Guild Yule LLP

The Defence of Highway Maintenance Claims in British Columbia

Summer, 2013
(Updated from original paper; Fall 2009)
Adam Howden-Duke
(With the assistance of Joseph Antifaev, Articled Student)

1. Introduction

Negligence may be alleged against a highway maintenance contractor under a variety of scenarios. The most common cases involve adverse road conditions during winter months and many involve catastrophic accidents and resulting significant injuries or death. It is important to understand that there is a certain level of complexity involved in proceeding against a highway maintenance contractor, and that it does not necessarily follow that simply because an accident occurs involving slippery road conditions the responsible contractor is liable. The Supreme Court of Canada has made it clear that the highway maintenance contractor is not the guarantor of the absence of ice on highways;

> "*The duty to maintain would extend to the prevention of injury to users of the road by icy conditions. However the Department is only responsible for taking reasonable steps to prevent injury. Ice is a natural hazard of Canadian winters. It can form quickly and unexpectedly. Although it is an expected hazard, it is one that can never be completely prevented. Any attempt to do so would be prohibitively expensive*."[1]

Madam Justice Southin in *Gobin v. Her Majesty the Queen in the Right of the Province of British Columbia* added to this sentiment when she wrote:

> "*...One of the results of the line of cases beginning with Just v. British Columbia, supra, is that cases are now brought asserting operational negligence, for instance, in not salting the road sufficiently (see Tucker v. Asleson(1993) 78 BCLR 2d 173 (CA)) when in truth, the real cause of the accident is a motorist either driving beyond his ability or having a vehicle inadequate for the conditions. The roads of British Columbia are frequently dangerous in Spring and Winter, and motorists should drive with this reality in mind*." [2]

The purpose of this paper is to provide a general overview relating to claims made against highway maintenance contractors in the Province of British Columbia. The paper will discuss the current state of the law regarding the scope of the duty of care and the standard of care applied, some specific considerations in the defence strategy to be applied to such claims, and the evidentiary considerations which flow from these. We commence with a brief background to the current maintenance scheme, and roles of the various parties involved.

2. The Highway Maintenance Program

The Provincial Government (the "Crown" for the purposes of this paper), as owner of Provincial highways, has owed a duty of care to users of those highways since at least the

[1] Per Cory J. in *Brown v British Columbia (Minister of Transportation and Highways)* [1994] 1 SCR 420; [1994] SCJ No. 20
[2] 2002 BCCA 373 @ paragraph 68

development of the neighbour principle in *Donoghue v Stevenson*. In Canada, the standard of care of a road authority to protect the motoring public has been articulated in many cases, but most adopt the formulation set out in the 1919 Supreme Court of Canada case of *Raymond v Town of Bosanquet*[3]:

> *"I think that the if the particular road is kept in such reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and from upon it in safety, the requirement of the law is satisfied.*"

Within the Crown, the Ministry of Transportation and Infrastructure[4] (the "Ministry" for the purposes of this paper) is tasked with the responsibility for keeping open and maintaining those highways for which the Crown is responsible[5]. The Supreme Court of Canada in *Lewis (Guardian ad litem of) v. British Columbia*[6] concluded that the Crown's duty of care in this regard is non-delegable and as such, ultimate responsibility rests with the Ministry.

Prior to December 1, 1988, the Ministry had sole responsibility for the maintenance of British Columbia highways. From that date onwards, the Ministry contracted with various independent contractors to provide a number of highway services throughout the Province.

Currently the highway maintenance contract areas are comprised of 3 regions (South Coast, Southern Interior and Northern) and these regions contain 28 separate contract areas. Each contract area is operated by one independent highway contractor. There are approximately 13 corporate groups providing services to the Ministry. Bidding by Contractors for contract areas takes place at certain intervals (the current contracts are for 10 year terms). Quite often a new contractor will take over from a predecessor. Since most actions for personal injury do not have to be commenced until 2 years after the event (and, in the case of injured persons under the age of 19; until they turn 21), it is important to determine which contractor had responsibility for a particular location at the time of the accident. Where a defendant seeks to join the contractor as a third party, it is important to determine this quickly, as the Supreme Court Civil Procedure rules only allow a window of 42 days of receipt of the Notice of Civil Claim to serve a Third Party Notice, without leave of the court or consent of the parties.[7]

