

COPY,

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120525
Docket: M060300
Registry: Vancouver

Between:

William Dirk Van Tent

Plaintiff

And:

**City of Abbotsford,
Her Majesty The Queen in the Right of the Province of British Columbia,
as represented by the Ministry of Transportation and Highways,
and 456355 doing business as Jake's Contracting**

Defendants

Before: The Honourable Madam Justice Ballance

Oral Reasons for Judgment

Counsel for the Plaintiff:

E.J. McNeney, Q.C.
J.S. Stanley

Counsel for the Defendants:

C.A. Wallace
K. Yee

Place and Date of Trial:

Vancouver, B.C.
September, 26 - 29, 2011

INTRODUCTION

[1] THE COURT: Sunday, July 3, 2005 was the last day of the Canada Day long weekend. The volume of afternoon traffic westbound along Highway 1 near Abbotsford B.C. was heavy. At approximately 5:00 p.m., the plaintiff, Bill Van Tent, who was riding in the right-side westbound lane, strayed out of his travel lane to the right of the fog line, where he encountered an uneven edge of pavement and was thrown off his motorcycle.

[2] At issue in this proceeding is the liability for the accident.

[3] At the time of the accident, an on-ramp accessing the westbound lanes of Highway 1 was being constructed near Atkinson Road. The project had commenced sometime in April that year and was nearing completion.

[4] The corporate defendant, which I will refer to as "Jake's", had been contracted by the other defendant, the City of Abbotsford, to construct the on-ramp. It is common ground that at all material times the defendants were responsible for the construction project.

BACKGROUND

The Manual

[5] The Ministry of Transportation and Highways publishes a manual titled, Traffic Control Manual for Work on Roadways (the "Manual"). The Manual sets forth basic principles and prescribes standards for the design, application, installation, and maintenance of the types of traffic control used in work and construction zones. Traffic control devices discussed in the Manual include signs, signals, lighting devices, markings, barricades, channelization, and hand signaling.

[6] The traffic control standards detailed in the Manual apply to all work zones on all streets and highways open to public travel, irrespective of the type of roadway or the authority having jurisdiction over it. The Manual provides that the function of traffic control devices is to ensure roadway safety in two main ways. First, to provide for the orderly and safe movement of vehicles throughout the road system; and

second, to provide guidance, regulation, and warning as is needed to ensure the safe passage of the individual elements of the traffic stream. The traffic control devices are meant to assist motorists safely traverse any facility open to public travel.

[7] The Manual endorses five basic requirements to ensure the effectiveness of all traffic control devices in work zones. They are spelled out as follows: fulfill a need, command attention, convey a clear, simple meaning, provide adequate time for a proper response, and command respect for road users.

[8] Uniformity of meaning is emphasized as being a particularly vital element of traffic control. In section 1.3.2, the Manual instructs as follows:

The placement, size and sign messages should be such that attention is drawn to them, and they are legible, their meaning is clear, the regulation is reasonable and there is adequate time for response.

[...]

Simply stated, uniformity means always treating similar situations in the same way. The use of uniform traffic control devices does not, in itself, constitute uniformity. A standard device used where it is not appropriate is as objectionable as a nonstandard device; in fact, this may be worse, in that such misuse may result in public disregard for the device at other locations where it is needed.

[9] The Manual stipulates that traffic control signs must be erected in an advance warning area and work area. The stated purpose is an obvious one: to inform motorists what to expect ahead before they reach the work zone with enough time to adjust their driving patterns if need be.

[10] Section 1.4.1 provides that the advance warning area may vary from a series of signs, starting two kilometres upstream from the work area, to a single sign or flashing lights on a vehicle. It stipulates further that the advance warning area, from the first sign to the start of the next area, should be long enough to give motorists adequate time to respond to conditions.

[11] Of notable significance is that the Manual expressly states that the traffic control guidelines and the standards that it describes are generally the minimum required.

The Project

[12] James Stewart joined Jake's in 2004. At the time of the accident, he was the superintendent responsible for construction of the on-ramp. Construction was typically carried out on off-peak traffic hours, during which time the right westbound lane was normally closed to traffic.

[13] Mr. Stewart prepared a traffic control plan in relation to the project. In early April 2005, he supplied a copy of it to an individual with the Ministry of Transportation and Highways. The Ministry evidently approved, or at least did not reject, the plan in the form submitted by Mr. Stewart.

[14] This marked the first time that Mr. Stewart had created a traffic control plan. He had not previously been involved in the preparation of one. He agreed that the standards he incorporated into that plan were drawn from the provisions of the Manual. He composed the plan by drawing from similar plans that Jake's had on hand and had used in the past applying, in essence a cut-and-paste methodology.

[15] At first, Mr. Stewart testified that he had read the Manual from front to back before he wrote the traffic control plan. He later clarified, however, that he had not read it cover to cover, and had reviewed only the portions of it that he believed pertained to the project.

[16] Mr. Stewart agreed that the traffic control standards contained in the Manual are generally acknowledged to be the minimum of what is required. He disagreed that he needed to implement anything more than the minimal standards set out in the Manual with respect to the project.

The Cut

[17] In order to match the elevation of the new on-ramp to the surface of the existing westbound lanes, the generous six-foot shoulder had been cut away. Mr. Stewart explained that the cut, which ran parallel to the highway, was made by a milling machine with an adjustable sliding arm that used the fog line as a guidepost to mark the placement of the cut. According to Mr. Stewart, a cut was made approximately 12 inches to the right of the fog line, give or take one inch, and where it cut through the rumble strip it left a somewhat scalloped effect. He testified that had the cut varied by more than one inch either way, the deviation would have been apparent to the naked eye and would have posed a concern to his paving crew because it had the potential of adversely affecting the placement of the asphalt. Mr. Stewart could not recall any such problem coming to his attention and therefore assumed there were none.

