COURT FILE NO.: 6880/90

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
BRENDA RENE MURRAY and DONNA MURRAY, GLENN MURRAY and KELLY LYNN MURRAY	Desmond Dixon; Sloan Mandel, for the Plaintiff(s)
Plaintiff(s)	
- and -	
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO	Duncan Finlayson, Q.C.; Jasmine Sweatman; Stuart Rudner, for the Defendant
Defendant	
	HEARD: January 15-19, 2001

REASONS FOR JUDGMENT

JENKINS J.

[1] On November 24, 1989, Brenda Rene Murray was a healthy intelligent 17 year old, an honour student and class valedictorian. At approximately 7:35 a.m., she became a quadriplegic, suffering a closed head injury with a cerebral contusion and subarachnoid haemorrhage. She sustained numerous fractures to her face, ribs, pelvis and left arm. She requires 24 hour care since she cannot communicate other than by eye blinking and with the use of her foot and right hand. She spends the majority of her time alternating between a wheelchair and bed.

[2] Eleven years later, this action reaches this court. Counsel have agreed on the quantum of damages. The remaining issue of liability is to be determined.

BACKGROUND

[3] On the day of the accident Brenda Murray was a relatively inexperienced driver particularly with respect to winter conditions. She obtained her driver's licence in the month of June that year. She had taken driving school lessons and was accustomed to operating a motor vehicle on Highway 48 before this accident. The accident occurred on Highway 48 between Moorings Road and Weir's Sideroad. Highway 48 is a two lane asphalt covered road with gravel shoulders. It is relatively straight and level several kilometres to the east of the accident. Brenda Murray at approximately 7:35 a.m. drove her mother, Donna Murray's 1987 Toyota Camry in a westerly direction on Highway 48. Her intention was to travel to her school to attend an early morning volleyball practice. She travelled a relatively short distance when she lost control of this vehicle. It travelled into the eastbound lane and came into a violent collision with a 1988 Chevrolet Pickup truck operated by William Knispel, who was driving in an easterly direction. This stretch of highway in question is depicted in Exhibit 10, Tab J and in Exhibit 1, Volume 1, Tab 4(b).

[4] Highway 48 was resurfaced in 1973 by three layers of asphalt. In the fall of 1989, before this accident, the MTO placed a 336 meter long patch on the west lane of Highway 48 between 190 meters west and 526 meters west of Holmes point road. This was completed by September 29, 1989. It is agreed upon by the parties, through their experts, that Brenda Murray lost control of her automobile immediately west and close to the west edge of this patch. She travelled between 50 meters to 110 meters in a westerly direction on the original highway which was resurfaced in 1973. The patch consisted of a layer of hot asphalt mix which was sloped to meet the original road surface. Two additional patches were installed after this accident, however, they did not cover the original surface where Brenda Murray's vehicle travelled out of control. The entire highway was resurfaced in the fall of 2000.

[5] Pursuant to a Maintenance Strategy Report dated May 8, 1987, the Ministry identified a number of imperfections relating to the road surface of Highway 48 between Sutton Road and Durham Road, which includes our area of interest. (Exhibit 2, Volume 4, Tab 51). The report identifies a number of "major maintenance treatments" that were required for this stretch of roadway. Known deficiencies included "the need to rout and seal construction joints, longitudinal cracking, meandering cracking, random cracking and to apply hot mix patching in areas of pavement fatigue". These imperfections were deemed to be of top priority (Priority Number One - within 2 years). Under the heading Preferred and Alternative Strategies, it was indicated that the preferred strategy for this stretch of roadway was "major rehabilitation." A holding strategy was noted to included "hot mix patch sections of pavement fatigue and severe wheel track rutting. Rout and seal cracks as indicated above".

[6] The Maintenance Strategy Report is based partly on Flexible Pavement Condition Evaluation Forms (see Exhibit 2, 53-55 and on an 1988 ARAN Survey results), the ARAN (Automated Road Analyser).

[7] The original section contained four transverse cracks which were photographed by Mr. Billings, the defendant 's expert, in 1999. They are illustrated in photographs 24 and 25 in Appendix I of his report marked Exhibit 10.

[8] Between 1989 and 1999 when he took these photographs the cracks had been grouted and filled with a black sealant. These may be seen in photographs 7 and 8 of the Billings Report, Exhibit 10. Mr. Billings in his investigation and analysis in 1999 using a measuring device in his automobile determined that a vehicle travelling west over Patch 1 would experience a bump when entering the original section, although he described it as a slight bump.

[9] Highway 48 in 1989 was and still is a very busy highway. It extends from Highway 401, north through Markham in a northerly direction, turning in an easterly direction at Sutton, located near the southern boundary of Lake Simcoe, travels near the village of Pefferlaw, crosses Highway 23 and intersects with Highway 12. For the purposes of this action it was referred to by the experts as running east and west in the area of this accident. In the 1980's in addition to the regular non-commercial traffic on Highway 48, many gravel trucks traversed this route. An increasing number of heavy gravel trucks loaded their cargo in Breckin to the east then travelled in a southerly direction then westerly on Highway 48 to Metropolitan Toronto. These vehicles carried gravel to the site of the Sky Dome in Toronto. They also supplied gravel to the booming construction industry. These trucks would normally load at Breckin around 3:00 a.m. They would then proceed south on Highway 12 then westerly on Highway 48. Traffic westbound on Highway 48 was very busy until approximately between 6:30 a.m. till 8:45 a.m. The westbound lane of Highway 48 contained 2 sets of longitudinal groves which were more pronounced than the groves on the eastbound lane. The depth of the groves is one of the disputed issues in this action. The witnesses agree, however, that the groves in the eastbound lane were less pronounced. This could be explained by reason of the fact that the heavy gravel trucks had discharged their loads when travelling in an easterly direction on Highway 48.

THE WEATHER EFFECT

[10] In the general area of the accident, Highway 48 travels relatively close to the southern boundary of Lake Simcoe. The Morning Glory Swamp lies between the lake and Highway 48 which is marshy and effects the weather. In late November and early December, before Lake Simcoe freezes over, frequent snow squalls travel off the lake in a southerly direction over the Morning Glory Swamp onto Highway 48 causing whiteouts, blowing snow, which adversely effected traffic on Highway 48. This special problem in this area was recognized by the defendant.