(a.) The Contract

The contract between the contractor and the Crown contains provisions requiring contractors to perform most maintenance services, such as plowing highways, roadside snow and ice control, applying winter abrasive and de-icing chemicals, the removal of ice from rock faces or tunnel walls overhanging the highway, rock scaling, roadside pruning, removing obstacles on the roadway, sweeping the highways of sand, gravel and other

[3] (1919), 59 S.C.R. 452
[4] Formerly known as the Ministry of Transportation and Highways
[5] See the Transportation Act SBC 2004 c. 44, and in particular section 2(1) thereof for the legislative scheme.
[6] [1997] 3 SCR 1145
[7] Rule 3-5 (this time limit also impacts record keeping in other ways – discussed below)

debris, and removing obstructions in ditches caused by falling rock. The contractors also have duties relating to minor roadway repairs, and repairs to bridges. Most duties are driven by an obligation to patrol the highway. Contractors are not involved in major capital improvements and design input.

Because of the broad range of responsibilities, there are a number of potential claims that may arise in relation to the contractors' duties. We have seen claims arising out of bridge wash-outs, black ice, frost and snow on highways, sand, gravel and other debris, fallen trees, rocks and ice, pavement height differential, road workings, warning signage (temporary and permanent), and the presence of winter abrasive residue, amongst others.

Detailed specifications for the performance of maintenance are also contained within the contracts between the various highway maintenance contractors and the Ministry. These "Maintenance Specifications" (currently found at Schedule 21 to the contract) are set out and can be described under the following categories:

1. Surface Maintenance;
2. Drainage Maintenance;
3. Winter Maintenance;
4. Roadside Maintenance;
5. Traffic Maintenance;
6. Structure Maintenance;
7. Emergency Maintenance; and
8. Inspection.

Each highway in the Province is given a road classification rating. For winter maintenance activities alphabetic characters are used, and for summer maintenance activities, numeric characters. These classifications affect the priority with which certain maintenance activities are to be undertaken; Class A (winter) and 1 (summer) highways are given the highest priority and have the most stringent guidelines for compliance.

3. Liability

In order to be successful against a highway maintenance contractor, a plaintiff (or Defendant by Third Party Notice against the contractor) must establish that:

1. The highway contractor owed the plaintiff a duty of care;
2. The required standard of care to discharge the duty was not met; and
3. The failure to meet the standard of care, caused or materially contributed to the plaintiff's injury.

There have been a number of decisions in British Columbia which have considered the liability of highway maintenance contractors. Judicial consideration of the applicable standard of care has resulted in a test based upon a duty to "reasonably" maintain the highways. The analysis often involves consideration of whether a decision is one of policy or is operational in nature. The determination of reasonableness is a complex one which involves an analysis of many factors including the priorities accorded in the

Maintenance Specifications and decisions made by the contractor to allocate its resources across the contract area. While failure to comply with the Maintenance Specifications is not of itself a breach of the standard, compliance of itself, will also not be sufficient to discharge the contractor's duty. The contract does play an important role for the Court in determining the appropriate standard for the contractor. We explore the concepts involved in more detail, below.

(a.) The Crown's Duty of Care

Given that maintenance of Provincial highways is ultimately the responsibility of the Crown, the starting point to any consideration of liability of highway contractors is an analysis of the Crown's liability. As noted above, the nature of the Crown's duty regarding highways is to keep them in such reasonable state of repair that those using the road may, exercising ordinary care, do so safely.

In Canada, the existence and nature of a duty of care is governed by the 2 stage *Anns*[8] test. In *Cooper v Hobart*[9] the Supreme Court of Canada (McLachlin CJC and Major J) discussed the application of policy considerations at the 2nd stage of the *Anns* test;

> *"It is at this second stage of the analysis the distinction between governmental policy and execution of policy falls to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy.*"

The distinction between policy and operational decisions featured subsequently in the cases of *Just v British Columbia*[10] and *Brown v British Columbia (Minister of Transportation & Highways)*[11]. In the former, the Supreme Court held that the impugned decisions relating to rock slope inspections were operational. The Crown had made a policy decision to inspect the slopes above Highway 99; the plan implemented by the roadwork crew as to the nature and manner of inspections was operational in nature and not immune from review. In *Brown*, the implementation of a summer schedule, which meant there was only a call-out system in place for road maintenance, was a policy decision involving "*classic policy considerations of financial resources, personnel and, as well, significant negotiations with government unions*."