[18] The cut left a vertical drop of approximately four inches between the existing pavement and the base of the on-ramp. Two layers of fresh asphalt were to be laid down on the base on two different days. A two-inch asphalt lift was placed along the new on-ramp on June 23. The final layer was scheduled to be laid on July 7, and the accident happened in the intervening period.

The Traffic Control Signs

[19] Jake's positioned four traffic control signs along Highway 1 in relation to the construction zone. Two of them were put into place at the outset of the project; one known as the C-19, and the other as C-18.

[20] The C-19 sign reads, "Construction 2 km Ahead" and shows an arrow pointing forward. The appendix to the Manual describes the use of the C-19 sign in these terms:

The C-19 sign may be used for long duration work zones on a multilane roadway where the normal speed limit is 70 kilometers per hour or higher to extend the Advance Warning Area by one kilometer or 2 kilometers.

[21] Mr. Stewart placed the C-19 sign on either side of the westbound highway, approximately two kilometres in advance of where the start of the cut was subsequently made.

[22] Mr. Stewart also placed the C-18 sign on both sides of the westbound lanes, somewhere between 20 and 60 metres further west of the C-19 sign. This sign was smaller than the C-19. It displayed the word, "Construction" with an arrow pointing ahead. The appendix directs that the C-18 sign be erected in the advance warning area for long duration work. When the cut was made on June 23, Jake's erected two more signs further west along Highway 1. For ease of reference I will sometimes refer to these additional signs together as the "Post-cut Signs".

[23] One of the Post-cut Signs is described in the Manual as C-25 "Bump or Rough Roadway Ahead". It depicts a wavy horizontal line suggesting the existence of three bumps across the roadway as opposed to the side of the road. According to the Manual, the C-25 sign is to be used to warn of sharp changes in the road profile which are sufficiently abrupt to create a potentially hazardous condition. The evidence establishes that the C-25 was situated approximately 30 metres in advance of the cut. It was the same 75-by-75-inch dimension as the C-18. There was no reliable evidence about its height.

[24] The second Post-cut Sign was a C-13R "Low Shoulder on Right Ahead" sign. It was 75 inches by 75 inches in size and sat relatively low to the ground. The graphic on the C-13R shows a car appearing to be leaning to the right and almost tipping over an uneven edge. The corresponding commentary in the Manual states that the C-13R is to be used on unfinished paving projects where the shoulders have not been brought up to the level of the new pavement and the drop-off is potentially hazardous. The Manual directs that the C-13R be erected on the right-hand side of the roadway in advance of the low shoulder. In the case at hand, the C-13R was positioned only about three metres before the start of the cut.

[25] Whereas the first two construction signs had been stationed on both sides of the westbound lanes, the Post-cut Signs were erected on the right side only.

[26] In addition to the four traffic control signs I have described, a sign directing drivers to decrease their speed from 100 to 80 kilometres per hour was positioned between the C-18 and the C-25 signs. At the time of the accident, Jake's had deliberately covered that reduce-speed sign with a garbage bag. Mr. Stewart agreed that the applicable speed limit at the time of the accident was 100 kilometres per hour.

The Barrels

[27] As well as erecting the signage, Mr. Stewart positioned 17 large orange barrels in the zone. He testified that he used the barrels as a "visual aid" to alert motorists that there was construction underway and to prevent them from using the on-ramp before its completion.

[28] The barrels were moved out of the way to accommodate application of the first lift of asphalt on June 23, and returned to their positions after that layer was laid down.

[29] Two barrels were positioned east of the start of the cut, along the existing shoulder. The first one was situated near to, but in advance of, the C-25 sign. The second was placed between the C-25 and the C-13R signs. A third barrel was situated very close to the start of the cut, just to the west of where it began. I find that the outer left side of that third barrel was approximately eight inches from the edge of the cut.

[30] To summarize, the sequence from east to west along Highway 1 was as follows: C-19 sign, C-18 sign, Temporary Reduce Speed to 80 kilometres per hour sign, barrel, C-25 sign, barrel, C-13R sign placed roughly three metres east of the start of the cut, and a barrel sitting slightly west of where the cut began.

[31] The remaining 14 barrels were positioned every 50 feet or so westward along the on-ramp. Mr. Stewart testified that those barrels were arranged four to five feet to the right of the fog line. He said that he did not want them sitting too close to the westbound travel lane because he did not want drivers colliding with them.

[32] At the end of each work shift, Mr. Stewart and/or other construction personnel checked to ensure that the barrels were in their proper places. At his examination for discovery, Mr. Stewart explained that before the accident occurred he had observed six barrels that had been struck by vehicles and had to be replaced. He testified further that he had noticed that as many as a hundred barrels had been moved or had toppled over before the accident, and agreed that he had concluded that they had been displaced as the result of vehicles striking them.

[33] Also during his discovery, Mr. Stewart expressly agreed that some of the barrels were smashed as though they had been hit by a vehicle travelling westbound on Highway 1. He further stated that he did not deem it necessary to take any traffic control steps beyond what the Manual instructed, even though he knew cars were probably crossing the edge and striking the barrels.

[34] Mr. Stewart attempted to retreat from that evidence and highly qualify it at trial. In cross-examination, he would not agree that the displaced barrels had indicated to him that westbound vehicles may have been crossing the fog line and onto the shoulder or the on-ramp area. He emphasized that because he had not personally witnessed a vehicle strike a barrel, he was not prepared to agree that any of them had been struck or displaced by westbound traffic. When confronted with his contradictory discovery evidence on the matter, Mr. Stewart claimed that at the examination plaintiff's counsel had confused him by the sheer volume of questions he posed with the objective of extracting the desired answers from him. Mr. Stewart went on to suppose that the barrels might have been struck by vehicles using the unfinished on-ramp, claiming that he had noticed that the barricades used to prevent access to the on-ramp had occasionally been moved out of the way. He also claimed to have seen motorists drive onto the blocked-off on-ramp, weave through the barrels, and then "jump onto Highway 1". He gave no evidence of ever taking any steps to attempt to prevent these alleged instances of wrongful access to the on-ramp.

