Indexed as:

Steen v. British Columbia (Ministry of Transportation and Highways)

Between
Pam Steen, plaintiff, and
Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Transportation and Highways, the District of Squamish and Capilano Highway Services Company (a partnership), defendant

[1999] B.C.J. No. 706

Vancouver Registry No. B963824

British Columbia Supreme Court
Vancouver, British Columbia

Romilly J.

Heard: March 15-19 and 22-25, 1999.
Judgment: filed March 30, 1999.

(31 pp.)

Torts -- Negligence -- Liability -- Highways and streets -- Dangerous highway conditions, standard of care, icy patches -- Causation -- Causal connection -- Defences -- Contributory negligence -- Apportionment of fault -- Motor vehicle accidents -- Crown -- Torts by and against Crown -- Negligence by Crown -- Construction and maintenance of highways -- Liability of Crown for acts of servants.

Action by Steen against the Ministry of Transportation and Capilano Highway Services for damages sustained in a motor vehicle accident. The accident occurred on the morning of February 9, 1996. Capilano maintained the highway where the accident occurred. Steen was familiar with the highway and the road appeared clear to her. The speed limit was 80 kmh. Steen's estimated speed was 101 kmh. She lost control of her vehicle on black ice, crossed the centre lane and collided with an oncoming vehicle. Capilano claimed that it had sanded the accident site 30 minutes before the accident. However, individuals at the accident scene found it to be very slippery. There was no sign of sand or salt on the highway.

HELD: Action allowed. The Ministry and Capilano were 60 per cent liable. Steen was 40 per cent liable. Both lanes of the road were extremely slippery at the time of the accident. Whatever work was done by Capilano was inadequate to make the road safe for public motorists. Capilano was negligent in the fulfilment of its duty. The contractual relationship between Capilano and the Ministry was not relevant to Steen. Steen was not privy to their contract and this was not a contracts case. The icy conditions contributed to the accident. This satisfied the requirements of causation. Direct scientific evidence that proper treatment of the road would have averted the accident was not essential. Steen lost control of her car only when she unexpectedly hit the ice. This rebutted the inference that it was solely her negligence that caused her vehicle to leave her lane. Steen was partly responsible for the collision due to her increased speed and inattentiveness to the condition of the road. She should have driven at a speed that was suitable to the conditions and to her driving experience.

Statutes, Regulations and Rules Cited:

Crown Proceedings Act, R.S.B.C. 1996, c. 89, ss. 2(c), 3(2)(b), 3(2)(f).

Highway Act, R.S.B.C. 1996, c. 188, ss. 25(1), 30(1).

Ministry of Transportation and Highways Act, R.S.B.C. 1996, c. 311, ss. 12, 22.

Counsel:

J.N. Laxton Q.C. and R.D. **Gibbens,** for the plaintiff.
T.H. MacLachlan, for HMTQ as represented by the Ministry of Transportation.
I. Giroday and R. Killough, for the defendant, Capilano Highway Services.

ROMILLY J.:--

BACKGROUND

1 This action concerns a motor vehicle accident that occurred on the morning of February 9, 1996. The accident occurred in and around an area known as the Cat Lake area approximately 10 Kilometres north of Squamish, British Columbia. The accident occurred on Highway 99.

2 The plaintiff was proceeding southbound when she lost control of her vehicle, slid into the northbound lane and collided head-on with a vehicle travelling northbound driven by Mr. Jeff Kirby.

THE PLEADINGS

3 The plaintiff has alleged that she sustained damages as a result of the negligence of the Defendant, Capilano Highway Services Company (A Partnership) ("Capilano") and sets out the particulars of her allegations of negligence in paragraph 7 of the Amended Statement of Claim filed December 13, 1996. Those particulars are as follows:

> (a) Failing to perform a reasonable inspection of Highway 99 in order to determine whether it was in a safe condition or in need of sanding and/or

salting because it was slippery with ice and thereby in an unsafe, dangerous and hazardous condition.

(b) Failing to properly maintain Highway 99 by failing to salt and sand the said Highway properly or at all, such that the Highway was slippery with ice and in an unsafe, dangerous and hazardous condition.

(c) Failing to install concrete lane dividers on a particularly unstable corner at the site of this accident.

(d) Failing to warn motorists using Highway 99 that the said Highway was slippery with ice and in an unsafe, dangerous and hazardous condition to motorists using the same.

(e) Constructing the curved section of the road where the plaintiff's accident occurred improperly or failing to repair and maintain that section of the road properly or at all, such that the road tends to accumulate and hold water rather than having the water drain off to the sides with the result that when the road is wet and freezing temperatures occur, this section of the road becomes a hazard to motorists due to the formation of black ice on its surface, of which condition the Defendants knew or ought to have known.

