[page277]

From this statement, we take the trial judge to have meant that, given the occurrence of prior accidents on this low-traffic road, the existence of permanent residents, and the type of drivers on the road, the municipality did not take the reasonable steps it should have taken in order to ensure that Snake Hill Road did not contain a hazard such as the one in question. Based on these factors, the trial judge drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question. This factual inference, grounded as it was on the trial judge's assessment of the evidence, was in our view, far from reaching the requisite standard of palpable and overriding error, proper.

65 Although we agree with our colleague that the circumstances of the prior accidents in this case do not provide a direct basis for the municipality to have had knowledge of the particular hazard in question, in the view of the trial judge, they should have caused the municipality to investigate Snake Hill Road, which in turn would have resulted in actual knowledge. In this case, far from causing the municipality to investigate, the evidence of Mr. Danger, who had been the municipal administrator for 20 years, was that, until the time of the trial, he was not even aware of the three accidents which had occurred between 1978 and 1987 on Snake Hill Road. As such, we do not find that the trial judge based her conclusion on any perspective other than that of a prudent municipal councillor, and therefore that she did not commit an error of law in this respect. Moreover, we do not find that she imputed knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road. The existence of the prior accidents was simply a factor which caused the trial judge to find that the municipality should have been put on notice with respect to the condition of Snake Hill Road (para. 90).

66 We emphasize that, in our view, the trial judge did not shift the burden of proof to the municipality [page278] on this issue. Once the trial judge found that there was a permanent feature of Snake Hill Road which presented a hazard to the ordinary motorist, it was open to her to draw an inference that the municipality ought to have been aware of the danger. Once such an inference is drawn, then, unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. In our view, this is what the trial judge did in the above passage when she states: "I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing" (para. 90 (emphasis added)). The fact that she drew such an inference is clear from the fact that this statement appears directly after her finding that the municipality ought to have known of the hazard based on the listed factors. Thus, it is our view that the trial judge did not improperly shift the burden of proof onto the municipality in this case.

67 As well, although the circumstances of the prior accidents in this case do not provide strong evidence that the municipality ought to have known of the hazard, proof of prior accidents is not a necessary condition to a finding of breach of the duty of care under s. 192 of The Rural Municipality Act, 1989. If this were so, the first victim of an accident on a negligently maintained road would not be able to recover, whereas subsequent victims in identical circumstances would. Although under s. 192(3) the municipality cannot be held responsible for disrepair of which it could not have known, it is not sufficient for the municipality to wait for an accident to occur before remedying the

disrepair, and, in the absence of proof by the plaintiff of prior accidents, claim that it could not have known of the hazard. If this were the case, not only would the first victim of an accident suffer a disproportionate evidentiary burden, but municipalities would also be encouraged not to collect information pertaining to accidents on its roads, as this would make it more difficult for the plaintiff in a motor vehicle accident to prove that the [page279] municipality knew or ought to have known of the disrepair.

68 Although in this case the trial judge emphasized the prior accidents that the plaintiff did manage to prove, in our view, it is not necessary to rely on these accidents in order to satisfy s. 192(3). For the plaintiff to provide substantial and concrete proof of the municipality's knowledge of the state of disrepair of its roads, is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and in our view, it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

69 To summarize our position on this issue, we do not find that the trial judge erred in law either by failing to approach the question from the perspective of a prudent municipal councillor, or by improperly shifting the burden of proof onto the defendant. As such, it would require a palpable and overriding error in order to overturn her finding that the municipality knew or ought to have known of the hazard, and, in our view, no such error was made.

V. Causation

70 We agree with our colleague's statement at para. 159 that the trial judge's conclusions on the cause of the accident was a finding of fact: Cork v. Kirby MacLean, Ltd., [1952] 2 All E.R. 402 (C.A.), at p. 407, quoted with approval in Matthews v. MacLaren (1969), 4 D.L.R. (3d) 557 (Ont. H.C.), at p. 566. Thus, this finding should not be interfered with absent palpable and overriding error.

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71 The trial judge based her findings on causation on three points (at para. 101):

(1) the accident occurred at a dangerous part of the road where a sign warning motorists of the hidden hazard should have been erected;
(2) even if there had been a sign, Mr. Nikolaisen's degree of impairment did increase his risk of not reacting, or reacting inappropriately, to a sign;
(3) even so, Mr. Nikolaisen was not driving recklessly such that one would have expected him to have missed or ignored a warning sign. Moments before, on departing the Thiel residence, he had successfully negotiated a sharp curve which he could see and which was apparent to him.