[35] Mr. Stewart's purported explanation for his material inconsistencies, as well as his trial evidence generally on the point, was strained and gave the impression of being concocted. Upon being further pressed in cross-examination, he eventually conceded that it was at least possible that some barrels could have been struck by westbound vehicles that had migrated over the fog line. Despite that, he implausibly maintained that he had not reached that conclusion before the accident took place.

[36] Mr. Stewart testified that the majority of the barrels had been struck before the cut had been made. He agreed, however, that they were displaced at an average rate of one to two per day throughout the entire time span of the project, including after the cut. Still, it did not occur to Mr. Stewart to change and/or add more traffic signs along Highway 1 or reposition the barrels or take any other steps as a result of those barrel strikes so as to better alert westbound drivers of the existence of the cut.

[37] Another subject area where Mr. Stewart's answers strained his credibility concerned his professed lack of understanding as to the purpose of a rumble strip or a road shoulder. As to the rumble strip, Mr. Stewart first testified that his understanding was that it let a motorist know that he or she was about to leave the road, yet when he was later asked to agree that when a vehicle passes across a rumble strip it makes a noise which alerts the driver to come back to the roadway, he declined to do so. Instead, he answered that he felt counsel was trying to trick him by posing that straightforward proposition. Mr. Stewart subsequently clarified that he preferred the word "confuse" to "trick" in describing counsel's motive. Mr. Stewart then continued that when he builds roads, a rumble strip is laid down simply because it is specified in the plans, and that he had no idea why it is to be placed on the road. He likewise claimed not to know why shoulders were constructed at the side of roadways or what purpose they might serve. This was an astonishing piece of testimony in light of the fact that Mr. Stewart supervises the construction of roads for a living. His purported ignorance on these points was feigned and not worthy of belief.

[38] Overall, I found Mr. Stewart's credibility to be significantly impugned at trial. I consider it unsafe to give any weight to his evidence on matters of controversy, unless corroborated by other cogent evidence that I do accept.

The Accident - July 3, 2005

[39] Mr. Stewart had been on site on Thursday, June 30. There was no construction work scheduled for the July 1 holiday or over that holiday long weekend. He lives a 10-minute drive from the construction zone and was on site regularly and drove by the area at least daily to check for vandalism and see whether anything was out of place. Mr. Stewart went past the work zone around noon on the day of the accident; nothing appeared to be out of place.

[40] The plaintiff, Mr. Van Tent, has been riding motorcycles between 35 and 40 years. On the day of the accident, he and two friends, William Foston and Wayne Kirton, were returning from Kelowna. They were each driving their own motorcycles and had been on the road for about six hours. On that sunny late afternoon, the traffic flow from about Hope, B.C. onward was congested. Mr. Van Tent and his companions were moving at a pace of between 50 and 60 kilometers per hour, well under the posted speed limit.

[41] Mr. Van Tent had driven along that particular stretch of highway, usually on a motorcycle, between two and six times per year over a period spanning more than 30 years. However, this was the first time that he had driven through the on-ramp construction site. Mr. Van Tent agreed that this section of the highway is dead straight, dead flat, and offered excellent visibility that day.

[42] Mr. Van Tent's custom is to ride in the right lane when he is travelling on a multiple-lane highway. He only moves into the left lane long enough to complete a pass, which he described as a "leapfrog" manoeuvre, i.e. moving into the left lane, negotiating the pass, and then returning to the right lane. True to his habit, Mr. Van Tent was travelling in the right-hand lane that afternoon. In fact, he was riding quite close to the fog line, somewhere between 12 and 16 inches to its left. He had been travelling in that path for a period of between five and ten minutes

before the accident happened. Mr. Van Tent was riding an Ultra Glide Harley Davidson. Its width at the front is about three feet, side to side. He candidly agreed that his right hand, and thus part of his right handle bar, was probably over the fog line as he rode. I find that it was.

[43] As Mr. Van Tent proceeded westward, he glanced in his rear-view mirror to check on the position of Mr. Foston, who was riding behind him. Preparatory to that manoeuvre, he performed a quick left-shoulder check, which caused his bike to veer to the right. He had anticipated that his manoeuvre would cause this “mini-drift” as he put it to occur. As soon as it happened, Mr. Van Tent felt his front tire hit the edge of the cut, and he was flung over his handle bars and into the left travel lane. There was no time to take evasive or compensatory action.

[44] As Mr. Van Tent slid along the highway, he had the presence of mind to tuck his head and roll as best he could. Afterwards, he slowly came to his feet down the road. With the assistance of others, he walked back up the road to where he believed he had lost control, which he testified was at or very near to the start of the cut. Mr. Van Tent testified that it was only then that he noticed the uneven edge. He had not seen it before. He persuasively testified that, had he seen the uneven edge or the C-13R sign, he would have stayed clear of the edge.

[45] Mr. Van Tent was almost positive that where he fell, being at or near to the start of the cut, the fog line had been ground in half and there was no remaining old pavement to the right of it. He insisted that, in any case, the cut was certainly not made a foot to the right of the fog line as Mr. Stewart had testified.

[46] Mr. Van Tent did not recall having seen any of the traffic signs erected by Jake’s warning of the construction ahead, however, he did recall the barrels. Although he could not remember specifically whether he had noticed the ones situated before the cut, his recollection was that when he was roughly a quarter kilometre east of the spot where he believes he fell, he could see a line of barrels along the on-ramp. He believes they were situated six to ten feet to the right of the fog line, and he perceived them together as a grouping of sorts.

[47] The barrels alerted Mr. Van Tent to the fact that he was in a construction zone of some kind. He says that he assumed that the construction was taking place over to his right in the vicinity where the barrels were located.