[11] In the fall of 1988, before this accident, the patching that has been referred to was undertaken and created a relatively smooth surface in the patched area.

TRAFFIC ACTIVITY

[12] The defendant has tendered Exhibits relating to accident frequency in the subject area in the fall of 1988. This data does not take into consideration the unreported accidents, however,

Mr. Billings testified that they were normally on the same ratio as reported accidents. He gave no statistics to reach that conclusion.

HISTORICAL PAVEMENT CONDITIONS AND ROAD MAINTENANCE

[13] In the late 1980's M.T.O. acquired an ARAN ("Automated Road Analyser") device to collect data on wheel track rut depths and cross falls. This device is mounted on a van, and operates at highway speeds. A bar mounted across its front extended over the full lane width. There were ultrasonic sensors installed along the bar with four-inch separations. At regular (short intervals) each sensor transmits an ultrasonic pulse that is detected on reflection from the pavement, by which the height of the sensor above the pavement can be calculated. Amalgamation of the individual sensor outputs allows the pavement profile to be calculated from which the left and right wheel track rut depths are calculated as the gaps below an imaginary string stretched across the pavement.

[14] The wheel track rutting measured by the ARAN machine in May 1988 is available to us only in half-kilometres steps, presumably averaged over the two wheel tracks over 500-meter sections. The MTO concluded that this rutting as measured was too small for water accumulation during a rain fall with normal cross fall.

[15] At Exhibit 2, Volume 4, Tab 45, a Ministry Justification Report dated February 27, 1989, recommended maintenance work urgently needed which included Highway 48 between Baldwin and Port Bolster, which included our area of interest.

> **PROJECT JUSTIFICATION**
>
> The above sections of Highway 48 require localized repairs of varying degrees to correct deficiencies in the pavement, in order to provide a safe acceptable ride to the travelling public (emphasis mine). Hot mix patching will correct settlements, distortions, cracking and severe ravelling until major reconstruction or resurfacing is scheduled in the future.
>
> The Geotechnical Section provided input during the preparation of this Justification Report and is in agreement with our recommendations.
>
> **RECOMMENDATION**
>
> This work should be carried out in 1989. Failure to carry out the work at this time will necessitate more extensive and costly repairs in the future.

[16] Pursuant to this report, ten separate areas of repaving along Highway 48 between Baldwin and Port Bolster were identified. Patch No. 6 (west of Buckners Aluminium \ one lane \ 310 meters in length) is the patch over which Brenda Murray travelled immediately prior to her loss of control.

[17] Greater wheel track rut depths were determined on some parts of Highway 48 in an 1991 ARAN Compilation.

[18] In the 1987 Pavement Condition Report, the overall rutting between Sutton and Durham Road 23 was described as "moderate", but severe rutting was noted in a few localized areas.

[19] The Rut Depth vs. Distance graphs provided by the M.T.O. were generated using averaged measurements and may not identify localized areas of severe rutting.

[20] The inspector's diary for Hot Mix Patching Contract No. 25-89-10, does not specify the location where the patch was placed, so far as whether it was in the appropriate location.

[21] The area in question, where Brenda Murray lost control of her vehicle was estimated to be between 50 meters and a 110 meters in the vacinity of the Morning Glory Swamp which extended on both sides of Highway 48.

[22] Both Mr. Scherer, the plaintiff's expert and Mr. Billings, conducted measurements of rutting in the subject area of the accident 10 years after the accident. They used different measuring devices. Mr. Billings, using a 1.2 meter baseline which accords with the MTO's guideline found that the rutting was rated relatively low. Mr. Schere on the other hand, using an 8' baseline recorded rutting significantly greater than Mr. Billings.

[23] Mr. Scherer concluded that due to the moist conditions that generally exist in marshy areas, it is reasonable to expect that the potential for rutting and other pavement deformations would be higher in the vacinity of the Morning Glory Swamp. He concluded that it was reasonable to expect that rutting of some severity would exist adjacent to an area that had been selected for patching when considering similar pavement and sub-grade cross-sections throughout the area.

WINTER MAINTENANCE PROGRAM

[24] Each district has a patrolman on duty 24 hours a day. When the patrolman determines that a section or sections of a highway requires maintenance, he contacts the checker who is located at the appropriate yard. In this case the Baldwin yard was the appropriate yard which housed a supply of sand and salt. Sleeping accommodations were provided for four drivers who would be sent out by the checker pursuant to instructions from a patrolman. The patrolman and checker were in contact by means of a radio. The checker also had direct access to Environment Canada weather reports. On November 23, 1989, at the relevant times Arthur Foster was the checker, Kenneth Clodd was the patrolman and Grant Murphy was the trucker.

[25] The protocol for winter maintenance is set out in Summary Table 1, Recommended Treatments for Class I and II Bare Pavement and Class III Centre Bare Level of Service. (See Appendix 'A').

[26] The Maintenance Operating Instruction M-700-C (Exhibit 2, Volume II,Tab 8, pp.13-14 is quoted as follows:

> This Maintenance Operating Instruction is intended to assist Ministry maintenance personnel to better understand the procedures necessary to achieve established levels of

service on Ministry highways during winter, (see also, Maintenance Quality Standard M-700-1, Winter Operations Control).

This instruction is also a guide for supervisory staff responsible for directing and controlling winter maintenance operations.

At p.13 of 26:

B. SANDING:

1. Sand is used as an abrasive to provide traction on slippery surfaces. It will be used most often when the temperature is too low for salt to be effective. Sand is most effective in providing traction on dry, hard, snow.

2. As a general rule, sand will be used when the temperature is failing below, or not expected to rise above -12°C. However, sand will be used at higher temperatures if traction is required immediately.

3. Sanding, when required, should normally follow after the plowing operations. This minimizes the amount of sand being pushed off to the side of the road.