4 The defendant, Capilano, denies all allegations of negligence. Further, Capilano alleges in paragraph 7 of its Amended Statement of Defence filed February 22, 1999 that the plaintiff's damages were sustained as a result of the negligence of the plaintiff, particulars of which include the following:

(a) Failing to take any, or alternatively, adequate care for her own safety;

(b) Driving the motor vehicle without due care and attention and at a speed that was excessive relative to the road and weather conditions contrary to Section 144 of the Motor Vehicle Act;

(c) Failing to remain on the right side of the roadway contrary to Section 150 of the Motor Vehicle Act; and

(d) Failing to direct the course of the vehicle she was operating so as to prevent it from crossing the centre line.

In short, Capilano alleges that this accident occurred because the plaintiff was driving at a speed well in excess of the posted speed limit of 80 kilometres per hour or, alternatively, was driving at a rate of speed which was excessive relative to the road and weather conditions prevailing at the time of the accident and was travelling on the southbound shoulder of Highway 99 rather than in the southbound lane which is intended for vehicles travelling along Highway 99 southbound.

FACTS

5 From the evidence, I find as a fact that on the 9th February, 1996, the plaintiff, a lawyer, left Whistler, British Columbia, driving her Toyota 4Runner, in the early morning travelling southbound on highway 99 to her office in West Vancouver. I am satisfied that when she left Whistler, the weather was fairly warm for the time of the year.

6 At Cat Lake, about seven minutes away from Capilano's highway maintenance yard where service equipment for the roads was kept, at an unsigned curve in the highway, the plaintiff's vehicle went out of control on black ice on the highway, crossed the centre line and collided head-on with an oncoming vehicle travelling northbound on the same highway. The accident took place at ap-

proximately 7:53 a.m. The eyewitness to the accident are the brothers Steven Nicoll and Kevin Nicoll. They were proceeding northbound towards Whistler. At the point of the highway where the accident occurred there were two northbound lanes and one southbound lane. According to Steven Nicoll there were three vehicles proceeding northbound. The first vehicle was a Blazer, the second vehicle was a Taurus and behind the Taurus were the Nicoll brothers in a white Neon. These vehicles were proceeding in a single line in the outside northbound lane. Mr. Nicoll describes what he saw the plaintiff's vehicle doing when he first noticed it:

> When I noticed the vehicle, I could see its wheels turning back and forth, you know, like it wasn't affecting the direction of the travel of the vehicle. Then it kind of drifted, it came closer to the curb and then it drifted this direction a little bit.
>
> The Court: Coming back into its proper lane almost?
>
> The Witness: Yes, then this Blazer was able to drive through and the Taurus in front of us was trying to guess the direction of the vehicle, but it seemed to -- the 4Runner seemed to do exactly what the Taurus didn't want it to do. They hit directly in front of us...
>
> .....
>
> It was in a -- like a four-wheel slide, sliding across the centre line with its wheels turning back and forth and I could see the rims of the wheel, like the motion of the wheel stop while the vehicle continued going, and then they continued to roll and stop and, you know, the wheels were doing this, back and forth motion, and the vehicle was just in a four-wheel slide on the ice.

7 Kevin Nicoll stated:

> Q. Now when you say sliding out of control, was the truck moving in the same direction as the wheels?
> A. I don't really know. I know it was just sliding, and you could tell that she was trying to correct it because you see the tires turning to correct the slide, and then it kind of straightened out and hit the other car and in the other lane, head on.

8 I find that the Nicoll brothers are truly independent witnesses. They also gave their evidence in a very forthright fashion. I accept their evidence in total. Apart from the evidence to which I have already alluded, I accept their evidence that at the time of the accident both the northbound lanes and southbound lanes of the highway were extremely slippery and hazardous and that they saw no sign of salt or sand on the highway at the accident scene at the time of the accident. I specifically accept their evidence that they could not stop suddenly at the accident scene but that they had to travel for some distance before they could come to a stop after the accident because of the slippery conditions that existed in the northbound lanes. I accept their evidence that when one of the Nicoll brothers got out of his vehicle in one of the northbound lanes he slipped and fell on the ice and had to "palm" his way around his car to get to the shoulder of the road. In addition I accept the evidence of the Nicoll brothers about their observations of the difficulty that other southbound motor vehicles

were having on the icy road immediately after the accident, especially the vehicle that almost hit one of the constables on the scene of the accident because it lost control on the icy surface of the road.

9 It is also noteworthy that Cst. Pearson also slipped on the black ice on the highway when he came to the accident scene to investigate the accident. I also find as a fact that at the accident scene at the time of the accident there was no sign of sand or salt on the highway. In this regard, I accept the evidence of the Nicoll brothers and every other independent witness who was at the accident scene that morning.