[48] Mr. Van Tent is an enterprising man who has held a wide array of jobs. For several years he worked for Mainroad Contractors, operating various types of heavy machinery related to road work and maintenance. In that capacity, he had sometimes been part of a paving crew on what he called grind-and-pave jobs. He agreed that the difference between freshly laid asphalt and existing roadway is readily apparent, and that in all likelihood he was aware that there was fresh asphalt in the area where the barrels were sitting. He also agreed that he had surmised that a paving project was underway in that area, and that he knew that an area with newly laid asphalt would not be safe to drive on. From his years with Mainroad Contracting, Mr. Van Tent was aware that if only one lift of asphalt had been laid down, there could be a drop-off from the existing pavement to the new blacktop layer. He also acknowledged that a sharp change in road profile was a potential hazard to motorists, especially a motorcycle rider, and that such a risk could arise wherever paving projects were in progress.

[49] Although Mr. Van Tent had never himself manned a grinding machine, he appeared very familiar with its operation. He credibly explained that the machine is vehicle-like, complete with a steering wheel. The operator cuts the asphalt by driving the machine, using a marker as a visual aid to stay on course. Mr. Van Tent said that he had seen grinding machines drift off the marker as they made the cut "a million times". He would, therefore, not agree that the cut in this case was uniformly made 12 inches to the right of the fog line, adding that in reality grinding machines do not cut as smoothly as that. In any case, Mr. Van Tent's evidence is that where he lost control of his motorcycle, the cut had been made right into the fog line.

[50] A friend of Mr. Van Tent's, who is now deceased, took photographs of the roadway from assorted vantage points at an unspecified time following the accident.

Those photographs suggest that all or some part of the rumble strip to the right of the fog line had been cut away, but that the fog line itself remained intact.

[51] Mr. Van Tent disagreed that those photographs accurately depicted the proximity of the cut to the fog line at the spot where he lost control, and believes that they show a section of the highway further to the west. It was not established what segment of the roadway in relation to the beginning of the cut, which is the place that I find Mr. Van Tent fell, is captured by those photographs. It is also too difficult to accurately gauge from them the distance between the fog line and the placement of the cut. Accordingly, they are of little probative value.

Mr. Foster and Mr. Kirton

[52] Mr. Foston is a now retired professional truck driver who has ridden motorcycles for roughly 45 years. At the time of the accident, he was following Mr. Van Tent and was getting ready to pass the one car that was travelling between them. Mr. Foston testified that just before the new on-ramp area, he caught a fleeting glimpse of a construction sign. He said the sign was positioned close to the ground with sandbags around it, and was not very visible in such heavy traffic. He believes that it displayed the word "construction", but does not recall it having an arrow pointing forward.

[53] Mr. Foston's recollection was that the sign he saw was positioned fairly close to the work zone. In cross-examination, he acknowledged that the placement of the sign could have been as near to the work area as where the C-13R sign is shown to be located in one of the photographs in evidence. However, Mr. Foston persuasively insisted that at no time prior to the accident did he see the C-13R sign. In this regard, he explained that, had he seen it, it would have concerned him because he knew that sharp changes in the road profile presented a serious hazard for motorcyclists. He acknowledged in general terms that the potential for uneven pavement is present where road paving projects are underway.

[54] Mr. Foston testified that he observed barrels lined up in the on-ramp area, at a distance of between eight and ten feet to the right of the fog line. He said that the

barrels shown in the photographs of the scene taken at an undetermined time were not in the same place as they were when the accident occurred, in that the photographs depict them as being situated closer to the fog line than they actually were that day. According to Mr. Foston, there was no barrel sitting close to the cut or fairly snug up to the edge of it at the time of the accident.

[55] Although he noticed what appeared to be fresh blacktop in the on-ramp area prior to the accident, Mr. Foston credibly maintained that he did not see the edge until after the accident happened. He saw Mr. Van Tent being thrown over the handle bars of his Harley and into the left lane of traffic. After the accident, Mr. Foston pulled over and very slowly crossed the edge at about a 90-degree angle. His recollection was that the drop-down from the edge to the new level felt like a curb, which he believed to be four to five inches deep. He supported Mr. Van Tent's evidence to the effect that the cut had been carried out closer to the fog line than what was depicted in the photographs in evidence.

[56] Mr. Van Tent's other companion, Wayne Kirton, was riding about five car lengths ahead of Mr. Van Tent. He, too, is a professional truck driver and has been riding motorcycles for decades. Mr. Kirton testified that he saw no traffic signs of any kind indicating any danger ahead. However, he did notice the orange barrels sitting along the new blacktop, which made him aware that he was passing through a construction area. Mr. Kirton estimated those barrels were positioned a distance of six or more feet to the right of the fog line. He acknowledged that sharp changes to the road grade pose a hazard to motorcyclists and should be avoided, but, as had Messrs. Van Tent and Foston, Mr. Kirton persuasively testified that he did not see the uneven edge as he rode along.

[57] Mr. Kirton testified that he did not know how far the edge was from the fog line. In cross-examination he was shown a photograph purporting to represent the segment of road where Mr. Van Tent lost control, and was asked whether he agreed that the cut was made about one foot to the right of the fog line. Mr. Kirton answered that the placement of the cut at the spot where Mr. Van Tent was thrown

off was not as represented in the photograph before him. He would not agree that there was a distance of one foot between the fog line and the cut, and although he could not say precisely how far, he believed that the cut was closer to the fog line than one foot.

[58] The first time that Mr. Kirton noticed the dip in the road surface caused by the cut was when a police officer in attendance at the scene drew it to his attention after the accident.

[59] This is a convenient place to make the observation that, in the end, the debate in the evidence surrounding the depth of the edge, be it two, four or five inches, was of marginal relevance. The fact is I find that the drop-off was not readily visible to passing traffic and that the edge that existed at the time of the accident presented a danger to a motorcyclist who might cross over it without knowing it was there, as evidenced by precisely what happened to Mr. Van Tent.