4. As a general rule, if the pavement is dry and the snow is not packing or sticking - do not sand.

C. SALTING:

1. Salt applied to snow, forms a brine mixture. This reduces the possibility of the snow sticking to, or packing on the pavement. It also prevents ice build-up and allows the plow to remove the snow easier. Salt, assisted by sun, traffic and warmer daytime temperatures, is also used as a melting agent to eliminate icy conditions.

2. As the temperature gets lower, the effectiveness of the salt decreases until it becomes ineffective.

   Normally, salt should not be applied when the temperature is below -12 °C. However, in the presence of sun and heavy traffic volume, which creates a higher road surface temperature, salt can be effective down to a temperature of -18 °C.

3. Salting operations, when required at the beginning of a storm, should commence early, before 0.5 cm of snow accumulates, or before sleet or freezing rain produce icy conditions.

   Salting operations should not take place in anticipation of a storm.

4. Salt should be applied a minimum of 0.5 h in advance of plowing to prevent the salt from being pushed off before it has had a chance to work. This is consistent with salt being used to assist in the plowing operations.

   The lower the temperature, the longer it will take for the salt to work.

5. As a general rule, salt should not be applied during night hours to 05:00, since night-time temperatures are usually lower and sun and traffic volumes are not present to enable salt to work effectively. However, at night, if the temperature is high enough and not dropping, then salting operations may be carried out at the beginning or during the storm, i.e. temperature is above -7°C with wet snow, sleet or freezing rain occurring. Salting after the storm, to bare the pavement, should be done after 05:00.

6. If the pavement is dry and the snow is not packing, DON'T SALT.

[27] The decision with respect to the application of salt or sand was made by the patrolman. He would relay this information to the checker who then made the decision as to how many trucks to send out and the routes to be followed. For this section there were four trucks available to be sent.

[28] The patrolman was to complete a "Right of Way" information sheet. The checker was to complete a winter sanding and salting attendance and record sheet. The individual truck drivers were to sign in and out on these sheets. This sheet discloses the name of the checker, who requested the work, the truck number, the time it was called out, when the trucker was able to proceed, the time in and out for each trip, the total hours worked, the number of sand or salt tonnes carried and the kilometres covered. It further disclosed the nature of the instructions.

ACTIONS OF THE MTO ON NOVEMBER 24, 1989

[29] Kenneth Clodd was the patrolman on duty from 12:00 midnight until 8:00 a.m. In the completed "Right of Way" schedule depicted at Exhibit 2, Volume III, Tab 27, he indicated that at 3:00 a.m. he travelled 48 North to Highway 7 and 12, at 3:30 a.m. he travelled north to 48 West. He recorded the weather and road conditions at 3:20 a.m., the temperature was -8°C, the wind was blowing from the southwest, the night was clear, there was no precipitation. He noted that the road was bare and dry to damp and visibility was good. At 6:00 a.m. he noted the temperature was -7°C, the wind was blowing from the southwest, the weather conditions were clear in the south section of his route and cloudy in the north. The north section was the highway section where the accident took place. He noted that the south section as clear and the north section was cloudy. He noted that the road was snow covered in the north section with a visibility being between poor to fair. He noted that there was heavy dry snow in the north section. His summary of the road conditions were that it was light to heavy snow on the road with slushy sections and icy sections. Mr. Clodd called for spot sanding along Highway 48 from Baldwin yard to the Shell station in the Town of Sutton, and then continue sanding for a distance of slightly over 14 kilometres, from the Shell station to the Port Bolster Stone Company. Eleven tonnes of sand were ordered and were sufficient to carry out the order as requested. Mr. Clodd testified that he was given no weather information from the Baldwin yard or the checker, but relied on weather information from his T.V. or radio at home. When Mr. Foster received Mr. Clodd's instructions, he relayed those instructions to Mr. McColgan, the yard supervisor. McColgan would then instruct the driver to carry out those instructions. Mr. Foster completed the Winter Sanding and Salting Attendance and Record Sheet which is at Exhibit 2, Volume III, Tab 35. This record sheet is in Mr. Foster's handwriting and indicates time requested, the truck number, the time the truck driver was called out, the time the contractor was able to proceed, the

time out/time in, the total hours worked, the number of sand tonnes used. It is also supposed to specify the number of kilometres covered. In this case, on this particular route, no kilometres were recorded by Grant Murphy. I duplicate the Winter Sanding and Salting Attendance Record Sheet (see Appendix 'B').

[30] Randy Marles, was the patrolman who replaced Kenneth Clodd at 8:00 a.m. As part of his patrol he drove through the area of the accident between 8:15 a.m. and 8:20 a.m. He observed the vehicles that were involved in the accident at the scene. At 8:35 a.m. he ordered for spot salting between Highway 7 and 12. At 9:15 a.m. he ordered spot sanding between Highway 48 and Pefferlaw and at 10:40 a.m. spot sanding between Highway 48 and Mount Albert. At 10:00 a.m. he recorded the temperature at -5°C with the wind from the north he described the road conditions as dry, damp and wet. I duplicate the "Right of Way" information form (Exhibit 2, Volume III, Tab 28) completed by Mr. Marles (see Appendix 'C'). Mr. Marles testified that the Ministry doesn't provide weather forecasts, they watch T.V. for that information. Mr. Marles, when asked on cross-examination if the patrolman followed the summary for recommended treatments (Exhibit 2, Volume II, Tab 8, p.25), he replied "pretty much so".

[31] Grant Murphy, the truck driver of vehicle #4, was ordered to sand Highway 48 in the area where this accident occurred. According to the Winter Sanding and Salting Attendance Record Sheet (Exhibit 2, Volume III, Tab 35), he was able to proceed at 6:15 a.m. and left the yard at 6:22 a.m., then returned at 7:41 a.m. He had no memory of the day of the accident and relied totally on the Winter Sanding and Salting Attendance Record Sheet for his evidence of his actions November 24th. He testified that they always overloaded the truck so they didn't have to go back. He said "you cheat - you always cheat". He testified that spot sanding meant that if you see snow or ice on the road you sand it. Mr. Murphy testified that there was sufficient material in the truck to do the road, stating:

A. And than some.

Q. And then some. All right. Would it be enough to do it going out and coming back both, or was there - would it be less than that for both ways?

A. You can cheat, you know what I mean?

THE COURT: I'm sorry, I can't hear what you said.