10 Mr. Krzanowski who is one of the machine operators for Capilano testified that he knew that the Cat Lake area tended to freeze up before other areas on Highway 99 between Squamish and Whistler. He testified that on the morning of the accident he did a general patrol of Highway 99 between Squamish and Whistler looking for slippery road conditions. He testified that on the morning of the accident he proceeded through the Cat Lake area northbound at about 6:15 a.m and that he proceeded through this same area southbound at 7:00 a.m. Mr. Krzanowski testified that during this patrol he placed a mixture of sand and salt on the areas that he found to be slippery. This evidence is interesting because neither of the Nicoll brothers, Staff Sergeant Eglinski nor Cst. Pearson saw any sign of sand or salt at the accident scene immediately after she accident, at 8:00 a.m. on the morning of the accident.

11 At approximately 7:20 a.m. on the morning of the accident Capilano received a call from the K.C.M.P. about icy conditions at the Cat Lake area, the scene of the accident. Capilano's office which was seven minutes away from the Cat Lake area immediately dispatched Mr. Crowston with a full sanding truck and spreader to deal with the hazard at Cat Lake.

12 Mr. Crowston arrived at the Cat Lake area at approximately 7:30 a.m. and he claims that he applied a mixture of sand and salt to the northbound lanes at Cat Lake and then decided to proceed 15 kilometres northbound to the Garibaldi Salt Sheds spreading a mixture of sand and salt in other slippery areas of the road before he refilled his truck and returned to apply material to the southbound lanes at Cat Lake. While on his trip to the Garibaldi Salt Sheds, the accident took place.

13 While I am not in a position to second guess Mr. Crowston, it is clear from the evidence that he was sent by his foreman, Mr. Merv Stalkie, to deal with the hazardous slippery conditions that he had been advised existed at Cat Lake. It is obvious from the conditions chat existed on the highway at that area at the time of the accident that he had not dealt with this problem or was at least negligent in the manner in which he dealt with it. The bottom line is that at the time of the accident, a few minutes after he passed through that area, the Cat Lake portion of the highway was still slippery and hazardous. In fact both the northbound and southbound lanes of the highway were like a skating rink.

14 The facts as found by me with respect to the contributory negligence of the plaintiff will be dealt with later on in this judgment.

ISSUES

15 The issues in this matter are set out in the defendant's opening as follows:

(a) The negligence of the independent contractor
(b) The negligence of the Province

(c) The contributory negligence of the plaintiff

16 The first two issues are joined by virtue of the recent Supreme Court of Canada case of Lewis v. British Columbia, [1997] 3 S.C.R. 1145, which holds that the Province is liable for the acts of its independent contractors. This issue has been conceded by the defendant Ministry. However, it should be noted that the Ministry's two representatives in this instance were diligent and dedicated in their task of monitoring the contractor's work to ensure that reasonable safety standards were met. They did all that could have been done in the circumstances. The Ministry cannot be said to have been negligent itself in the carrying out of its duty. Nonetheless, the Province remains liable for the acts of its contractor.

LIABILITY OF PUBLIC AUTHORITIES

17 The seminal cases on liability of public authorities are Just v. British Columbia (1989), 64 D.L.R. (4th) 689 (S.C.C.) and Brown v. British Columbia (1994), 112 D.L.R. (4th) 1 (S.C.C.). The majority in these cases confirmed that the test set out in Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.) at p.754, and adopted by the Supreme Court of Canada in Kamloops v. Nielsen (1984), 10 D.L.R. (4th) 641, continues to be the law in Canada.

DUTY OF CARE

18 In Lewis, supra, the court considered the duty owed to the plaintiffs by the Ministry as well as the independent contractor at para. 23:

> The paramount authority and direction for repairs and maintenance thus lies with the Ministry. That statutory authority, when exercised, gives rise to a duty to perform that work with reasonable care. In the absence of a specific statutory exclusion from that duty, it must arise from, and proceed in tandem with, the authority to manage, control and direct the repair and maintenance of the highways. That duty to reasonably perform the maintenance work would of course require the employees of the Ministry who undertook the work to perform it with reasonable care. The same responsibility to exercise reasonable care in performing the authorized work that is applicable to the Ministry extends to independent contractors engaged by the Ministry to perform the work. This is the appropriate interpretation and application of the authorizing statutory provisions.

19 The Court continued at para. 33 to discuss the policy considerations which support the Ministry's liability for the acts of its contractors:

> In my view, the particular vulnerability of the travelling public should be a significant factor in reaching the conclusion that the respondent cannot escape liability for negligent repair work by delegating it to an independent contractor. The vast majority of highway travellers are in no position to assess the extent or nature of the construction and maintenance work which should be done, the competence of those undertaking the work or the financial responsibility of any independent contractor performing the work. Their lack of knowledge and very natural tendency to rely upon the Ministry in these matters indicates the potential vulnerability of highway travellers when maintenance work is done negligently. They should be entitled to rely upon and to look to the respondent as the entity

responsible for taking reasonable care in carrying out the repairs and maintenance of the roads.