[60] The testimony of Messrs. Van Tent, Foston, and Kirton was not challenged in cross-examination in any meaningful way. I found them to be forthright and credible witnesses. The only aspect of Mr. Van Tent's testimony that I consider unreliable was his recollection that, at the place he fell, the cut had been made right along the fog line. I conclude that he was in no shape to reliably make that observation at the time, and find that he is honestly mistaken about that. Having said that, however, on balance the evidence that I do accept indicates that at the start of the cut where Mr. Van Tent fell, the cut had been made somewhat closer to the fog line than the 11 or 12 inches urged by Mr. Stewart. Along the same lines, while I accept that Mr. Foston genuinely recalls the edge feeling like a four-to five-inch curb, I find that in the immediate aftermath of having witnessed the accident, he was simply mistaken about that. I also acknowledge that Mr. Van Tent's use of the expression "a million times" to describe how often he had seen grinders deviate from their markers, was an obvious exaggeration. I take him to mean that he had seen that event happen often, and find that his overstatement does not detract from his strength as a witness.

[61] Overall, I consider the evidence of Messrs. Van Tent, Foston, and Kirton to be reliable and I accept it.

Overview of the Parties' Positions

[62] Mr. Van Tent asserts that given the construction work that the defendants had undertaken along the busy highway, of which Mr. Van Tent was a lawful and foreseeable user, they owed him a duty of care. His position is that the Manual prescribes a minimum set of standards that the defendants must follow with respect to the placement of adequate traffic control signage in the construction zone, and that the common law requires their adherence to an even greater standard of care. Additionally, he submits that ss. 138 and 139 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (the "MVA") impose a statutory duty on the defendants to post adequate warning and speed signs.

[63] Mr. Van Tent asserts that the defendants were obligated to place adequate signs notifying him of the construction zone generally, and more particularly of the specific hazard of the uneven edge that Jake's had created within the zone. He asserts that the defendants failed to use and place appropriate traffic control signage sufficiently warning him of the perilous difference in the road profiles. He also contends that the traffic barrels that had been placed on the on-ramp were offset too far from the lane edge, such that they created an illusion that the paving/construction works were closer to the barrels than to the edge of the fog line and/or created the sense that the barrels were sitting on a fully-constructed lane for the purpose of keeping motorists off the new on-ramp.

[64] The defendants contend that Mr. Van Tent is the author of his own misfortune and that the accident was entirely his fault. They point out that it is not incumbent upon them to ensure the safety of the travelling public. Rather, they say that the extent of their duty is to reasonably contemplate the safety of persons who, unlike Mr. Van Tent, are using the road with reasonable and ordinary care. They argue that they discharged their duty in the case at hand.

[65] The defendants' position is that by virtue of the fact that Mr. Van Tent was riding a motorcycle through a construction zone, he was not only required to conduct himself with ordinary and reasonable prudence, he was expected to exercise heightened caution. They assert that Mr. Van Tent failed to drive with reasonable care, much less with the requisite extra caution dictated by the circumstances, and that the evidence of his failings in this regard are numerous. They cite, for example, that he failed to see the warning signs that provided crucial information about the approaching construction zone and the upcoming uneven road profile, which were clearly there to be seen by a motorist of ordinary prudence who was attentive and maintaining a proper lookout.

[66] Building on that line of argument, the defendants say that Mr. Stewart's choice of traffic signs is basically a moot point as Mr. Van Tent claims to have not seen any of them in any event. Their companion assertion is that any discussion concerning the position of the barrels is a "red herring". In this regard, the defendants point to the fact that Mr. Van Tent's own evidence is that his move across the fog line was inadvertent. They say he was not at all confused about where he was supposed to be riding and the placement of the barrels did not lead him to believe that traffic was being channelled over to the right, so that he would be safe in moving that way.

[67] The defendants emphasize that Mr. Van Tent knew he was riding through a construction zone, that a paving project was underway to his right, and that activity of that kind could present hazards to motorcyclists, including the very one he encountered. Their essential assertion is that by looking behind him to ascertain his friends' position, which caused him to veer to the right of the fog line while driving through a construction zone in heavy traffic, Mr. Van Tent assumed an unreasonable risk of harm and his conduct was negligent.

[68] The defendants also argue that placing the barrels closer to the edge would not have moved Mr. Van Tent away from riding close to the fog line. Their reasoning is that the presence of the C-13R sign, which they say would have almost

completely blocked the existing shoulder, had not triggered such a response in Mr. Van Tent.

DISCUSSION

[69] The defendants do not challenge Mr. Van Tent's proposition that they owed him a duty of care. It is obvious they did. In order to successfully maintain an action in negligence, however, Mr. Van Tent must show that the defendants breached their duty in that they failed to exercise the standard of care reasonably expected in the circumstances, and that Mr. Van Tent suffered injury as a result of that breach.

[70] The standard of care demanded of the defendants is not one of perfection or even what might be considered the optimum in the circumstances. The standard is measured against the conduct of a reasonably prudent person in the circumstances. It is measured objectively. (See generally, *Mustapha v. Culligan of Canada Ltd.*, [2008] S.C.J. No. 27, [2008] 2 S.C.R. 114; *Stewart v. Pettie*, [1995] S.C.J. No. 3, [1995] 1 S.C.R. 131; *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] S.C.J. No. 41, 28 D.L.R. (4th) (620); *Rowe v. British Columbia*, [1989] B.C.J. No. 137 (S.C.)).

[71] 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.

[72] In my view, the defendants failed to adhere to several of those minimal standards. With respect to many of them, Mr. Stewart variously seemed not to know of them or appreciate their application or the complexities of the planning work that was required of him in creating and implementing an appropriate traffic control plan.

[73] A fundamental tenet embraced by the Manual is that individuals who are assigned the responsibility for safety along the roadworks should be trained in matters of traffic control. It stipulates that the most important duty of those individuals is to ensure that all traffic control devices conform to the applicable traffic control plan and are effective in providing safe conditions for motorists. Mr. Stewart had neither training nor experience in traffic control of this kind. He had never before created a traffic control plan and had cobbled one together, in part, by borrowing from the plans of other projects using a cut-and-paste process. He did not adequately customize the plan for the on-ramp project. When Mr. Stewart compiled the traffic control plan for the project, he had not bothered to read the Manual in its entirety, preferring instead to review only the extracts he thought were pertinent.

