly that he did not notice a compound curve. He would certainly have been looking for one because he was then aware of Dr. Lansdown's conclusion that there was one.

[23] Mr. Forest, the public works superintendent of the defendant, was not aware that the curve was compound and did not know what a compound curve was.

[24] Dr. Lansdown revisited the site on October 1, 1994 and November 12, 1994 and found that the confusion at the junction of the two curve segments (experienced in January 1994 and described in his report of April 1994) had been greatly reduced. It was his opinion that some grading and shaving had taken place in the spring and "the difficult geometry of the transition from the east to west segments of the curve had been eased". What is puzzling is that both Mr. Forest and Mr. Chouinard, the grader operator who routinely graded the road, said that no changes had taken place. Either these gentlemen had forgotten about the changes, or Dr. Lansdown had overestimated the seriousness of the problem at the time of his initial inspection.

[25] As to the existence of a compound curve, I prefer the evidence of Dr. Lansdown. His findings in that regard are more within his area of expertise than that of Mr. Redwood and, as I have said; Mr. Redwood's report does lend some support to Dr. Lansdown's thesis. At the same time, I accept that the problem may not have been as severe as Dr. Lansdown first believed and, in any event, was so subtle as to escape the

attention of not only the average layperson, but a trained accident reconstructionist such as Mr. Redwood.

[26] There was conflicting evidence - mostly between the two experts - as to the speed at which the curve could be safely driven. Dr. Lansdown thought that the posted speed limit should be lower than 90 km/h. and Mr. Redwood disagreed.

[27] On January 15, 1994 Dr. Lansdown personally drove his car through both curves in both directions a number of times. He felt "discomfort" at speeds ranging from 75 km/h. to 95 km/h.

[28] Dr. Lansdown tested the road again on November 12, 1994 and found some driver discomfort westbound at speeds ranging from 85 km/h. to 95 km/h. with a strong tug to the right and sideslip in the west segment at 95 km/h.

[29] In contrast, Mr. Redwood had no difficulty taking the curve at 112 km/h. and Cst. Joyal said he had no difficulty in taking the curve at normal highway speeds.

[30] In his report Mr. Redwood said that the coefficient of friction of the roadway was somewhat inconsistent as there were areas more heavily travelled with tracks in the gravel. He took as his reference, the textbook by Baker "Traffic Accident Investigation Manual" which gave the coefficient for friction for loose gravel at from .40 to .70. He took .40 to be conservative. He calculated the critical curve speed (that is the speed required to sideslip) for the curve at 112 km/h. in the loose gravel.

[31] This critical curve speed or coefficient of friction was challenged by Dr. Lansdown, who said that while the text Baker seems to recognize the different characteristics of

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"deep, loose" and "packed" gravel, it did not seem to recognize the critical case of "packed with grit" or a well packed surface with a dusting of loose gravel such as the road in question. He said that it has long been recognized that the design coefficient for gravel roadways in Manitoba should be .17 or less depending on design speed.

[32] In response to this, Mr. Redwood said that he had done literally hundreds of tests of gravel roads and had never found a coefficient of less than .40. Then on November 14, 1994 he actually tested the coefficient of friction at the site and found it to be from .61 to .64. Taking into account the changing gravel conditions on the road, he estimated that the probable coefficient at the time of the accident was something in the order of .50. In this respect then, in my view, Mr. Redwood's evidence carries somewhat more weight than that of Dr. Lansdown: Mr. Redwood made an actual test. Dr. Lansdown did not.

[33] In summary then the expert evidence on this point is conflicting, with Mr. Redwood's being more persuasive to me than that of Dr. Lansdown. I have not overlooked Dr. Lansdown's evidence as to his personal "feel" for the road, but again that is contradicted by the evidence of Mr. Redwood and Cst. Joyal who had no problems with it. I recognize that they are virtually professional drivers and the average driver may not feel as comfortable on the curve as they did.

[34] Another point to be considered is that the defendant has never had a report of an accident at this curve. Mr. Forest, who has been working for the defendant for twelve years, had never heard of an accident there. It is conceivable that mishaps did occur there which were not reported or which were reported to the police and not to the municipality. Nevertheless, it is reasonable to

assume that if there had been a serious accident, or one attributable to some fault in the road at the point in question, this would have come to the attention of the defendant. Thus, the actual experience at the curve supports the conclusion that the general public is not having any problem with it, even with the posted speed of 90 km/h.

[35] It may be that in an abundance of caution the speed limit should be posted somewhat lower than 90 km/h. to accommodate the safe design standards mentioned by Dr. Lansdown. However, the plaintiff has failed to prove, on the balance of the evidence, that the curve cannot reasonably be driven at the normal highway speed of 90 km/h.

[36] Nevertheless, I am satisfied that the curve is a compound curve and that there is a potential for at least some drivers to be mislead and confused - or "disconcerted" as Dr. Lansdown says - by this fact. The compounding does increase the degree of risk presented by the curve.