Policy decisions based on budgetary concerns may reduce the level of maintenance required to meet the standard of care. In *Lennox v New Westminster (City)*[12] and *Sandhu v Delta (Corp.)*[13] the defendant municipalities had maintenance programs which were

[8] *Anns v. Merton London Borough Council,* [1978] A.C. 728; per *Kamloops v. Nielsen* [1984] 2 S.C.R. 2
[9] [2001] 3 S.C.R. 537
[10] [1989] 2 S.C.R. 1228
[11] Supra, at note 1
[12] 2012 BCSC 410
[13] 2012BCPC 435

complain driven, rather than proactive. The reasons for these policies were purely budgetary. In *Lennox*, Mr. Justice Fitch considered the test for whether a policy decision is reasonable:

> *"In my view, regard must be had to the policy itself, its purposes and the mischief it seeks to prevent in order to determine how non-compliance with that policy should be factored into the assessment of whether reasonable care has been exercised."*

In both *Lennox* and *Sandhu* the courts determined that complaint driven maintenance programs were not unreasonable *per se* and that no liability could attach to the municipalities as they had met the requirements of their maintenance programs.

(b.) The Standard of Care

As noted in the introduction to this paper, in *Brown*[14] Cory J, speaking for the majority, stated:

> *"…. However the Department is only responsible for taking reasonable steps to prevent injury. Ice is a natural hazard of Canadian winters. It can form quickly and unexpectedly. Although it is an expected hazard it is one that can never be completely prevented. Any attempt to do so would be prohibitively expensive. It can be expected that a Department of Highways will develop policies to cope with the hazards of ice."*

In undertaking maintenance of highways pursuant to contract, the independent contractor effectively steps into the shoes of the Crown, for those aspects of the highway within its contractual responsibility.

The determination of whether a maintenance contractor has met the appropriate standard of care requires expert evidence. This is because the proper steps, measures, preparations and procedures of highway maintenance are complex and beyond a court's independent determination. In *Collins v Rees*[15] a contractor was alleged to have breached the standard of care in failing to keep the roadway free of ice. In dismissing the plaintiff's claim, Mr. Justice Williams noted that the plaintiff had failed to call any evidence as to the appropriate standard of care. He declined to draw any inference as to the appropriate standard, as it was a matter beyond the knowledge of a layperson.

The Maintenance Specifications, as a measure of the standard of care, were considered in *Dagneault v. Interior Roads Ltd.*[16]. In that case, the allegations against the contractor were that it breached its contractual responsibilities under the maintenance contract and secondly, failed to warn the plaintiff of icy road conditions. After finding that there was no breach of the maintenance contract, Mr. Justice Goldie went on to consider the duty and standard of care owed by the maintenance contractor:

---

[14] Supra, at note 1
[15] 2012 BCSC 1460
[16] (1995), 8 BCLR (3d) 108 (BCCA),

> "*It is the law in this Province that reasonable maintenance of highways is a statutory duty of care owed by the Crown to the users of provincial highways:* Just v. British Columbia, *[1989] 2 SCR 1228. To use the language of the analytical model adopted by the Supreme Court in* Just v. British Columbia, *it is apparent a large measure of responsibility for "operational implementation" is delegated to Interior under the Maintenance Contract. It is equally apparent the scope of that delegation is delineated by "policy decisions".*
>
> *One such policy decision is the classification of highways and the assignment of response times to specified road conditions anticipated to occur under winter conditions. This bears directly on the equipment and stores the contractor must have on hand. It may also reflect budgetary constraints as the higher the classification the greater the allocation of resources....*
>
> *I think it is clear that the "*prevention of injury*" referred to in the preceding excerpt from Mr. Justice Cory's judgment* [in *Brown v British Columbia*] *refers to the taking of reasonable steps to prevent injury. This is satisfied when the policy decisions adequately recognize the hazards of winter driving conditions. In my view, the contractual arrangements I have referred in the Maintenance Contract meet this criterion*."

Mr. Justice Goldie concluded that the "policy decisions" made by the Ministry and contained in the maintenance contract met the duty to prevent injury to users of the road by icy conditions. The standard of care owed by the Contractor was to follow the standards set out in the contract; this is the "operational" aspect of the analytical model in *Just*.

However, that is not the end of the analysis. In *Holbrook v. Argo Road Maintenance*[17], breach of the Maintenance Specifications did not equate to a breach of the standard of care. There the plaintiff was injured when her vehicle lost control in icy conditions. The terms of the maintenance contract required the contractor to apply winter abrasive and de-icing chemicals to the road surface and to apply these within specific response times. In addition, it required immediate application of these if slippery conditions were encountered during patrols. "*Slippery*" was defined as "*any road condition which causes an increase in normal dry surface stopping distances as a result of build-up of frost, ice or snow*".