20 In Anns, the House of Lords set out a two-stage test to determine whether a public authority owes a duty of care to the plaintiff. The first stage is whether there is a sufficient relationship of proximity between the parties such that the carelessness of the defendant might cause damage to the plaintiff. The second stage is to consider any factors which may negative or reduce that duty.

1. Proximity

21 It has been noted in Just, Brown, and Lewis, supra that a relationship of proximity does exist between the Ministry of Transportation and Highways and members of the public who use the highways. In Lewis, Cory J. stated at para 16 that "[t]here could not be a clearer case of proximity... In fact, the very basis of the Ministry's duty to use due care at the operational level is to ensure the safety of users of the highway."

2. Factors Reducing or Eliminating Duty

a)Statutory Exemption from Liability

22 statutory provisions which relate to the issues in this case are:

Highway Act, K.S.B.C. 1996, c. 188:

> 25(1) .....
>
> "maintenance" means the work, after the construction of a highway, of preserving and keeping it in repair including... other works necessary to keep open and maintain the highway for the use by the traffic for which it is required.
>
> .....
>
> 30(1) The control of the construction and maintenance of every arterial highway is vested in the ministry.

Ministry of Transportation and Highways Act, K.S.B.C. 1996, c. 311:

> 12. The minister has the management, charge and direction of all matters relating to the acquisition, construction repair, maintenance, alteration, improvement and operation of... highways...
>
> .....
>
> 22. The minister must direct the construction, maintenance and repair of all . . . highways . . . in progress, or constructed or maintained at the expense of the government, and which are under the minister's control.

Crown Proceeding Act, R.S.B.C. 1996, c.89:

> 2. Subject to this act,
>
> .....
>
> (c) the government is subject to all the liabilities to which it would be liable if it were a person...
>
> 3. .....
>
> (2) Nothing in section 2 does any of the following:
>
> .....
>
> (b) subjects the government to greater liability for the acts or omissions of an independent contractor employed by the government than that to which the government would be subject for those acts or omissions if it were a person;
>
> .....
>
> (f) subjects the government, in its capacity as a highway authority, to any greater liability than that to which a municipal corporation is subject in that capacity.

23 In Just, supra, the court considered these provisions, as they were prior to the 1996 revisions, and concluded at p. 703:

> On their face these statutory provisions do not appear to absolve the respondent from its duty of care to maintain the highways reasonably. Rather, by inference they appear to place an obligation on the province to maintain its highways at least to the same extent that a municipality is obligated to repair its roads.

b) Policy or Operational Decision

24 This question was not argued by the parties, so I will only comment on it briefly. The policy/operational distinction is based on the premise that certain actions of the government must be free from judicial scrutiny in order to allow the government to effectively govern. However, the full immunity previously enjoyed by the Crown is clearly no longer desirable. The compromise between these two principles arrived at by the courts frees policy decisions from scrutiny by the courts, but any Crown actions which can be construed as operational will be subject to review.

25 Policy decisions are usually, but not always, made by people of high authority. They involve social or political factors, and deal with the allocation of resources and budgetary considerations (Just, supra at p.706). Policy decisions are described as polycentric, multi-faceted, planning or macro-decisions which affect the welfare of the nation (Swanson Estate v. Canada (1991), 80 D.L.R. (4th) 741 (Fed.C.A.), at p.749). Conversely, operational decisions are usually the product of

administrative direction, expert or professional opinion, technical standards or general standards of reasonableness (Just, supra at p.706) . Micro-decisions which are specific and constitute governmental tasks which involve "serving" would also be operational (Swanson, supra at pp.749-50). If a decision is found to be policy based, it may still be reviewable if it is found not to be reasonable in the circumstances, or not a bona fide exercise of the discretion granted to the body by statute.

26 In the present case, the issue is clearly operational. The financial, personnel and budgetary considerations had already been made and contractors hired to deal with maintenance of the highways. The issues of the mixture of salt and sand, the equipment and application rate to be used are all specific, operational decisions based on technical standards to determine how to best handle various hazardous road conditions in that area. Therefore, those decisions are subject to review by the courts.