The trial judge concluded that, on a balance of probabilities, Mr. Nikolaisen would have reacted and possibly avoided an accident, if he had been given advance warning of the curve. However she also found that the accident was partially caused by the conduct of Mr. Nikolaisen, and apportioned fault accordingly, with 50 percent to Mr. Nikolaisen and 35 percent to the Rural Municipality (para. 102).

72 As noted above, this Court has previously held that "an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (Van de Perre, supra, at para.15). In the present case, it is not clear from the trial judge's reasons which portions of the evidence of Mr. Laughlin, Craig and Toby Thiel and Paul Housen she relied upon, or to what extent. However, as we have already stated, the full evidentiary record was before the trial judge and, absent further proof that the omission in her reasons was due to her misapprehension or neglect, of the evidence, we can presume that she reviewed the evidence in its entirety and based her factual findings [page281] on this review. This presumption, absent sufficient evidence of misapprehension or neglect, is consistent with the high level of error required by the test of "palpable and overriding" error. We reiterate that it is open to the trial judge to prefer the testimony of certain witnesses over others and to place more weight on some parts of the evidence than others, particularly where there is conflicting evidence: Toneguzzo-Norvell, supra, at pp. 122-23. The mere fact that the trial judge did not discuss a certain point or certain evidence in depth is not sufficient grounds for appellate interference: Van de Perre, supra, at para. 15.

73 For these reasons, we do not feel it appropriate to review the evidence of Mr. Laughlin and the lay witnesses de novo. As we concluded earlier, the trial judge's finding of fact that a hidden hazard existed at the curve should not be interfered with. The finding of a hidden hazard that requires a sign formed part of the basis of her findings concerning causation. As her conclusions on the existence of a hidden hazard had a basis in the evidence, her conclusions on causation grounded in part on the hidden hazard finding also had a basis in the evidence.

74 As for the silence of the trial judge on the evidence of Mr. Laughlin, we observe only that the evidence of Mr. Laughlin appears to be general in nature and thus of limited utility. Mr. Laughlin admitted that he could only provide general comments on the effects of alcohol on motorists, but could not provide specific expertise on the actual effect of alcohol on an individual driver. This is significant, as the level of tolerance of an individual driver plays a key role in determining the actual effect of alcohol on the [page282] motorist; an experienced drinker, although dangerous, will probably perform better on the road than an inexperienced drinker. It is noteworthy that the trial judge believed the evidence of Mr. Anderson that Mr. Nikolaisen's vehicle was travelling at the relatively slow speed of between 53 to 65 km/h at the time of impact with the embankment. It was also permissible for the trial judge to rely on the evidence of lay witnesses that Mr. Nikolaisen had successfully negotiated an apparently sharp curve moments before the accident, rather than relying on the evidence of Mr. Laughlin, which was of a hypothetical and unspecific nature. Indeed, the hypothetical nature of Mr. Laughlin's evidence reflects the entire inquiry into whether Mr. Nikolaisen would have seen a sign and reacted, or the precise speed that would be taken by a reasonable driver upon approaching the curve. The abstract nature of such inquiries supports deference to the factual findings of the trial judge, and is consistent with the stringent standard imposed by the phrase "palpable and overriding error".

75 Therefore we conclude that the trial judge's factual findings on causation were reasonable and thus do not reach the level of a palpable and overriding error, and therefore should not have been interfered with by the Court of Appeal.

VI. Common Law Duty of Care

76 As we conclude that the municipality is liable under The Rural Municipality Act, 1989, we find it unnecessary to consider the existence of a common law duty in this case.

VII. Disposition

77 As we stated at the outset, there are important reasons and principles for appellate courts not to interfere improperly with trial decisions. Applying [page283] these reasons and principles to this case, we would allow the appeal, set aside the judgment of the Saskatchewan Court of Appeal, and restore the judgment of the trial judge, with costs throughout.