The weather conditions prevailing were severe, resulting in a consistent period of compact snow covering the highway, and Mr. Justice Meiklem found that the contractor's employees did not meet the maintenance standard set out under the contract. He then went on to consider whether a breach of the maintenance standard constituted a breach of the standard of care owed by the contractor to the plaintiff, holding:

> "*Is the standard of care applicable to the defendant Argo breached by non-adherence to the stringent contractual maintenance standard? Unless that*

[17] [1996] BCJ No. 1855 (BCCA)

question is answerable in the affirmative, I would not find the defendant Argo negligent on the facts of this case because I find the preponderance of evidence supports the conclusion that the road surface was not particularly slippery, and was reasonably well maintained. It was no more hazardous than one would expect given its location, time of year and the weather conditions prevailing. Applying the commonly applied reasoning that public budgets and resources are not unlimited, I would find that the defendant's patrols were adequate and the reasonable standard of care met."

Mr. Justice Meiklem also held that compliance with the Maintenance Specifications will be required, unless this would be to require more than the common law test of reasonableness;

"My conclusion is that a highways maintenance contractor will be in breach of its duty of care to the users of the highway if it is in breach of the contractual maintenance standards, provided that the contract standards are within the Crown's duty of care and are equal to or less than a reasonable standard determined by the court, but the law does not impose a higher standard of care upon contractors than the courts would impose upon the Crown, simply because of the provisions of the contract."

The effect of this is that the contractual delegation by the Crown of operational responsibility may act as a cap on the on the standard of care expected of a contractor (in the sense that the argument that a reasonable state of maintenance is something more than what is required by the contract, becomes an issue for the Crown).

Later decisions have also taken an approach which consider the Maintenance Specifications as relevant to, but not determinative of, the standard of care which remains to keep the highway in a reasonable state of repair. Examples include *Mochinski v. Trendline Industries Ltd*.[18], *Bradshaw v. Rankel*[19], *Belitchev v. Grigorov*[20] and *Benoit v Farrell Estate*[21].

These include cases we have defended; *Talbot-Kelly v. Fairfield*[22], *Foster v Perry*[23], *Nason v Nunes*[24], *Hanna v Nederpel*[25] and more recently, *Harrington v. Sangha*[26] and *Collins v Rees*[27].

Perhaps one of the most useful cases to consider how maintenance specifications influence the standard of reasonableness is *Nason v Nunes*[28]. That case involved a single

[18] [1996] BCJ No.1071 (BCCA) – although rendered around the same time, neither decision mentions the other.
[19] [1999] BCJ No. 3026
[20] 2000 BCSC 765
[21] 2004 BCCA 348
[22] 2005 BCSC 357
[23] 2005 BCSC 1214
[24] 2007 BCSC 266 (Plaintiff's appeal against the contractor abandoned; 2008 BCCA 203)
[25] 2007 BCSC 1335
[26] 2011 BCSC 1035
[27] Supra at note 15

vehicle accident on an icy bridge on a winter classification "C" road, where the contract required the contractor to (amongst others) conduct a patrol once every 16 hours and remove compacted snow within 7 days of the end of measurable snowfall. There, Madam Justice Russell held:

> *"... the Crown determines what level of attention each road should receive as a matter of policy. It then may delegate the responsibility for providing that level of attention to independent contractors, who are to be judged on their operational implementation of the maintenance contract on a standard of care within the boundaries set by government policy decisions.*
>
> *From these authorities I conclude that, while the contractual terms are not determinative of the appropriate standard of care, they are highly significant in formulating a standard appropriate in all of the circumstances. The delegation of operational responsibility via such maintenance contracts represents the Crown's policy decision as to what road should be accorded what priority."*

She went on to find the contractor to have met the standard of care in circumstances where the evidence showed the contractor had complied with the contract and acted reasonably in so doing, and no evidence having been called to challenge the maintenance required by the contract to be insufficient:

> *"As the authorities make clear, the complete prevention of icy conditions is not the applicable standard of care. Here, Argo was required to patrol the road every 16 hours, which it did, and to respond within 5 hours if notified that a classification 'C' road was slippery. In the circumstances, Argo did all that was expected of it under the Maintenance Contract, and all that was reasonable in the circumstances, to maintain Road 9 in a condition safe for the driving public. As I have stated, I find that there was sand on the bridge at the time of the accident. Further remedial measures could only reasonably be undertaken if Argo's patrols discovered the icy conditions on Road 9 (within 16 hours of freezing conditions being anticipated), or if a member of the public reported the icy conditions (within 5 hours of such a report). To hold the contractor to a higher standard of care by requiring more patrols than set out in the Maintenance Contract would completely ignore the government's policy as to how resources were to be allocated to Road 9."*

Just as the Maintenance Specifications influence the standard of care pertaining to highway maintenance, so too does the Ministry's Traffic Control Manual for Work of Roadways (the "Manual" for the purposes of this paper) come into consideration for work it governs.

The Manual sets out various procedures for road maintenance, including signage and markings. Compliance with the Manual is statutorily required under section 18.14(1) of the Occupational Health and Safety Regulation[29]. In *Van Tent v Abbotsford (City) &*

---

[28] Supra at note 24
[29] BC Reg. 269/97

456355 BC Ltd.[30] the Court of Appeal agreed with the trial Judge's use of the Manual in determining the appropriate standard of care. The trial Judge found the defendant city and contractor were negligent in failing to adequately mark an uneven edge in the pavement (during roadworks), contrary to the Manual;

> *"In this case, the standard of care is greatly informed, although not dictated, by the collection of uniform traffic control standards detailed in the manual. By virtue of performing construction work on a provincial highway, the defendants were required, at a minimum, to abide by the principles and guidelines it contained. The applicable standards endorsed in the manual accord with common sense and the conduct expected of a prudent contractor in the circumstances in relation to the task of ensuring the safety of the users of the road and work crews during times of construction and maintenance".*

In order to prove the contractor met the standard of care, it is usually imperative to retain an independent expert who can discuss implementation of the policy to demonstrate that the contractor's actions were reasonable given the road conditions and weather forecast at the time. The expert can also opine on the contractor's other obligations flowing from the contract that may show that the contractor's actions were reasonable under the circumstances. For example, contractors are obliged to use environmental best practices, which can be at odds with using de-icing chemicals on roadways near sensitive watersheds.

(c.) The Scope of the Duty of Care

The scope of the contractor's duty of care is limited to its responsibilities under the 4 corners of the maintenance contract; whereas, liability for matters falling outside of the contract falls to the Crown.

The Crown's duty to maintain highways only applies to roads that recognized as highways. In *Skutnik v British Columbia*[31] the province and BC Hydro were sued for failing to maintain a rural 'b' road. The local municipality and BC Hydro had entered into an agreement for both to contribute to the maintenance of the road. The plaintiff claimed for economic loss as the degradation of the road caused him to no longer be able to transport his goods from his farm to market. His claim was ultimately dismissed as the road had not been designated as an arterial highway. Master McDairmid held that as such, there was no duty on the Crown to maintain it.

In doing so, he relied on *Winskowski v Coldstream (District)*[32] in which the Court found no obligation to improve a road that was not recognized as a highway. The policy reasoning was that "*a contrary ruling would require judicial intervention in highway maintenance issues everywhere for an endless myriad of issues*." The plaintiff commenced further proceedings to have the road declared as a highway. Though the court made that declaration, it held there was still no duty to maintain or upgrade the

[30] 2013 BCCA 236
[31] 2012 BCSC 1081
[32] [1996] BCJ No. 1088

road. In making this determination, the Court of Appeal later praised the lower court[33] for "*Distinguishing between recognition of the road as a public highway by reason of history, and a duty falling on the Province to enhance the road to the standard of a road developed in more modern times as a public highway*."

A case in which the Court examined the scope of the contractor's duty of care is *Sloan v Northcoast Road Maintenance Ltd*.[34] where the plaintiff's vehicle was struck by a slab of snow-ice falling from above. Errico J. considered the terms of the Maintenance Specification for roadside snow and ice control (what is now chapter 3-320 of the Maintenance Specifications), holding that the contract did not require the removal of ice of the type that struck the plaintiff's vehicle. Similarly, he considered the terms of the Maintenance Specification for highway inspection (what is now chapter 8-830 of the Maintenance Specifications), and held the contractor was not obligated to report the weather conditions or prior ice falls at that particular location to the Ministry pursuant to the contract. He concluded that any extra responsibilities such as reporting the weather conditions or prior ice falls, fell outside of the scope of the contractor's duty of care but that these responsibilities were within the Crown's duty of care, and accordingly the Crown was held liable for the breach of duty to the plaintiff.