[74] Throughout his cross-examination, Mr. Stewart confirmed numerous other instances of his ignorance of elemental principles of the Manual and his larger failure to adhere to reasonable safeguarding concepts. He would not agree with the common-sense proposition reflected in the Manual to the effect that special care should be taken in applying traffic control techniques, because work zones can pose unusual or unexpected situations to motorists. Without explanation, he flatly disagreed that signs should inform drivers generally of the existence of the construction zone and become more specific as they get closer to the hazard presented. Yet, those guidelines are explicit in the Manual.

[75] The Manual also makes clear that traffic signs and controls are to be maintained as if every driver were encountering the construction area for the first time and in less than ideal conditions. Mr. Stewart admitted he did not prepare the plan on that footing. As mentioned, Mr. Van Tent was injured his first time through the construction zone.

[76] Mr. Stewart would not agree that he was dealing with a work zone control activity within the meaning of the Manual, even though it is plain that he was. As well, although he acknowledged that the traffic control measures laid out in the

Manual were generally considered to establish baseline requirements, Mr. Stewart would not agree that he might need to take steps beyond those contemplated in the Manual in particular cases, or in this case.

[77] Mr. Stewart prepared the traffic control plan on the basis that the project qualified as a short duration work, even though the definitions in the Manual make it plain that it was a long duration project. Appended to the plan was a schematic figure of a typical traffic control situation said to be applicable in the asphalt grinding/cutting phase of the project. It is referred to as the “advance warning area-longer term work”, which Mr. Stewart chose to use, even though he did not agree that the project qualified as longer duration work in the first place. That schematic shows the placement of the C-19 and C-18 signs, but it does not show or refer to the Post-cut Signs. The worksite had clearly become more hazardous after the cut was made and pending the completion of the final layer of asphalt. Yet, in Mr. Stewart’s mind the posting of the C-19 and C-18 signs was all that he had to do in terms of traffic control signage in order to comply with the Manual, both before and after the cut was made. He had only bothered to erect the Post-cut Signs because someone at Jake’s had suggested that be done. Mr. Stewart considered those signs to be extras that were not strictly necessary in the circumstances. Contrary to Mr. Stewart’s sense of it, the C-19 and C-18 signs, of themselves, were plainly deficient to adequately warn motorists of the potential danger of the uneven edge left by the cut which was coming up close to the fog line on the right.

[78] Mr. Stewart testified that he did not consider placing another C-13R sign further east in advance of the start of the cut, because he had already put a C-25 sign to the east. In his testimony, he referred to the C-25 sign as an uneven pavement sign, and explained that his understanding and the reason he used it was to let motorists know there was a possibility of uneven pavement ahead.

[79] The figure appended to the traffic control plan also shows the placement of two speed reduction signs following the C-19 and C-18 signs. The first of those informs an approaching motorist that a reduced speed to 80 kilometres per hour is to

come into effect ahead, and the second one announces that the reduced speed is now in effect. Jake's erected the sign directing that traffic proceed at a reduced speed of 80 kilometres per hour to the west of the C-18 sign. It is not entirely clear as to whether the sign warning of the upcoming reduced speed was also put in place.

[80] In any event, Mr. Stewart testified that the temporary reduce-speed sign was covered by a black garbage bag when the construction crews were not working and the right-hand lane was not closed. He explained that practice had been followed by Jake's on past projects. Mr. Stewart agreed that he had not indicated he intended to cover the reduce-speed sign in his traffic control plan. He also agreed that such action is not authorized by the Manual.

[81] Enshrined as an essential principle in the Manual is the notion that worksites are to be carefully monitored under varying conditions of traffic and weather to ensure that the traffic control measures that have been implemented are operating effectively and in good repair.

[82] The fact that barrels were displaced on a regular basis, both before and after the cut, and that Mr. Stewart knew of six instances where they had been damaged to the point of requiring replacement is uncontroverted. The defendants argue that those barrel displacements could have come about through a variety of means such as negligent westbound drivers, wide-load vehicles, or motorists moving barrels to access the on-ramp. I accept that there are a number of potential explanations for the dislodged and damaged barrels, including one or more or all of those cited by defendants' counsel. Another plausible and I think obvious explanation, despite Mr. Stewart's reluctance to concede the point, is that westbound vehicles on Highway 1 had been migrating over the fog line and hitting the barrels. In the end, it seems to me that speculating on the various reasons for the barrel strikes and why motorists may have drifted over the fog line, misses the point. What I think germane is that Mr. Stewart did not know why the barrels were being displaced pretty much daily within the worksite that he was responsible for. What he did know is that

displacement by vehicles was routinely happening, and that it was likely that some of those barrel strikes were being made by westbound travellers who were crossing the fog line, whether rightly or wrongly. And he knew that the displacements continued to occur even after the Post-cut Signs had been put in place.

[83] The fact that the barrels continued to be displaced after the cut was made and the Post-cut Signs were erected ought reasonably to have raised a question in Mr. Stewart's mind as to the overall effectiveness of the nature and placement of the existing traffic control signage and barrels and the safety of the construction zone at large. Mr. Stewart did not see it that way, however. He testified that he never thought to increase the number of barrels or signs or change or reposition them despite the daily or almost daily barrel displacements.

[84] The existence of the barrels on the fresh sheet of asphalt provided visual clues to motorists that construction activity, most likely paving, was being carried out on the on-ramp area. In my opinion, those indicators did not adequately warn motorists of the risks presented by the uneven road profile that existed on and after June 23, and persisted until the time of the accident, which I find was not readily visible to the passing traffic. Had the "reduce speed" sign not been concealed, it would have served as an additional general warning to motorists of the need to take caution. Instead, motorists were left to think that it was safe to proceed through the unmanned construction zone with no reduction of speed.

[85] Mr. Stewart was cross-examined about the care he had taken to determine the visibility of the C-13R sign by an approaching motorist. He testified that he could see that sign from approximately a half kilometre away. When asked whether he could make out what the sign said at that proximity, he replied, "Maybe, maybe not, anything's possible."