A. You could cheat, you know what I mean?

THE COURT: You could cheat?

A. Yup.

THE COURT: What do you mean by that?

A. Well, you could let it run slow.

THE COURT: Okay. Go ahead.

[32] In answer to Mr. Finlayson's question, "would you expect that 11 tonnes and the spot sanding to come back with any material if you're carrying out the operation the way you've described it?

A. You always ditched the material.

Q. Sorry?

A. You ditched material.

Q. You ditched the material?

A. You put it on the road?

Q. You put it on the road?

THE EVIDENCE OF THE ACCIDENT

[33] Three witnesses to the accident called at the trial were William Knispel, the driver of the eastbound vehicle involved in the accident, Denyse Martial, the drive of the vehicle travelling westerly behind Brenda Murphy and her sister Lise Craig, a sister of Denyse Martial, who was a passenger in the Martial vehicle.

[34] William Knispel age 51, was a welder by trade and was travelling northerly on Highway 48 then easterly to the accident. He was very familiar with Highway 48 and travelled it frequently. He described the general winter driving conditions on Highway 48 in the area of this accident as being "never very good in that area" because it was an open area and marshy. The road tended to be "damp and slick". He testified that there was between 1 and 1 1/2" of snow on the eastbound lane which was snow covered. He maintained a slow rate of speed at 68 km per hour because the roads were bad. He testified there was no sand on the road and no evidence of sanding at the time of the accident. When he first turned onto Highway 48, in travelling the approximate 8 km to the point of the accident, he described the road conditions on Highway 48 as "sloppy and slick". He considered the traffic normal for that time of morning, busier for traffic travelling westerly than the eastbound lane. He was familiar with the rutting problem on Highway 48. He observed the Murray vehicle a very short time before the accident. He saw it suddenly travel into his lane giving him no opportunity to avoid the accident. He sustained some minor injuries to his knees and ankles.

[35] Denyse Martial was driving her automobile in a westerly direction following Brenda Murray's vehicle. Her sister Lise Craig was a passenger in the front seat. Mr. & Mrs. Hemphill were their parents sitting in the back seat. They were travelling to a funeral and were on their way from Wilberforce to Erin. They were generally unfamiliar with Highway 12 and Highway 48. When they reached Highway 48, Denyse Martial described the weather as follows, "it was blizzard like, very, very snowy and treacherous actually". They stopped for a coffee break at

Pefferlaw at approximately 7:00 a.m. When they turned onto Highway 48, Denyse Martial observed one vehicle "Brenda Murray's vehicle in front of them travelling in the same direction". At this point in time Denyse Martial described the road as "snowy, windy with snow blowing across the roadway". She said "you could see the dark road underneath - dark, kind of shiny black road". It was less snowy than where they had driven from, which was a blizzard. She estimated her speed to be about 60 km an hour. She was driving very cautiously because of the weather and because her mother-in-law was a backseat driver, so she was sure to go at a very cautious speed. She estimated the Murray vehicle to be travelling the same speed as they were. She described the Murray vehicle as follows, "it had been travelling in a normal fashion, and suddenly, the rear end of the vehicle slightly fishtailed and then it went right across into the eastbound lane and hit a pick up truck that was travelling easterly". She did not observe any brake lights that came on from the Murray vehicle nor the Murray vehicle travelled in one direction or another prior to the sudden fishtail movement. She concluded that Brenda Murray hit black ice. She and her sister, Lise Craig, commented that that was their first impression that she had hit black ice. They had been travelling between 150' to 200' behind the Murray vehicle. They stopped and rendered assistance to Brenda Murray. Mr. Hemphill exited from the back seat of the car and when he came around the car onto the roadway he slipped or lost his footing and slipped back. She did not recall seeing a sander or salter pass her on the highway. She was driving a 4 wheel vehicle and had it engaged in 4 wheel drive. She took it out of 4 wheel drive when she left the coffee shop, being mindful the fact that driving 4 wheel "is hard on the vehicle and it guzzles a lot of gas" and she was going to be travelling on a straight stretch of highway. It also appeared to be less snow covered than the blizzard conditions that she had experienced before the coffee break stop.

[36] Lise Craig testified that they were travelling below the speed limit, quite slow because of the road conditions. She describe the Murray vehicle as travelling at roughly the same speed. She observed that the Murray vehicle swerved to the left then to the right. She assumed the Murray vehicle hit black ice. She observed nothing unusual in Brenda Murray's driving before the accident.

THE LAW

[37] The case of *The Queen v. Cote* (1974), 51 D.L.R. (3d) 244 (S.C.C.), allowing the appeal in part from (1983), 42 O.R. (2d) 548 (C.A.) the Supreme Court of Canada held that there was no general duty to salt or sand the highway by the Crown, but the basis of liability is there must be a highly special dangerous situation at a particular location in order to attract liability.

[38] In the *Montani v. Matthews* (1996), 29 O.R. (3d) 257 (C.A.), aff'g unreported decision of Justice White, dated June 24, 1992, Moldaver J.A. at p.269 held:

> In my view, the Ministry's position is not entirely accurate. It is well established that there is no *general* duty on the Ministry to salt and sand roads in order to prevent or retard the formation of icy conditions. To impose such a duty would effectively turn the Ministry into an insurer of road conditions.

But what is a special and highly dangerous condition? More particularly, in cases such as this, is it necessary for the ice to have actually formed before it can be said that a special and highly dangerous condition exists? I think not.

[39] In *Landriault v. Pinard* (1976), 1 C.C.L.T. 216 (Ont. C.A.), namely:

- that a highway may be found to be in a state of non-repair when a condition exists that could be remedied by applying sand or salt; and

- that it is a question of fact in each case whether a condition of non-repair exits.