(d.) The Conduct of the Plaintiff

The conduct of the plaintiff can be relevant not only as to contributory negligence, but also to a consideration of the contractor's standard of care. In addition to her comments in *Gobin*[35], in *Redlack v. Vekved*[36]**,** a case where there was no snow on the road, but there was on the sides of the road, Madam Justice Southin stated:

> *"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 travelled portion of the highway and thereby causes injury."*

(e.) Causation

The Supreme Court of Canada has re-iterated in recent years that the onus of causation falls to the Plaintiff to prove that but for the negligent act or omission of the contractor, he or she would not have suffered the injury.[37]

---

[33] 2013 BCCA 234
[34] [1993] BCJ No. 2655
[35] Supra at note 2
[36] 1996 CanLII 3089, 1996 CarswellBC 2179 (BCCA)
[37] *Clements v Clements* 2012 SCC 32

In most cases, it is no great challenge for plaintiffs to prove that the accident was caused by icy or snowy conditions given the contemporaneous records usually generated by the RCMP when called to an accident scene. However, it is to be remembered that the plaintiff has the onus of proving both the condition of the maintenance of the highway (e.g. the existence of ice), and that this maintenance or lack thereof caused his or her loss of control.

In *McPhee v British Columbia*[38], the plaintiff failed to prove that his single MVA was caused by the presence of black ice. His injuries meant he had no memory of the accident and there were no witnesses to it.

In addition, the Plaintiff has the onus of establishing that the contractor erred in maintenance of the highway, such that the condition either formed, or was not properly ameliorated, and that the condition caused the accident. In *Harrington, supra*[39], Mr. Justice Willcock framed the issue this way:

> *"The issue in the case is not whether the condition of the roadway caused or contributed to the accident, but, rather, whether the road conditions that caused the accident were a result of the breach of the standard of care."*

It is often essential for the contractor's counsel to retain expert evidence from meteorologists and other experts to establish what the likely conditions of the roadway were before and during the accident, as well as what might have happened to the roadway's conditions if the contractor had acted differently (by using de-icing chemicals, instead of sand, for example).

It is also worth noting that a Plaintiff can be contributorily negligent for not taking reasonable precautionary measures for driving in icy conditions. In *Brook v. Billabong Road & Bridge Maintenance Inc*[40]., Bruce J. upheld a small claims judgment in which the Provincial Court judge concluded that the contractor was 50% liable for a single vehicle accident near Smithers, B.C. during freezing rain. The Court found that the contractor had not met the private law standard of care when it decided to prioritize hills and curves when addressing freezing rain and black ice. Instead, the Court interpreted the Contract to hold that the contractor should have given equal priority to all parts of the roadway (including the location of the accident) and should have restored traction as soon as reasonably possible as the contractor encountered slippery conditions while on patrol. The Plaintiff was found to have been 50% responsible for driving too fast for the conditions.

(f.) Summary

The predominant focus of any inquiry into the standard of care of the highway contractor and whether that was met, will be compliance with the contractual standards. However,

[38] 2007 BCSC 568, (upheld on appeal; 2008 BCCA 254)
[39] Supra at note 26
[40] 2011 BCSC 297

even if in compliance, a consideration of reasonableness must still be had. For example, restoring traction following notification of ice on a portion of a highway within the required 2 hours (for classification "A" highways) will not satisfy the standard if this could have reasonably been done sooner, having regard to the other maintenance being undertaken and predictability of the condition. On the other hand, the standard may still have been met even though the Maintenance Specifications were not complied with, provided the actions taken were a reasonable allocation of resources; employing the "operational" decision model.

With the approach in the current round of contracts to less proscriptive and more discretionary Maintenance Specifications, there seems little risk that the courts will take any different approach in assessing what is the appropriate standard of care, and whether that has been discharged on a given set of facts.

4. Particular Defence Issues

(a.) Deduction of Part 7 Benefits

The BC Court of Appeal's decision in *Brennan v. Singh*[41], made it possible for highway contractors to deduct the amount of a plaintiff's Part 7 no fault benefits from the amount of damages awarded against them in a tort case.

In British Columbia, s. 83(5) of the *Insurance (Vehicle) Act*[42], is the legislative provision dealing with the deduction of no fault benefits after an assessment of an award of damages. The provision sets out that after assessing damages, the amount of benefits must be disclosed to the court and taken into account, or, if the amount of benefits has not been ascertained, the court must estimate it and take the estimate into account, and the person is entitled to enter judgment for the balance only.