[86] Mr. Stewart explained that he had better than 20/20 vision and knew where the sign was located. He agreed that some motorists would reasonably be expected to have less than 20/20 vision. Mr. Stewart also agreed that some drivers would not be able to make out the C-13R sign until they were perhaps 20 to 30 metres away

from it. That distance generally accords with what appears to be depicted in the photographs in evidence.

[87] Mr. Stewart also agreed that for various reasons motorists could be expected to take their eyes off the highway for anywhere between two and three seconds at a time. He did not disagree with the propositions that a vehicle going 50 kilometres per hour moves a distance of 13.88 metres per second, and that a distance of 16.66 metres per second is covered by a driver travelling at 60 kilometres per hour. I accept those calculations as accurate as a function of pure arithmetic. Based on them, Mr. Van Tent argues that assuming the C-13R sign became visible 30 meters in advance of the start of the cut, a motorist travelling at 50 kilometres per hour would have just over two seconds, 2.1 seconds precisely, to react to the sign, and a motorist moving 60 kilometres per hour would have 1.79 seconds to react. Applying the same arithmetic, an individual travelling at the posted speed limit of 100 kilometres per hour would have scarcely more than one second to react to the message on the sign, assuming it first became visible at 20 metres away.

[88] It was evident at the end of this exchange in cross-examination that Mr. Stewart had not specifically considered the range of distance from which approaching westbound traffic would be able to read the C-13R sign or whether the placement of it so close to the actual hazard reasonably allowed for sufficient reaction time by motorists.

[89] I do not share the defendants' view that the presence of the two barrels along the generous shoulder before the cut would have indicated to a reasonably attentive driver that the shoulder was closed. Even if the placement of those barrels suggested that were the case, the vast majority of them were placed much farther west and could have easily provided a contradictory representation. That is, creating the perception that the construction activity and the danger it potentially posed, was considerably farther away.

[90] There were several reasons why Mr. Van Tent and his fellow riders did not see the Post-cut Signs before the accident unrelated to any failings on their part. As

stated earlier, I find that the uneven road elevation brought about by the cut was not readily visible to a reasonably attentive driver. The potential risk presented by that somewhat hidden danger, particularly to motorcyclists, was compounded by the fact that the signage was sub-standard. The Post-cut Signs were situated among large orange barrels that would have likely dominated the attention of a reasonably prudent driver and I find did so in the case of Mr. Van Tent. Aggravating that problem was the fact that the lone C-13R sign which was positioned between two orange barrels sat too low to the ground to be readily seen, particularly by a motorist driving in heavy weekend highway traffic. To enhance visibility, the Post-cut Signs should have been placed so they would have been more prominent to traffic approaching from the east. The efficacy of the C-13R sign was further undermined by the fact that it was simply situated too close to the beginning of the dangerous edge to provide a warning sufficiently in advance to approaching motorists including Mr. Van Tent. It practically stood on top of the very danger it was meant to warn about.

[91] Moreover, the C-25 sign which indicates the presence of bumpy or uneven road surface ahead was plainly the wrong sign to use in the circumstances. It suggested that the roads straight ahead may be bumpy and did not convey to approaching motorists the existence of uneven pavement to the right of the roadway. The choice of that sign stands as a further example of the overall inadequacy of the signage and the deficiency of the traffic control plan.

[92] Based on the foregoing, I conclude that the Post-cut Signs were significantly inadequate to reasonably warn oncoming motorists of the hazard lurking near the side of Mr. Van Tent's travel lane.

[93] In my opinion, not only did the defendants fail to observe several of the minimal traffic control standards sanctioned by the Manual in relation to the project, they were also in breach of s. 138 of the MVA. It is settled principle that the mere breach of a statute, standing alone does not constitute negligence *per se*: *Canada v. Saskatchewan Wheat Pool*, [1983] S.C.J. No. 14, [1983] 1 S.C.R. 205. Nor is the

applicable standard of care dictated by the Manual; rather, it is informed by the Manual. More importantly and beyond the defendants' failings that I have described, the defendants failed in their common law duty to implement reasonable measures to warn motorists of the danger presented by the uneven road profile. That conduct fell below the standard expected of a reasonably prudent contractor in the circumstances.

[94] The cumulative effect of the breaches with particular emphasis on the inadequate type and number of warning signs, combined with the failure to properly position the signs that were used, produced an unreasonable risk of harm to Mr. Van Tent. The likelihood of harm was foreseeable and considerable and the potential gravity of it was significant, especially to motorcycle riders.

[95] I accept Mr. Van Tent's evidence that had he been alerted to the existence of the perilous uneven edge so close to his lane of travel, he would have moved far away from it. The totality of the evidence establishes that in all probability the accident would not have happened but for the defendants' negligence in failing to adequately warn Mr. Van Tent of the potentially serious hazard that was not visible to the reasonably prudent and attentive motorcycle rider. Stated another way, the accident would not have occurred just the same had the defendants acted in accordance with their standard of care in discharge of the duty they owed to Mr. Van Tent. The negligence of the defendants clearly made a difference and is a cause of Mr. Van Tent's injury. Causation has been established within the meaning of the authorities: *Athey v. Leonati*, [1996] S.C.J. No. 102, [1996] 3 S.C.R. 458; *Resurface Corp. v. Hanke*, 2007 S.C.C. 7.

[96] What then of the role played by Mr. Van Tent in the accident? Did he fail to exercise the level of care for his own safety that is expected of an objectively reasonable motorcycle rider in the circumstances? If his conduct amounts to a marked departure from the expected standard of care, the next question is whether his conduct played a causative role in the accident.

[97] As a user of the highway, Mr. Van Tent was obligated to take reasonable care for his own safety. He elected to ride nearly as closely as possible to the outer right boundary of his lane. Indeed, he was so close to that outer edge that his right hand and some part of his right handle bars extended outside the lane altogether. He did so even though it was readily apparent to him that a paving project of some kind was underway in relatively close proximity to his right, and he knew that fresh asphalt had been laid and could pose a hazard to him as a motorcyclist, including the very hazard that he confronted.