The reasons of Gonthier, Bastarache, Binnie and LeBel JJ. were delivered by

BASTARACHE J. (dissenting):--

I. Introduction

78 This appeal arises out of a single-vehicle accident which occurred on July 18, 1992, on Snake Hill Road, a rural road located in the Municipality of Shellbrook, Saskatchewan. The appellant, Paul Housen, a passenger in the vehicle, was rendered a quadriplegic by the accident. At trial, the judge found that the driver of the vehicle, Douglas Nikolaisen, was negligent in travelling Snake Hill Road at an excessive rate of speed and in operating his vehicle while impaired. The trial judge also found the respondent, the Municipality of Shellbrook, to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1. The Court of Appeal overturned the trial judge's finding that the respondent municipality was negligent. At issue in this appeal is whether the Court of Appeal had sufficient grounds to intervene in the decision of the lower court. The respondent has also asked this Court to overturn the trial judge's finding that the respondent knew or ought to have known of the alleged disrepair of Snake Hill Road and that the accident was caused in part by the negligence of the respondent. An incidental question is whether a common law duty of care exists alongside the statutory duty imposed on the respondent by s. 192.

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79 I conclude that the Court of Appeal was correct to overturn the trial judge's finding that the respondent was negligent. Though I would not interfere with the trial judge's factual findings on this issue, I find that she erred in law by failing to apply the correct standard of care. I would also overturn the trial judge's conclusions with regard to knowledge and causation. In coming to the conclusion that the respondent knew or should have known of the alleged disrepair of Snake Hill Road, the trial judge erred in law by failing to consider the knowledge requirement from the perspective of a prudent municipal councillor and by failing to be attentive to the fact that the onus of proof was on the appellant. In addition, the trial judge drew an unreasonable inference by imputing knowledge to the respondent on the basis of accidents that occurred on other segments of the road while motorists were travelling in the opposite direction. The trial judge also erred with respect to causation. She misapprehended the evidence before her, drew erroneous conclusions from that evidence and ignored relevant evidence. Finally, I would not interfere with the decision of the courts below to reject the appellant's argument that a common law duty existed. It is unnecessary to impose a common law

duty of care where a statutory duty exists. Moreover, the application of common law negligence principles would not affect the outcome in these proceedings.

II. Factual Background

80 The sequence of events which culminated in this tragic accident began to unfold some 19 hours before its occurrence on the afternoon of July 18, 1992. On July 17, Mr. Nikolaisen attended a barbeque at the residence of Craig and Toby Thiel, located on Snake Hill Road. He arrived in the late afternoon and had his first drink of the day at approximately 6:00 p.m. He consumed four or five drinks before leaving the Thiel residence at approximately [page285] 10:00 or 10:30 p.m. After returning home for a few hours, Mr. Nikolaisen proceeded to the Sturgeon Lake Jamboree, where he met up with the appellant. At the jamboree, Mr. Nikolaisen consumed eight or nine double rye drinks and several beers. The appellant was also drinking during this event. The appellant and Mr. Nikolaisen partied on the grounds of the jamboree for several hours. At approximately 4:30 a.m., the appellant left the jamboree with Mr. Nikolaisen. After travelling around the back roads for a period of time, they returned to the Thiel residence. It was approximately 8:00 a.m. The appellant and Mr. Nikolaisen had several more drinks over the course of the morning. Mr. Nikolaisen stopped drinking two or three hours before leaving the Thiel residence with the appellant at approximately 2:00 p.m.

81 A light rain was falling when the appellant and Mr. Nikolaisen left the Thiel residence, travelling eastbound with Mr. Nikolaisen behind the wheel of a Ford pickup truck. The truck swerved or "fish-tailed" as it turned the corner from the Thiel driveway onto Snake Hill Road. As Mr. Nikolaisen continued on his way over the course of a gentle bend some 300 metres in length, gaining speed to an estimated 65 km/h, the truck again fish-tailed several times. The truck went into a skid as Mr. Nikolaisen approached and entered a sharper right turn. Mr. Nikolaisen steered into the skid but was unable to negotiate the curve. The left rear wheel of the truck contacted an embankment on the left side of the road. The vehicle travelled on the road for approximately 30 metres when the left front wheel contacted and climbed an 18-inch embankment on the left side of the road. This second contact with the embankment caused the truck to enter a 360-degree roll with the passenger side of the roof contacting the ground first.

82 When the vehicle came to rest, the appellant was unable to feel any sensation. Mr. Nikolaisen climbed out the back window of the vehicle and ran to the Thiel residence for assistance. Police later accompanied Mr. Nikolaisen to the Shellbrook Hospital where a blood sample was taken. Expert testimony estimated Mr. Nikolaisen's blood alcohol level to be [page286] between 180 and 210 milligrams in 100 millilitres of blood at the time of the accident, well over the legal limits prescribed in The Highway Traffic Act, S.S. 1986, c. H-3.1, and the Criminal Code, R.S.C. 1985, c. C-46.