STANDARD OF CARE

27 In Just, supra at p.707, the court points out that the Crown may be held to a different standard than would an individual. Cory J. used the example of one's responsibility to maintain a sidewalk in front of his or her home versus the governmental responsibility for hundreds of miles of highway. At p.708 he stated:

> The frequency and the nature of inspection required of the individual may well be different from that required of the Crown. In each case the frequency and method must be reasonable in light of all the surrounding circumstances. The governmental agency should be entitled to demonstrate that balanced against the nature and quantity of the risk involved, its system of inspection was reasonable in light of all the circumstances including budgetary limits, the personnel and equipment available to it and that it had met the standard duty of care imposed upon it.

28 The court in Swanson, supra at p. 752 also discussed the standard of care required of government officials:

> What is required of them is that they perform their duties in a reasonably competent way, to behave as would reasonably competent inspectors in similar circumstances, no more and no less. In evaluating their conduct, courts will consider custom and practice, any legislative provisions and any other guidelines that are relevant. The risk of harm and its severity will be balanced against the object and the cost of the remedial measures. In the end, the court must determine whether the employees of the defendant lived up to or departed from the standard of care demanded of them, the same way as in other negligence cases.

TREATMENT OF ROAD BY CAPILANO

29 Evidence was presented that the area of the highway where the accident took place, Cat Lake, is known for its propensity to freeze first, or to be one of the areas to freeze first. This is partly due to the fact that this section is shaded from the morning sun by the mountains.

30 Capilano claims that the northbound lanes in the Cat Lake area were treated at 6:00 a.m. and the southbound lane at 6:45 a.m. At approximately 7:20 Capilano received a call from the RCMP indicating that this area of road had in fact become hazardous on the morning of the accident. The

evidence suggests that Mr. Crowston, in response to this call, passed through the area with a sanding truck at around 7:30 to 7:40, travelling at approximately 50 to 55 km/h, and treated the northbound lanes with a mixture of salt and sand in unknown proportions. He then proceeded north to the Garibaldi Salt Shed without treating the southbound lane.

31 The standards expected from Capilano are expressed in various documents and agreements before the Court. The Maintenance Standard for Highway Patrol prescribes patrol services to "identify and attend to any condition on the Highway that constitutes or has the potential to create an unsafe or hazardous condition to the travelling public and other Highway users." Further, under the Performance Standards, the contractor is expected to "provide a continuous application of Winter Abrasives through curves, on hills and at accident sites or at any other location on the Highway which could present a hazard to the travelling public and other Highway users." The custom and practice to be expected of Capilano is to respond to a call identifying a hazardous condition and to restore it to a condition that is safe for the travelling public.

32 Had Capilano complied with the standards as outlined, and carried out the work as their witnesses have testified, one would expect that the northbound lanes were sufficiently treated and the hazardous condition in those lanes rectified. However, the testimony of independent witnesses indicates that all lanes were extremely slippery at the time of the accident, not just the southbound lane. The plaintiff's car left the southbound lane and travelled into the northbound lanes, with the brakes applied, and her vehicle continued to slide. Steven Nicoll's car, which was travelling behind the Kirby vehicle, took approximately two blocks to stop due to the ice. When Mr. Nicoll exited his vehicle, which was in the northbound lane, he slipped and fell to the ground. He noted there was a fine crystal layer over the road. Further, while trying to get to the vehicles which had collided, he had to "palm' his way around his car to keep from slipping again on the icy surface. Mr. Nicoll also noticed that other cars were having difficulty stopping or slowing down on the road after the accident. He testified that a truck which was signalled to slowdown or stop by a police officer was unable to do so, due to the icy conditions. The officer was forced to run into a ditch to avoid being hit by the vehicle.

33 Cst. Pearson testified that when he exited his vehicle, which was stopped in the northbound lane, he slipped. He noticed that the road surface was very slippery, even in boots with good treads. He advised the emergency vehicles which were called to attend at the accident site to use extra caution as the accident area was extremely slippery. None of the witnesses at the scene noticed any sand or salt on the road,including Mr. Nicoll who fell to the ground and used his hands on the icy road to help himself up.

34 Defence counsel has argued that Mr. Crowston made the correct decision in continuing up the road to treat other icy areas instead of circling back or spending more time at the Cat Lake area to ensure that it was adequately treated. With respect, I disagree. Capilano received a call specifically about hazardous conditions in the Cat Lake area from the RCMP. These conditions must have been noticed by an officer or other motorist driving through the area. This person also would have encountered other areas of the highway en route, however, it was the Cat Lake area which was reported as hazardous. There were other employees on duty and other trucks prepared to go out and spread sand and salt on the roads generally. Therefore, Mr. Crowston should have concentrated his efforts on the area of which he had been warned. He may have decided to treat other icy patches which he encountered along the way to Cat Lake, but once he arrived at that area, which he knew from the report was problematic, he had a duty to ensure that the hazardous conditions there were

rectified before continuing north. Cat Lake was his first priority. He should have slowed his speed to ensure adequate application of the materials and covered both the north and southbound lanes to render the area safe for the travelling public.