[40] In the case of *Gould v. County of Perth* (1984) 48 O.R. (2d) 120 (C.A.), aff'g (1983), 42 O.R. (2d) 548 (H.C.J.) Southey J. at p.552 stated:

> There is no express statutory requirement for the sanding or salting of roads in winter by the body responsible for their maintenance, but the duty to salt or sand may arise in certain circumstances as part of the duty to keep a highway in repair.
>
> At p. 556:
>
> It is true that in all of these cases in which liability was imposed on the agency responsible for the highway, there was a localized situation of danger that the court might have regarded as being in the nature of a trap. In *The Queen v. Coté*, it was a patch of ice that could not be seen until the drivers were on it. In *Landriault v. Pinard*, it was a hill, in *Simms*, it was a ramp leading to a divided highway. These could all be described as highly special dangerous situations. The courts pointed out in each case that liability did not depend on the imposition of a general duty to salt or sand highways, but, in so doing, I do not think they intended to say that there could never be a duty to apply salt or sand on a substantial stretch of highway. Otherwise, the agency responsible could ignore with impunity the effect of a freezing rain that coated all roads in an area with ice. I do not think such a result would be reasonable. All that was meant by saying there is no general duty to sand or salt highways, in my judgment, was that the failure to salt or sand will not in itself be a sufficient ground for imposing liability on the responsible authority. Liability will only result where the situation gives rise to an unreasonable risk of harm to users of the highway, and the authority has failed to take reasonable steps to eliminated or reduce the danger within a reasonable time after it became aware, or ought to have become aware, of its existence. As Lacourcière J.A. said in *McAlpine v. Mahovlich, supra*, it is a question of fact in each case whether a condition of non-repair exists.

[41] In *Gould v. County of Perth* (1984) 48 O.R. (2d) 120 (C.A.), aff'g (1983), 42 O.R. (2d) 548 (H.C.J.) was appealed to the Court of Appeal. Dubin J.A. held at p.121:

> The facts in each case will determine whether a condition of non-repair exists. The salient features in this case, which in some respects are unique, are that an employee of the municipality charged with responsibility for salting and sanding highways in the area where the accident occurred was on the very site in the morning hours of the day of the accident. He was there with his equipment for sanding and salting. The road in question was obviously dangerous, slippery and treacherous by reason of ice, a fact also well know to the employee's superiors. The employee concluded that it would be inappropriate to

sand and salt the stretch of highway, which he had apparently contemplated doing, because of the high wind which was blowing across the highway at the time. He contented himself with salting and sanding the intersections.

It was conceded that there was no practicable or financial impediment to salting and sanding the highway during the period. Indeed, the equipment, materials and manpower were readily available.

[42] I have reviewed the following cases:

Montani v. Matthews (1996), 29 O.R. (3d) 257 (C.A.), aff'g unreported decision of Justice White, dated June 24, 1992

Barratt v. The Corporation of the District of North Vancouver, [1980] 2 S.C.R. 418

Peddle v. Ontario [1998] O.J. No. 5265 (QL) (C.A.) aff'g [1997] O.J. No. 1874 (Q.L) (Gen.Div.)

Rydzik v. Edwards (1982), 38 O.R. (2d) 486 (H.C.J.), Rutherford J.

Gauthier v. The King (1945), 2 D.L.R. 48, (S.C.C.)

Oliveira v. Pick [1996] O.J. No. 3718 (QL) (Gen.Div.) Wilkins J.

Colborne v. Ontario, unreported, 1997, Bolan J. (Ont.Gen.Div.) aff'd [1999] O.J. 1911 (QL) (C.A.)

Wright et al. v. Wilson, et al [1970] 2 O.R. 391 (H.C.J.)

MacMillan v. Ontario (Minister of Transportation and Communication), [1998] O.J. No. 2763 (QL) (Gen.Div.), appeal heard December 12, 2000, no reasons released yet.

DeBartok v. Ontario, [1997] O.J. No. 5000 (QL) (Gen.Div.), Wilkins J.

Bisoukis et al. v. Corporation of the City of Brampton et al (1999),46 O.R. (3d) 417 (C.A.)

[43] I conclude from the Authorities that the plaintiffs must establish:

(a) There existed at the time of the accident a highly special dangerous situation.

(b) Although there is not a general duty to salt or sand highways by the defendant, it would be necessary for it to apply a surface material such as salt or sand to discharge their obligation to prevent a highly special dangerous situation.

(c) A highly special dangerous situation must be known or reasonably known to the defendant.

(d) The defendant must have a reasonable opportunity of remedying a highly special dangerous situation.

FINDINGS

[44] I find Sergeant Edward Lintner a highly credible witness. He is a sergeant with the Ontario Provincial Police and had been with them since 1974. He lived in the Pefferlaw area and was very familiar with Highway 48 and particularly the area where the accident occurred. He has an extensive history of accident investigations and the supervising of accident investigation. He described Highway 48, in the general location of the accident as follows:

A. Highway 48 at that location is unique in the sense that it changes from a - just before there from a north south direction to an east west direction and then again north south, plus there's the lake close by. There's numerous entrances and exits and there's also a large traffic flow from heavy trucks which all contributed to the road conditions at that location. Under these conditions, you would get numerous different road conditions. You could go from a wet road to a slushy road to a frozen road to a water covered road, all through this section because of the road rutting caused by trucks, the cars entering and exiting at that time in the morning.. It is rush hour, particularly on a Friday morning, it's very busy.

Q. You indicated there was some rutting because of truck traffic?

A. Yes, there's an extremely - at that time and still is, I understand, a large volume of truck traffic on that section of highway, mostly gravel haulers. It's a term we use for them. They haul gravel down to the construction areas in the City of Toronto or around the City of Toronto. It's a main route down to the Highway 404. The other reason is that there's several gravel pits in the Breckin, Beaverton area that - so that's just a main route they take.

Q. All right. And specifically in the area of Highway 48 near Weir's Sideroad, we heard evidence yesterday that area is adjacent to something called the Morning Glory swamp.

A. Yes sir, there is a swamp there.

Q. And can you describe the land on either side of the highway in the vicinity of the accident scene there on 48?

A. It's a very wet area, almost a bogy type area.

Q. Yes?

A. Bulrushes and water lays there most of the time of the year.

Q. All right. From your own recollection, how was the rutting in the road in that vicinity compared to other areas of Highway 48?

A. I don't recall that it was necessarily any worse there, although the rutting in Highway 48 all through there was - was I would say from bad to good, I guess, because there had been some repairs taken place at some locations and some locations they hadn't repaired it yet.