[98] I reject the defendants' contention that by merely taking his eyes off the road in front to glance behind, while proceeding through an unmanned construction zone, Mr. Van Tent acted unreasonably and imprudently. I similarly reject the proposition that migrating over the fog line in an unmanned construction zone, of itself, constitutes an act of negligence. However, it does not necessarily follow from these observations that Mr. Van Tent's conduct was not negligent.

[99] The nature of the hazard that Mr. Van Tent ultimately encountered was in his mind as a possible risk as he drove almost as close as he physically could to the danger area while still remaining in his travel lane. At the same time, he undertook a manoeuvre of glancing over his left shoulder to determine his friend's position which he knew would cause his motorcycle to drift over to the right. Travelling as he was, so near to the right-side boundary of his lane, he could not afford to migrate to his right. It is the carrying out of that non-emergency manoeuvre in all of the circumstances knowing that it would cause his motorcycle to stray right that represents the taking of unreasonable risk on the part of Mr. Van Tent. The fact that Mr. Van Tent assumed that the construction or paving activity, and thus any risk, was farther afield in the vicinity of the grouping of barrels, does not negate the carelessness of his conduct in the circumstances. I conclude Mr. Van Tent's negligence played a causative role in his injury.

[100] In summary, I find that the conduct of Mr. Van Tent and the defendants was negligent and combined to cause the accident.

[101] I turn next to the matter of apportionment.

[102] Where two persons combine to cause a loss, liability is apportioned and apportionment is governed by the *Negligence Act*. For the purposes of these oral reasons, I will not recite the pertinent provisions.

[103] In assessing apportionment, the court examines the extent of blameworthiness, meaning the degree to which each party is at fault and not the degree to which each party's fault has caused the loss. The task of the court is to evaluate the fault and blameworthiness of those involved and not to assess the degrees of causation. That distinction is fundamental to the concept of apportionment.

[104] In *Aberdeen v. Langley Township*, 2007 BCSC 993, reversed in part, *Aberdeen v. Zanatta*, 2008 BCCA 420, Mr. Justice Groves endorsed the following enumeration of factors in assessing relative degrees of fault:

1. The nature of the duty owed by the tortfeasor to the injured person . . .
2. The number of acts of fault or negligence committed by a person at fault . . .
3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault . . .
4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy . . . Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis . . .
5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy. . .

(Authorities omitted)

[105] To those foregoing factors, Groves J. added the following at paragraph 67:

6. the gravity of the risk created;
 7. the extent of the opportunity to avoid or prevent the accident or the damage;
 8. whether the conduct in question was deliberate, or unusual or unexpected;
- and

9. the knowledge one person had or should have had of the conduct of another person at fault.

[106] After surveying the authorities Groves J. continued at para. 67 with this summation of the approach to be taken in assessing the relative degree of blameworthiness of the parties:

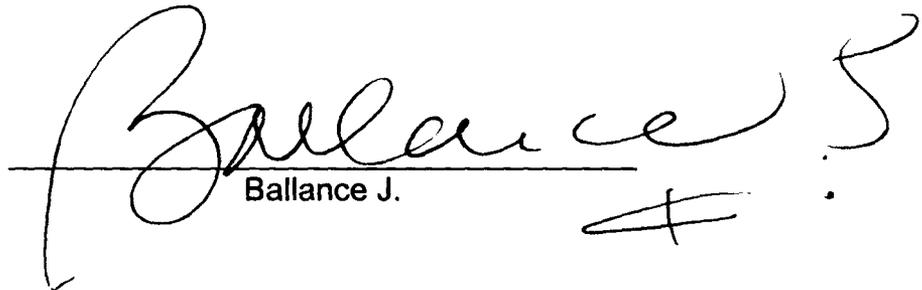
Thus, the key inquiry in assessing comparative blameworthiness is the relative degree by which each of the parties departed from the standard of care to be expected in all of the circumstances. This inquiry is informed by numerous factors, including the nature of the departure from that standard of care, its magnitude, and the gravity of the risk thereby created.

[107] The defendants were entrusted, over a period of several months, with the safety of motorists travelling a major highway while the construction project was being carried out. Responsibility to devise and implement suitable traffic control measures was assigned to an untrained and inexperienced person who proved to be less than adequate. The cut created a very real hazard, particularly for motorcyclists, along a substantial stretch of highway. Jake's received nearly daily warnings, in the form of barrel displacements, from which it should have reasonably inferred that, for whatever reason, some number of the westbound travellers were straying over the fog line and dangerously into the construction area. Yet, Jake's did not close the right westbound lane during non-work hours, or undertake any reasonable steps to improve the sufficiency of the signage or the barrel configurations. The defendants failed to implement reasonably adequate warning measures to alert oncoming motorists of the hazard that they had created near the side of the roadway; a hazard that was not readily visible to reasonably attentive and prudent motorcycle riders on their approach to the area. There was no suggestion that the time or cost that the defendants might have incurred in order to discharge their duty would have been prohibitive, much less disproportionate, to the potential that the hazard would inflict harm.

[108] In my opinion, the defendants' multiple failures and overall disregard for the safety of the reasonably foreseeable users of the road represents conduct that is exceedingly more at fault and carries greater blame, than does Mr. Van Tent's momentary lapse of judgment.

[109] I apportion liability 80 percent against the defendants and 20 percent against Mr. Van Tent.

[110] If the parties are not able to agree on costs, they may file written submissions using a timetable of their own choosing so long as it incorporates a final deadline of August 31.

A handwritten signature in cursive script that reads "Ballance J.". The signature is written over a horizontal line. Below the line, the name "Ballance J." is printed in a standard font. To the right of the signature, there is a handwritten mark that looks like a stylized "S" or "5" with a dot below it, and another handwritten mark that looks like a plus sign or a cross.