35 Evidence provided by counsel for the defendants suggests that the relevant portion of the highway was treated adequately. However, regardless of the details of the number of passes, the timing, what side of the highway was treated and what mix was used, the bottom line is that the road was like a skating rink at the time of the accident. The evidence clearly indicates that both the northbound and the southbound lanes were extremely slippery. Therefore, whatever work was done by Capilano was inadequate to do what they were supposed to do: make the road safe for public motorists. They were negligent in fulfilling this duty.

36 The contract which was in existence between the Ministry and Capilano is of interest, and may be some helpful in determining whether Capilano adhered to the provisions of the contract. However, with respect, Ms. Steen was not privy to their agreement, and this is not a contracts case. The issue is not whether Capilano complied with its agreement with the Ministry, but whether it was negligent in keeping the roads safe for those members of the public who use that section of Highway 99.

CAUSATION

37 The plaintiff brought the case of Snell v. Farrell, [1990] 2 S.C.R. 311 to the court's attention with regard to the issue of causation. In that case, Sopinka J. described causation as follows at pp. 326-7:

> Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former. Is the requirement that the plaintiff prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury too onerous? Is some lesser relationship sufficient to justify compensation? I have examined the alternatives arising out of the McGhee case [McGhee v. National Coal Board, [1973] 1 W.L.R. 1 (H.L.)]. They were that the plaintiff simply prove that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation... In my opinion, however, properly applied, the principles relating to causation are adequate to the task. Adoption of either of the proposed alternatives would have the effect of compensating plaintiffs where a substantial connection between the injury and the defendant's conduct is absent.

38 Mr. Justice Sopinka outlined the appropriate test for causation at pp. 329-30.

> It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden. See Cross, op. cit., at p. 129. In my opinion, this is not a true burden of proof, and use of an additional

> label to describe what is an ordinary step in the fact-finding process is unwarranted.
>
> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept. This is, I believe, what Lord Bridge had in mind in Wilsher [Wilsher v. Essex Area Health Authority, [1988] 2 W.L.R,. 557, rev'g. [1987] 2 W.L.K. 425] when he referred to a 'robust and pragmatic approach to the... facts' (p. 569)

39 This issue was also discussed by the Federal Court of Appeal in Swanson, supra, where the court noted that scientific proof linking the defendant's act and the plaintiff's loss is no longer necessary. Wilson J. also stated that the onus of proving causation shifts to the defendant only in limited circumstances.

40 In government cases involving causation the Courts in Swanson, supra, and Kamloops, supra, drew a connection between the by-laws or legislation in question and the promotion of public safety. The government cannot suggest their legislation, which is specifically designed to protect the public, would not have protected a member of that public in the instant case. The government cannot be seen to attack the adequacy of its own legislation. The court in Swanson stated at p. 436:

> While Transport Canada cannot prevent a pilot from flying negligently or from endangering the lives of passengers, if he or she so chooses, it can reduce the risk that this will occur. They can stop an airline from using shoddy equipment. They can minimize, through inspection and enforcement, the occasions when such negligence will occur. Transport Canada cannot prevent airlines from trying to run their businesses as cheaply and profitably as possible, but they can seek to enforce compliance with the safety rules. The desire to promote passenger safety led to legislation and regulations under which the Crown was given the duty to ensure that certain safety standards were established and maintained. The Aeronautics Act obviously presumes a connection between the fulfilment of these duties and the maintenance of safe air travel.
> (Emphasis added)

41 The failure of Transport Canada to ensure that the airline complied with the Aeronautics Act was, therefore, found to be a cause of the accident. The same point exists with regard to the Highways legislation in this case.

42 The defendants in this case have argued that the plaintiff did not call expert evidence that the accident would not have occurred but for the failure of Capilano to adequately treat the highway with winter abrasives. As discussed above, however, more diligent attention to the Cat Lake area

where hazardous conditions were reported would have improved the road conditions. Evidence has been submitted that an application of sand provides immediate relief from slippery conditions. Had adequate winter abrasive been applied, the road would not have been slippery at the time the accident occurred. There is no doubt that the icy conditions contributed to the accident, and that is sufficient to satisfy the requirements of causation as enunciated in Snell v. Farrell, supra. Direct scientific evidence indicating that proper treatment of the road would have averted the accident is not essential.