Q. All right.

[45] Sergeant Lintner described the rutting problem on Highway 48 at the time of the accident as follows:

> A great deal depends on the time of day and the amount of vehicle traffic and how quickly the snow falls, but the road rutting causes the road to be changed from its original configuration, which is designed to make the water run off the roadway, rutting causes the water to either pool in more areas of the roadway or run with the roadway and into lower areas, so what you end up with is water will accumulate after a snowstorm if it's wetter snow, or if there's been salting or a rainstorm. The amount of traffic, particularly heavy truck traffic, will clear that - that water off the roadway. It depends on how much traffic there is, how quickly that water gets cleared off the roadway, and the temperature has a factor in that too. If there's a sudden drop in temperature, you might have ice actually form in those ruts on the roadway at various locations. It's - you need to experience particularly driving the roadway on a constant basis. You have to be totally aware that you're driving from one condition to another, and I don't know how you gain that, other than experience of driving on that road.

[46] Sergeant Lintner testified that he was involved with civilian committees that raised concerns about this highway. These concerns dealt with truck traffic and rutting. He testified that when the MTO began to contract out some of their duties that they previously had performed themselves, to contractors, there were growing pains. Some of the trucks failed to function properly, sand was not being discharged properly and in a few instances, some of the truck drivers had been charged with drinking and driving. He described these growing pains problems as improving over the years. Sergeant Lintner described the driving affect when travelling over a patched or repaired area which was a good area to an area that hadn't been repaired, depending on the weather conditions. "If there was just a heavy rain or a heavy wet snowfall or something like that, you would go from a wet pavement to a pavement covered in water and you could experience things like hydroplaning or momentary loss of control." Sergeant Lintner attended with the MTO in response to the citizens concerns. His understanding of the MTO reasons for not resurfacing Highway 48 was "budgeting", this was also the reason why the MTO subcontracted out the work for salting, sanding in the care of highways.

[47] On the day of the accident, the MTO had not complied with their Maintenance Strategy Report dated May 8, 1987. It listed imperfections as the top priority within two years. The Preferred Strategy for this stretch of roadway was "major rehabilitation". They instigated a holding strategy of hot mix patch sections of pavement, fatigue and severe wheel track rutting. No explanation was given as to why one patch was installed immediately west of the area where Brenda Murray lost control of her vehicle, not withstanding this area of highway was susceptible to winter effect from the lake which was well known to the MTO and the users of the highway.

[48] Sergeant Lintnar in cross-examination gave his opinion that more could have been done to correct the rutting problem on Highway 48.

[49] At 8:00 a.m. on November 24, 1989, Sergeant Lintner responded to a call to assist at the scene of the motor vehicle accident. It normally took him 15 minutes for the drive, however, this morning it took 30 minutes because of adverse road conditions. He recorded the weather conditions at 7:00 a.m. that morning when he reported to work that the weather was over cast, cold, snow and the roads were snow covered.

[50] At 6:00 a.m. Kenneth Clodd the patrolman, observed the temperature was -7°C having warmed from -8°C at 3:20 a.m. based on his observations of precipitation he called for spot sanding since the road conditions were snow covered with a few slushy and icy sections. There was no evidence called by the MTO that there were discussions between Mr. Foster and Mr. Clodd as to the appropriate material to be applied to the highway. It is to be remembered that there was direct contact between the checker and Environment Canada which provided meteorological information. Both of these witnesses appeared to rely on weather reports by way of radio or T.V., this practice was apparently followed by Mr. Marles who replaced Mr. Clodd as the patrolman. According to the Summary Table, I find that based on the meteorological information that a warming trend was developing, that salt was the preferred treatment. The temperature had warmed from -8°C at 3:20 a.m. to -7° at 6:00 a.m., it continued to warm up to the date of the accident and beyond. Had salt been applied, a brine solution would have been created to cover it, which would have been dissipated by the heavy vehicular traffic at that time of day. I find that there was sufficient rutting on the westbound lane of Highway 48 in the area of the accident which prevented the icy conditions to dissipate. That combined with a slight bump as the motorist exits the smooth patched area to the original highway area, hitting an icy area materially contributed to Brenda Murray's loss of control of her vehicle. I am also mindful that the ministry combined salt and sand in their instructions which according to Mr. Billings, was the equivalent of 60% salt. I am also mindful that the measurements of rutting taken by Mr. Billings 10 years after the accident on the area in question would be quantified by the ministry records as being "minimal".

[51] I was impressed by the evidence of Denyse Martial and Lise Craig when they described Brenda Murray's driving as normal, and not exceeding a safe speed. When Brenda Murray's vehicle fishtailed out of control, they both concluded that she must have hit some "black ice". They also described the appearance of portions of the road having black bare pavement showing with the wind blowing from the north across the highway.

ACTIONS OF CONTRACTOR (TRUCK DRIVER)

[52] Grant Murphy, was dispatched from the yard at 6:15 a.m. His duty was to spot sand and sand the exact area of the accident. The Winter Sanding and Salting Attendance and Record Sheet indicate that he was able to proceed at 6:15 a.m., checked out at 6:22 a.m. with 11 tonnes of sand, and returned at 7:41 a.m. The kilometres that he covered were not recorded for this trip, however, for the subsequent two trips that day they were recorded. Counsel for the defendant informed me at the opening of this trial that Mr. Murphy was not under subpoena, that he had

been avoiding service. I indicated that in my view he was an important witness to this lawsuit and accordingly, an order was obtained from me for his arrest to require him to attend at court. I am mindful that the demeanour of a witness is only one factor to be taken into consideration by the trier of fact. Demeanour of a witness ought not to be given undo emphasis, having said that, he arrived drinking a substance out of a pop can. He exhibited an extremely bedraggled appearance. He gave his answers in a halting way. Questions had to be repeated many times to obtain an answer. Mr. Finlayson asked a number of leading questions in order to make some sense from his testimony. The transcript of his evidence is flattering to him, in that it seemed to make sense of some of the questions and answers that were asked of him when the reality was otherwise. He had no recollection of the accident and relied entirely on the records for his evidence. His work history with the MTO consisted of a short work record with them before this accident. He started sometime in November and worked a matter of days or weeks until the date of the accident. He continued to finish the season in March. His co-employees described him as reliable.