In *Brennan*, the trial judge, Mr. Justice Harvey, looked at an alternative submission by the insurer for the defendant, who was an operator of an auto repair shop. The submission was that benefits payable to the plaintiffs by the plaintiffs' automobile insurer (in this case, Unifund in Ontario) should be deducted as collateral benefits at common law. Mr. Justice Harvey quoted from the Supreme Court of Canada decision of *Cooper v. Miller*,[43] which reiterates that "*the primary objective of tort is the restoration of the plaintiff to his or her pre-accident position. Double recovery is not permitted.*" In reference to that case, he stated as follows:

> "*The thrust of Cory J.'s analysis is that the plaintiff must demonstrate that they made some type of extraordinary effort to obtain additional insurance for the exception* [to double recovery] *to apply. For Mrs. Brennan to come under this exception, she must demonstrate that she is a prudent insurer ...*

[41] 2000 BCCA 294
[42] R.S.B.C. 1996, c. 231
[43] [1994] 1 SCR 359

> *Under this reasoning I am satisfied that Midtown is entitled to deduct the benefits payable by Unifund to Mrs. Brennan. The coverage at issue was obtained from her husband, Mr. Brennan, so she cannot be seen as a prudent insurer, if anyone can make that claim it is the husband. It is not, however, necessary to decide this point as the insurance at issue was a legal requirement of driving a car in Ontario. It is not a prudent act of forethought to obtain insurance which is required by law in order to operate a motor vehicle*."

In the Court of Appeal, Chief Justice McEachern agreed with the views of the trial judge:

> "*With respect, I do agree with the views of the trial judge expressed in paragraphs 37 to 44 of his Reasons for Judgment where, based on the decision of* Cunningham v. Wheeler *and other authorities cited, he found that the private insurance exception to the rule against double recovery could not be applied in a case such as this one where the plaintiff's benefits were payable under Ontario's compulsory insurance plan and not pursuant to a private policy of insurance*."

(b.) The Workers Compensation Act, s10

In British Columbia a worker covered by a Worksafe BC Certificate may not sue another worker or employer who is covered or should be covered by a certificate for an injury incurred in the course of their employ. Highway maintenance contractors and their employees are covered by WorksafeBC certificates. Any claim by a driver who was working at the time of the accident will therefore be barred against the contractor if the driver is considered by WorksafeBC to be in the course of his or her employment. To make this determination, WorksafeBC looks at a variety of factors. The driver may continue a claim against another driver who was not working. The non-working driver will be able to seek declaratory relief against the contractor as liability is several if one Defendant has a WCB defence.

(c.) The Health Care Costs Recovery Act

If found liable for personal injuries suffered by a Plaintiff, highway maintenance contractors will also be liable to repay to the Crown, the healthcare costs associated with that injury. All actions commenced on or after April 1, 2009 are required to include such a claim. In addition, the act applies to all claims extant on that date, however the Crown's independent right of recovery does not apply to actions involving accidents occurring before October 30, 2006.

The Act does not apply to ICBC (who have a separate scheme for the recovery of health care costs where an ICBC insured is found liable for the injury). A full analysis of how this Act applies to claims against highway contractors is beyond the scope of this paper, however it depends not only on when the accident occurred, but also the role taken by ICBC, where its' insured is also involved in the Plaintiffs accident.

(d.) The New Supreme Court Rules

A new set of Supreme Court Civil Rules came into effect in July 2009. A full analysis of the civil procedure applicable to claims involving highway maintenance is also beyond the scope of this paper. However it is noteworthy that these Rules require a full examination of the facts and gathering of evidence as soon as possible after an action is commenced. An example is the Rule governing Third Party Notices. Unless by consent or with leave of the Court, these must be served within 6 weeks of service of the Notice of Civil Claim. Therefore it is important to identify any third parties as soon as possible after a claim is served on a contractor.

5. Evidentiary Considerations

In our experience, most cases are defended on minimal documentation and evidence of standard practice. This is primarily because several years can elapse between an accident and the contractor being notified of it through service of a Notice of Civil Claim or Third Party Notice, and the standard documentation used to record maintenance activities does not record these with great specificity. In our experience, because of these limitations and the nature of the tasks they perform (when suitably prepared as witnesses) the road crew members' evidence of standard practice is usually accepted in order to re-create the highway maintenance performed, where direct evidence is lacking.