CONTRIBUTORY NEGLIGENCE

1. Presumption of Negligence

43 When a vehicle goes off the road, there is a presumption that the driver was negligent. This presumption must be rebutted by the driver: see Redlack v. Vekved (1996), 82 B.C.A.C. 313 (C.A.) at para. 17, Hackman v. Vecchio (1969), 4 D.L.R. (3d) 444 (B.C.C.A.) and Savinkofff v. Seggewiss (1996), 25 B.C.L.R. (3d) 1 (C.A.). In Savinkoff, the Court stated at para 28:

> The defendant did not attribute his skid and loss of control to anything other than the slippery road conditions. In my view, sliding out of control into the plaintiff and the stopped vehicle gives rise to an inference of negligence on his part, in that he was either not sufficiently attentive to the road conditions, or he was driving too fast, or both. It was for him to explain how this accident could have occurred without negligence on his part, and on the evidence there is no satisfactory explanation.

44 It should be noted, however, that in that case the defendant driver testified that he was aware of slippery conditions as there had been a significant snowfall. The Court found at p. 13 that there was "cogent, uncontradicted evidence to show that the slippery road conditions were reasonably foreseeable". In Redlack, supra, there was no snow on the road, but there was on the sides of the road. Madam Justice Southin stated at paras. 21-22:

> A prudent driver in such circumstances must always bear in mind the possibility of icy patches and drive within his or her own competence, and the capacity of her vehicle, to cope with such patches... To drive in such circumstances as if it were summer is not the conduct of a prudent driver.
>
> ...In the case at bar, the respondent really offered no explanation at all for how her vehicle went into the ditch except to say that there was ice on the road. Simply to prove that there was ice on the road does not exonerate the driver of a motor vehicle which leaves the travel led portion of the highway and thereby causes injury.

45 This issue was also discussed by Davey, C.J.B.C. in Hackman, supra at pp. 447-8:

> The jury should have been told... that the collision of respondent's car with the truck on the wrong side of the road as a result of the skid was evidence that the respondent was careless, unless he could explain the skid reasonably by showing how it may have happened without negligence on his part; that in order to do that

> respondent would be obliged to show that he did not expect ice at that point, and that he had no reason to expect it, for if he ought to have foreseen it, he was bound to drive slowly enough to avoid skidding upon it.

46 The plaintiff suggests that the presumption that a driver whose vehicle leaves the road is prima facie negligent may no longer be applicable since the decision in Fontaine v. British Columbia, [1998] 1 S.C.R. 424, which ousted the principle of res ipsa loquitur. The court in that case stated at paras. 20-21:

> It has been held on numerous occasions that evidence of a vehicle leaving the roadway gives rise to an inference of negligence. Whether that will be so in any given case, however, can only be determined after considering the relevant circumstances of the particular case.
>
> Where there is direct evidence available as to how an accident occurred, the case must be decided on that evidence alone.

And at para. 27:

> It would appear that the law would be better served if the maxim [res ipsa loquitur] was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a prima facie case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

(Emphasis added)

47 This suggests that the inference remains even though the concept of res ipsa loquitur should no longer be utilized by the courts. The circumstantial evidence may still be sufficient for the Court to draw the conclusion that the driver was negligent. However, the trial judge must weigh this evidence along with direct evidence, which may negate that inference and suggest a reason other than negligence for the accident.

48 In the present case, the plaintiff did not see any evidence that the roads were icy or treacherous. The roads appeared to be dry. Her drive from Whistler, until she reached the Cat Lake area, had been uneventful. Ms. Steen had no reason to expect ice on the roads. She lost control of her vehicle only when she unexpectedly hit the ice. This evidence rebuts the inference that it was solely her negligence which caused her vehicle to leave the southbound lane.

2. Highway Conditions

49 Ms. Steen was familiar with the highway to Whistler. This highway runs through the mountains, and there are areas where the road is shaded from the morning sun. It was early morning. The temperatures in February can dip below zero.

50 Ms. Steen testified that she had not noticed any indication of slippery or treacherous conditions on the road prior to losing control of her vehicle at the accident site. Sgt. Eglinski, who was travelling not far behind Ms. Steen, testified he did encounter some minor slippery patches north of the accident site. However, these seem to have been far less significant than the conditions at the accident scene.

51 Sgt. Eglinski testified that the road conditions were typical for the weather and the time of year. Similar evidence was provided in Savinkoff, supra, to which the Court stated at para 19, "[c]onditions that are 'typical' are the antitheses of what is objectively unforeseeable."

3. Other Vehicles

52 The Court in Savinkoff, supra also noted that other vehicles handled the corner without much difficulty. This suggested that the defendant was particularly inattentive to the conditions of the road. In the present case there is evidence of other drivers, including Sgt. Eglinski, managing the corner without losing control. While evidence was presented that other vehicles did slide on the ice, they managed to maintain control sufficiently to avoid a collision. However, one vehicle, as testified by Steven Nicoll, was sliding towards a police officer, who had to run into a ditch to avoid being hit by it. Had the officer not done so, he also could have been injured.