[53] I concluded that Grant Murphy did not carry out his mandate to sand Highway 48 before this accident. He failed to record the kilometres he allegedly covered. No one saw his vehicle on the road that morning. None of the witnesses to the accident nor the witnesses that followed the accident saw any evidence of sand on the highway before the accident or following the accident. The defendant argues that the photographs taken by the police and by the Georgina Fire Dept. on the morning of the accident, (Exhibit 4) disclosed the presence of sand on the highway and therefore it had to be from the Murphy vehicle. Mr. Billings gave the opinion that the photographs were taken between 8:40 a.m. and 8:50 a.m. Sergeant Wagner, the investigating police officer, made extensive notes on his investigation, and concluded that there was "dirt and slush on the roadway". It is interesting to note that Randy Marles the patrolman who replaced Mr. Clodd, drove through the scene of the accident, when the vehicles were still in place and when it was under investigation by the police officers. It is noted on his "Right of Way" information form that he ordered sand then changed it to salt. He must of thought that by 8:30 a.m., one hour after the accident, that salt was the appropriate substance to apply to the highway.

[54] I conclude that a highly special dangerous situation existed at approximately 7:30 a.m. November 24, 1989, in the area of where Brenda Murray lost control of her vehicle. The combination of the original pavement surface laid in 1973, immediately west of a patched area containing appreciable rutting in the westbound lane, trapped moisture which froze and created a black ice condition in this area of the highway. The defendant knew that this stretch of highway was susceptible to weather problems and failed to carry out the terms of its own Maintenance Strategy Report to rectify defects in this area. It failed to monitor its employees in the use of meteorological reports in order carry out the terms of the summary for recommended treatments. It recognized that morning at 6:00 a.m. that the weather conditions on Highway 48 were such to warrant the application of sand with a salt mixture. Given the proximity of the yard to the scene of the accident, and the fact that Grant Murphy was dispatched at 6:22 a.m. I find that had he properly applied the sand and salt mix, in the area where Brenda Murray went out of control, the icy conditions of the highway would probably have been rectified. The defendant is responsible in law for the actions of Grant Murphy, a subcontractor who failed to implement Mr. Clodd's instructions and Mr. Nixon's instructions. I do not know whether he "dumped the sand" or

"cheated". However, I do find that on the balance of probabilities, he failed to discharge his cargo for the reasons I have expressed.

CONTRIBUTARY NEGLIGENCE ISSUE

[55] Brenda Murray was an inexperienced winter driver. She drove a short distance before her accident. I accept the evidence of Denyse Martial and Lise Craig that she travelled in a normal fashion, and did not apply her brakes at any time, was not driving at an excessive rate of speed, however, she did lose control of her vehicle which resulted in her accident. Experienced drivers are able on many occasions to navigate over icy patches on a highway without losing control of their vehicle.

[56] I attribute contributory negligence to her at 30% of her agreed upon damages.

[57] I may be spoken to on the issue of costs.

JUSTICE J.H. JENKINS

Released: March 6, 2001

APPENDIX 'A'

SUMMARY TABLE 1
RECOMMENDED TREATMENTS FOR
CLASS I AND II BARE PAVEMENT AND CLASS III CENTRE BARE LEVEL OF SERVICE

TEMPERATURE RANGE °C	TYPE OF PRECIPITATION	ROAD CONDITION	ACTIVITY	RECOMMENDED TREATMENT 4/		
				BEGINNING OF STORM	DURING STORM /1	AFTER STORM /2
Below -18°	Dry Snow	No Packing Dry Pavement	Plowing	After 2 cm of snow accumulation	Continuously	Bare pvt/wing shlds/clean up
			Sanding	If slippery	Follow after plowing, if slippery	Slippery Sections only
			Salting	No	No	If temperature rising, to bare or assist in baring pavt
-18° to -12°	Dry Snow	No Packing Dry Pavement	Plowing	After 2 cm of snow accumulation	Continuously	Bare pvt/wing shlds/clean up
			Sanding	If slippery	No	Slippery Sections only
			Salting	No	No	If temperature rising, to bare or assist in baring pavement
-18° to -12°	Dry Snow	Packing	Plowing	If temp rising, after salting If temp falling, after 2 cm acc	Continuously	Bare pvt/wing shlds/clean up
			Sanding	If temp falling, if slippery	If temp falling, follow after plowing, if slippery	If temp falling, slippery sections
			Salting	If temp rising before 0.5 cm accumulation	If temp rising, as necessary after plowing	If temp rising, to bare or assist in baring pavement.
-12° to -7°	Dry Snow	No Packing	Plowing	After 2 cm of snow accumulation	Continuously	Bare pvt/wing shlds/clean up
			Sanding	If temp. falling, if slippery	Follow after plowing, if slippery	Slippery sections only
			Salting	No	No	If temp. rising, to bare or assist in baring pavt.
-12° to -7°	Dry Snow	Packing	Plowing	0.5h after salting	Continuously	Bare pvt/wing shlds/clean up
			Sanding	No	Follow after plowing, if slippery	Slippery sections only
			Salting	If temp rising, before 0.5 cm of snow accumulates	As necessary after plowing, to assist plowing	If temp rising, to bare or assist in baring pavt.
Above -7°	Wet Snow	Packing Wet Pavement	Plowing	0.5h after salting	Continuously	Bare pvt/wing shlds/clean up
			Sanding	No	Follow after plowing, if slippery	Slippery sections only
			Salting	Before 0.5 cm of snow accumulates	As necessary after plowing	To bare or assist in baring pavt.
Above -7°	Sleet or Freezing Rain	Possible Icing Wet Pavement	Plowing	No	No	Remove any slush
			Sanding	No	Yes	Slippery sections only
			Salting	When icing starts	Yes	Slippery sections only

NOTES:

1. During storm conditions plowing should be undertaken to ensure that the accumulation of snow on the road surface does not exceed 2.5 cm for Class I, 4 cm for Class II, and 5 cm for Class III Service Levels.
2. After the storm, plowing should continue to achieve bare pavement within 24 h for Class I & II Service Levels. Plowing after the storm should be done to achieve baring of the centre 2.5 m of pavement within 24 h, whenever possible, for Class III Service Levels, and then bared full width when favourable weather prevails.
3. Winging back shoulders should usually be done only once after the storm.
4. Recommended treatment for various conditions shown on this chart should be used in MOST cases. However, unusual circumstances may necessitate departure from the recommended treatment.
5. Temperature rising means temperature to remain in or rise above temperature range.
6. Temperature falling means temperature to remain in or [illegible]

905 853 4824

APPENDIX 'B'

Ministry of Transportation

TRUCK #4

WINTER SANDING AND SALTING
ATTENDANCE & RECORD SHEET

Nov 24 / 89

KER-DISPATCHER

NIGHT Art Forte (1)

DAY George Giles (2)

AFTERNOON Mike Kitching (3)

N.B.: A.M. & P.M. TO BE SHOWN ON ALL TIMES, AND 1 SHEET/UNIT

TEMPERATURE

DISTRICT #6

CONTRACT NO. 89-526

CONTRACTOR EVANS CONST LTD.

LOCATION BALDWIN YD

REQUESTED BY	TIME REQUESTED	TRUCK NO.	TIME CONTRACTOR CALLED OUT	TIME CONTRACTOR ABLE TO PROCEED	TIME OUT	TIME IN	TOTAL HOURS WORKED	SAND TONNES	SALT TONNES	KILO-METRES COVERED	DESTINATION – ROUTE	CONTRACTORS SIGNATURE
CLODD	05:55	4	05:56	06:15	06:22	07:41	1:19	11			SPOT YD TO SUTTON SHELL SAND SUTTON SHELL 10 FT STOCK	IN [signature] OUT [signature]
MARLES	09:15	4	09:16	09:23	09:26	10:40	~~1:14~~ 1:14	10		18	(OLD) 48 SPOT TO PEFFERLAW	IN [signature] OUT [signature]
MARLES	10:40	4	10:41	10:49	10:52	11:41	~~0:49~~ 2:15	9		16	OLD SPOT 48 TO MT. ALBERT.	IN [signature] OUT [signature]
							~~3:22~~ 3:34					IN OUT
												IN OUT
												IN OUT
												IN OUT
												IN OUT
												IN OUT
												IN OUT
												IN OUT
												IN OUT
												IN OUT
												IN OUT
TOTALS							3-51	30				

225A 84-11

TO BE COMPLETED AND SIGNED ON THE SAME DAY TO WHICH RECORDS PERTAIN [signature]

THIS FORM TO BE PREPARED IN TRIPLICATE: WHITE TO DISTRICT OFFICE, CANARY TO CONTRACTOR (DAILY) AND PINK TO BE RETAINED IN FIELD.

MINISTRY OF TRANSPORTATION AND COMMUNICATIONS, ONTARIO

PATROL NO. 610 SHIFT NO. R
DATE: day 24 month 11 year 89

RIGHT-OF-WAY INFORMATION

TIME PATROLLING BEGAN 8 00 A.M. ___ P.M. - ROUTE TAKEN: HWY #48 S TO HWY #12-125 TO JCT #7&12-12N TO HWY #48-48S TO RINGWOOD -48N TO YARD. 11 20 AM 12 30 PM HWY #48 S TO HWY #12-125 TO JCT #7&12-12N TO HWY #48-48S TO ~~[illegible]~~ RINGWOOD - 48N TO YARD 2 30 PM

TIME COMPLETED ___ A.M. ___ P.M.

ADVERSE CONDITIONS NOTED (See Section 1c - Instructions)	ACTION TAKEN	AT WHAT TIME?
A. MOD HEAVY SPOT PLOW +	~~SAND~~ SALT YD - 7&12	8 33 AM.
SPOT	SAND SPOT 48 - PEFFERLAW	9 15 AM.
SPOT	SAND SPOT 48 - MT. ALBERT.	10 40 AM

WEATHER AND ROAD CONDITIONS

TIME CHECKED 10 00 AM TEMPERATURE -5 °C WIND N

WEATHER CONDITIONS: CLEAR ☑ SOUTH CLOUDY ☐ AN ☐ A+ ~~EAST~~ MOD CM AW+ ___ CM AD + ___ CM AS ☐ AR ☐ FR ☐ FOG ___

ROAD CONDITIONS: DRY - DAMP - WET RB ☑ RCB ☑ RSP + ___ CM RSC+ ✓ CM RH ☐ RD ☐ RSL ☑ RI ☑ VISIBILITY FAIR - GOOD. DRIFTING ___

TIME CHECKED 3 00 PM TEMPERATURE -2 °C WIND N/C

WEATHER CONDITIONS: CLEAR ☑ CLOUDY ☐ AN ☑ A+ ___ CM AW+ ___ CM AD + ___ CM AS ☐ AR ☐ FR ☐ FOG ___

ROAD CONDITIONS: DRY - DAMP - WET RB ☑ RCB ☐ RSP+ ___ CM RSC + ___ CM RH ☐ RD ☐ RSL ☐ RI ☐ VISIBILITY GOOD. DRIFTING ___

ACCIDENT INFORMATION

LOCATION HWY #48 JUST WEST OF PEFFERLAW CUT OFF

DETAILS (Use Diagram Also If Applicable) HALF TON CHEV HIT CAR BROAD SIDE

DID O.P.P. INVESTIGATE? YES ☑ NO ☐ NAME OF INVESTIGATING OFFICER ___

DID YOU FILE AN ACCIDENT REPORT? YES ☐ NO ☐ DATE FILED ___

OTHER (Visitors, Complaints, Hired Equipment)

MILAGE
ENDING 63213
START 62966
247 Km.

L 114675

SIGNATURE [signature]

COURT FILE NO.: 6880/90

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BRENDA RENE MURRAY and DONNA MURRAY, GLENN MURRAY and KELLY LYNN MURRAY

Plaintiff(s)

- and –

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Defendant

REASONS FOR JUDGMENT

JUSTICE JENKINS

Released: March 6, 2001