[37] One is almost reduced to speculation as to precisely how the plaintiff got into trouble. He cannot tell us himself what happened. If he went into the curve at 45 miles per hour, that would have been within Dr. Lansdown's "comfort" zone and it is unlikely that speed would have been a factor; if he went into the curve at 55 miles per hour then there is more likelihood that speed was a factor. He may simply have driven too close to the shoulder and got caught up in loose gravel; he might have driven too close to the shoulder of the road and overcorrected too sharply; he may have negotiated the curve quite successfully but accelerated too abruptly and excessively on his way out of the curve; or he may have become disoriented by the transition point between the two segments of the compound curve. (I

note in passing that under s. 153(1) of the **Highway Traffic Act** of Manitoba, the onus is upon the plaintiff to show that loss or damage did not arise entirely or solely through his negligence or improper conduct.)

Notice To The Municipality

[38] The plaintiff was required to give notice of the accident to the municipality within seven days and he did not do so. In fact, he did not give the requisite notice until April 1992. I have decided that this failure to give notice is not fatal to his claim. He was very badly hurt and preoccupied with his injuries for weeks following the accident. He is of relatively limited education and business experience. He has had little experience of the law and lawyers, although he did hire a lawyer some years ago to defend him on a traffic charge. He had no idea that he was required to give notice of the accident to the municipality and he did not think to contact a lawyer about the accident until he saw a TV ad offering the services of lawyers for accident claims. When he finally engaged his lawyers, they did give the notice. Furthermore, there was little prejudice to the defendant. The RCMP did a thorough and helpful investigation, complete with a diagram and photographs. The defendant would not have been much further ahead if it had done its own investigation. It might have been helpful if they could have examined the state of the roadway at the accident site at or about the time of the accident, but they do have the RCMP photographs and, according to Mr. Redwood, although there would be some variation in the state of the road, it would not be all that significant.

Liability Of The Defendant For The Accident

[39] The central question for the court is not so much whether, and to what extent, the

plaintiff was the author of his own misfortune, or whether the existence of the compound curve might have contributed to the accident. The real question is the legal liability of the defendant in the circumstances.

[40] In **Hupe v. Franklin (Rural Municipality)** (1952), 7 W.W.R.(N.S.) 132, the Manitoba Court of Appeal held that while the province and some municipalities do erect signs for the convenience of the travelling public, there is no statutory or other duty in law to do so. In **Lupichuk v. (Municipal District) Beaver** (1956), 17 W.W.R.(N.S.) 389 (Alta. T.D.), at 392 there is the following:

"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: **Hupe v. Franklin R.M.**, supra."

[41] This quotation was adopted with approval by this court in **Dymond v. Manitoba** (1965), 51 W.W.R.(N.S.) 380, at 382 (Man. Q.B.).

[42] It would not be reasonable to hold the defendant liable for this particular accident. There was not anything obviously wrong with the road at the accident site. The curve was perfectly visible to oncoming westbound traffic. The municipality had never been

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notified of any previous accidents at the site and there was no evidence that any had ever occurred. They had no reason to believe - or even suspect - that the curve could not be safely driven at normal highway speeds and, indeed, I have held that it has not been proved that the curve could not be so driven. They had no reason to know of - or suspect - the existence of a compound curve. The public works superintendent had never heard of a compound curve and, until Dr. Lansdown did his investigations, nobody had drawn the fact of such a curve to the attention of the defendant. The compound curve in this case was so subtle that the average layperson would not likely have detected it, much less appreciated its significance. As I have said, even Mr. Redwood was not able to see it and he was looking for it. In short, there was nothing about the road and the curve as it presented itself to the municipal councillors in 1991 that would have engaged their "common sense and prudent discretion" and caused them to make any changes in the road or erect warning signs.

[43] The plaintiff relied on the decision of the Ontario Court of Appeal in *Houser v. West Lincoln (Township)* (1983), 29 M.P.L.R. 55 (Ont. C.A.), but I think that case is distinguishable on its facts, although it is similar to the present case. There the plaintiff drove his car off a road while attempting to round a very sharp curve at night. There were no signs warning of the approach of the curve or posting a lower than normal speed limit. Not only that, but the superelevation of the curve was most inadequate and, in fact, as one entered the curve there was actually negative superelevation which would have tended to cause a car to drive straight ahead off the road. The plaintiff was not familiar with the road and had no idea that the curve was approaching - perhaps, in part, because he was distracted by the headlights of an on-

coming vehicle. The trial judge found that the defendant was in breach of its duty to the plaintiff in that it should have posted warning signs, but held that this had nothing to do with the accident, which was caused by the plaintiff's own carelessness. However, the court of appeal held that, accepting the findings of the trial judge, the plaintiff had established that the defendant was in breach of its duty of care to him as a user of the highway; that the failure created a risk of harm, particularly for the nighttime traveller who was a stranger to the area; that the curve would be undetected and that there was a serious risk that it would cause him to drive off the highway at highway speeds and be injured.

[44] By contrast, in the present case the existence of the curve was obvious to the plaintiff, the superelevation was not markedly inadequate, the only defect in the road was the subtle compound curve and the situation generally was not so compelling as to impose a duty on the defendant to erect warning signs.

[45] In the result, the plaintiff's action is dismissed with costs if asked for.

Action dismissed.

Editor: Angela E. McKay/mjp