4. Speed

53 Despite Ms. Steen's denial, the photographs of the skid marks indicate that her vehicle was on the shoulder, over the right line of the southbound lane, when she lost control. Ms. Steen claims that she was not speeding, however the evidence suggests that she must have been travelling at more than the posted 80 km/h speed limit. The evidence of the witnesses at the scene is not particularly helpful in this regard, but the report of Mr. MacInnis, the engineer, shows that she must have been travelling at least 86 km/h. Ms. Steen's rate of speed was faster than a prudent driver would have been driving in such circumstances, considering the time of year, the temperature and the possible road conditions. She was further driving faster than the posted speed limit.

5. Expert Evidence

54 Mr. MacInnis, the engineer, provided a report and testified as to the speed at which Ms. Steen was likely travelling prior to the accident and at the time of impact. To the extent that his calculations include the presumption that the northbound lane was not icy, these estimates should be rejected. There is ample evidence that the northbound lane was slippery and covered with ice. Mr. MacInnis also provided independent estimates of the critical curve speed for the curve in question, and found that to lose control on ice in the southbound lane of this curve, Ms. Steen must have been travelling between 86-126 km/h. The lower end of the scale would be appropriate for wet, slippery ice, and the higher for dry ice. Using the mid range, her estimated speed would be approximately 101 km/h, and faster if she was travelling on the shoulder of the highway when she lost control. It is likely that Ms. Steen was travelling at approximately 100 km/h.

6. Inappropriate Braking

55 When she felt her vehicle sliding out of control, Ms. Steen's reaction was to fully apply the brakes. This response may have decreased her ability to regain control of her vehicle once she began to slide, and to avoid the collision. The plaintiff has provided some case law with respect to the expectations of person dealing with an emergency.

56 The first case is C.P. Ltd. v. Gill, [1973] S.C.R. 654 wherein the plaintiff suddenly came across an improperly lit vehicle, and the evasive action taken by him resulted in an accident. The Supreme Court of Canada stated at p. 665:

> It is trite law that faced with a sudden emergency for the creation of which the driver is not responsible, he cannot be held to a standard of conduct which one sitting in the calmness of a courtroom later might determine was the best course.

57 This position is supported by the case of Zervobeakos v. Zervobeakos (1969), 8 D.L.R. (3d) 377 (N.S.S.C.A.D.), wherein the plaintiff, while attempting to escape a burning building, sustained injuries. In finding him not contributorily negligent, even though he would have been rescued uninjured had he remained at the window of the house, the court found at p. 380:

> ....the respondent, due to the negligence of the appellant, was placed in a perilous position, and he could hardly be required, under the circumstances, to exercise as much judgment and self-control in attempting to avoid danger as would reasonably be expected of him under ordinary circumstances.

58 The final case raised by the plaintiff on this issue is that of Neufeld v. Landry (1974), 55 D.L.R. (3d) 296 (Man.C.A.), which also dealt with a motor vehicle accident. The Court commented at pp. 298-9:

> The conduct of the plaintiff driver must be assessed in the light of the crisis that was looming up before her. If in the 'agony of the moment' the evasive action she took may not have been as good as some other course of action she might have taken -- a doubtful matter at best -- we would not characterize her conduct as amounting to contributory negligence. It was the defendant who created the emergency which led to the accident. It does not lie in his mouth to be minutely critical of the reactive conduct of the plaintiff whose safety he had imperilled by his negligence.

59 These three cases suggest that where an emergency situation has occurred due to the negligence of the defendant, the plaintiff's actions shall not be judged by the same standard of care and caution as would be expected of someone under normal circumstances. However, in this case, the situation did not arise solely due to the negligence of the defendant. The plaintiff is at least partly responsible for the resulting collision due to her increased speed and inattentiveness to the condition of the road. She should have been driving at a speed which was suitable to the conditions and to her driving experience. While Ms. Steen may have reacted in the 'agony of the moment', her own actions were partly responsible for that occurrence. The emergency situation did not arise solely due to the negligence of the defendant, as it did in the above noted cases. Nonetheless, her reaction was a natural one in the circumstances.

CONCLUSION

60 After considering all of the facts in the case at bar and applying the law as enunciated above to those facts, I find that the main cause of the accident was the negligence of Capilano. I find the defendants Capilano and Her Majesty The Queen in Right of The Province of British Columbia as represented by The Ministry of Transportation and Highways 60 per cent liable for the accident. I also find that the plaintiff was 40 per cent liable for the accident. In the result there would be a division of liability of 60-40 in favour of the plaintiff.

61 The issue of quantum of damages will be dealt with at a subsequent date. Before closing, however, I would like to take this opportunity to thank counsel for the help they gave me in dealing with this matter.

ROMILLY J.

cp/s/jjl