However, there can be a wealth of documentary evidence relevant to the defence of a highway maintenance contractor, and while the absence of records is not necessarily fatal to such defence, having all the available documents does narrow the issues, and often lessen the steps (and cost) involved in defending such claims. It is important for employees of highway maintenance contractors to consistently document their activities on a daily basis as the company may not learn of an accident until many years later and employees' memories fade quickly. Moreover, it is equally important for employees and managers to document their best practices for the particular area where an accident occurred as soon as possible.

(a.) Documentary Evidence

Typical document repositories include:

The contractor: Typical documents include road condition reports, shift foreman's journals, crew time cards, incident or accident reports, weather forecasts, weather reports or thermograph reports, a communications centre log, vehicle maintenance details, winter abrasive and de-icing chemical stockpile amounts, and training records.

The Ministry of Transportation and Infrastructure: Copies of documents the contract requires the contractor to compile and send to the Ministry (such as road condition reports) ought to be in its possession. In addition, other relevant documents include records from relevant Roadside Weather Information System locations, accident histories, as built plans, programmable advisory sign board logs, and non-conformance (or similar) reports.

Environment Canada: Locations of weather stations and historical weather data is obtainable from Environment Canada, in addition to copies of weather forecasts issued, and explanations of terms.

Emergency responders: RCMP reports, including any traffic accident analysis, Fire rescue attendance, and (if consent is obtained) the EHS crew report, can be obtained from the respective agencies.

ICBC: If consent is obtained, ICBC's file will likely contain witness statements as well as details of the damage incurred to involved vehicles.

The vehicle: Many vehicles on the road today have on-board vehicle diagnostic computers (so called "black box") which retain data on speed, braking, seatbelt use and when or if airbags deployed. In addition, OnStar equipped General Motors vehicles can have further data which has been transmitted automatically using that service, and some commercial fleets also have GPS systems, or other satellite services, providing timing and similar evidence.

The Press: Often an accident will have generated press coverage, and photographs taken at the scene, or video coverage of such may be useful, in addition to a published article. Usually such footage can be obtained upon application to the archival department of the relevant agency, for a fee.

(b.) Witnesses

Obviously relevant crew members will have direct and indirect evidence of the road and weather conditions, and the maintenance activities leading up to and at the time of the accident. However, their knowledge of the area, their experience, and their knowledge of the maintenance specifications, will also be relevant.

In addition to witnesses to the accident, there will usually be Emergency crew and tow truck operators, who were witness to the aftermath of the accident and the road conditions.

(c.) Photographs

Photographs taken of the scene of the accident can be the most important; particularly where these are able to show the condition of the highway as it was at the time of the accident. However, also relevant can be those showing the resting position of the vehicles, any marks left by them in the accident, condition of tires, and damage to the vehicles.

(d.) Experts

Experts can assist the court in understanding the cause and progression of an accident (e.g. an accident reconstructionist); how, when and why ice formed on a particular

section of highway, and how predictable that was (e.g. a micro climatologist), or how and why a certain maintenance method is followed (e.g. a road maintenance engineer).

The court commented in *Collins v Rees*[44] that the proper procedures for road maintenance are something to be determined by experts, not the court. Mr. Justice Williams explained:

> *"Decisions as to the proper steps, measures and procedures to sign and maintain a highway system in a large metropolitan community are undoubtedly complex things. I am sure that engineers have spent their entire lives working on those very issues. The same applies with respect to issues such as drainage and vapour barriers. It is not reasonable to expect that a trial judge, as a layperson, will draw the inferences to establish this element. It is clearly a matter that requires expert evidence."*

The utility, particularly of an accident reconstructionist will depend upon how much information about the accident (including the road conditions) is available.

6. Conclusion

The first consideration when dealing with claims involving highway maintenance contractors is to recognize that these claims have distinct aspects. Once recognized, information can be acquired and organized to make a proper evaluation of the claim. Each case will be factually driven with numerous factors coming into play, and the sooner all the relevant evidence is identified and collected, the narrower the issues will be in any analysis of liability. That, in turn will help to minimize the costs defending the claim.

The fact that a serious accident has occurred in adverse road conditions is only one of many considerations that will determine the liability exposure of the contractor. From the defendant's perspective, it has been our experience that the vast majority of the claims presented are defendable. The highway contractors are experienced and diligent in risk management, and in educating their employees of the Ministry's requirements.

[44] Supra, at note 15