83 Mr. Nikolaisen had travelled on Snake Hill Road three times in the 24 hours preceding the accident, but had not driven it on any earlier occasions. The road was about a mile and three quarters in length and was flanked by highways to the north and to the east. Starting at the north end, it ran south for a short distance, dipped between open fields, then curved to the southeast and descended in a southerly loop down and around Snake Hill, past trees, bush and pasture, to the bottom of the valley. There it curved sharply to the southeast as it passed the Thiels' driveway. Once it passed the driveway, it curved gently to the south east for about 300 metres, then curved more distinctly to the south. It was on this stretch that the accident occurred. From that point on, the road crossed a creek,

took another curve, then ascended a steep hill to the east, straightened out, and continued east for just over half a mile, past tree-lined fields and another farm site, to an approach to the highway.

84 Snake Hill Road was established in 1923 and was maintained by the respondent municipality for the primary purpose of providing local farmers access to their fields and pastures. It also served as an access road for the two permanent residences and one veterinary clinic located on it. The road at its northernmost end, coming off the highway, is characterized as a "Type C" local access road under the provincial government's scheme of road classification. This means that it is graded, gravelled and elevated above the surrounding land. The portion of the road east of the Thiel residence, on which the accident occurred, is characterized as "Type B" bladed trail, essentially a prairie trail that has been bladed to remove the ruts and to allow it to be driven on. Bladed trails follow the path of least resistance through the surrounding land and are not elevated or gravelled. The [page287] province of Saskatchewan has some 45,000 kilometres of bladed trails.

85 According to the provincial scheme of road classification, both bladed trails and local access roads are "non-designated", meaning that they are not subject to the Saskatchewan Rural Development Sign Policy and Standards. On such roads, the council of the rural municipality makes a decision to post signs if it becomes aware of a hazard or if there are several accidents at one specific spot. Three accidents had occurred on Snake Hill Road between 1978 and 1987. All three accidents occurred to the east of the site of the Nikolaisen rollover, with drivers travelling westbound. A fourth accident occurred on Snake Hill Road in 1990 but there was no evidence as to where it occurred. There was no evidence that topography was a factor in any of these accidents. The respondent municipality had not posted signs on any portion of Snake Hill Road.

III. Relevant Statutory Provisions

86 The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1

> 192(1) Every Council shall keep in a reasonable state of repair all municipal roads, dams and reservoirs and the approaches to them that have been constructed or provided by the municipality or by any person with the permission of the council or that have been constructed or provided by the province, having regard to the character of the municipal road, dam or reservoir and the locality in which it is situated or through which it passes.
>
> ...
>
> (2) Where the council fails to carry out its duty imposed by subsections (1) and (1.1), the municipality is, subject to The Contributory Negligence Act, civilly liable for all damages sustained by any person by reason of the failure.

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> (3) Default under subsections (1) and (1.1) shall not be imputed to a municipality in any action without proof by the plaintiff that the municipality knew or should

have known of the disrepair of the municipal road or other thing mentioned in subsections (1) and (1.1).

The Highway Traffic Act, S.S. 1986, c. H-3.1

33(1) Subject to the other provisions of this Act, no person shall drive a vehicle on a highway:

(a) at a speed greater than 80 kilometres per hour; or
(b) at a speed greater than the maximum speed indicated by any signs that are erected on the highway ... .

(2) No person shall drive a vehicle on a highway at a speed greater than is reasonable and safe in the circumstances.

44(1) No person shall drive a vehicle on a highway without due care and attention.

IV. Judicial History

A. Saskatchewan Court of Queen's Bench, [1998] 5 W.W.R. 523

87 Wright J. found the respondent negligent in failing to erect a sign to warn motorists of the sharp right curve on Snake Hill Road, which she characterized as a "hidden hazard". She also found Mr. Nikolaisen negligent in travelling Snake Hill Road at an excessive speed and in operating his vehicle while impaired. The appellant was held to be contributorily negligent in accepting a ride with Mr. Nikolaisen. Fifteen percent of the fault was apportioned to the appellant, and the remainder was apportioned jointly and severally 50 percent to Mr. Nikolaisen and 35 percent to the respondent.

88 Wright J. found that s. 192 of The Rural Municipality Act, 1989 imposed a statutory duty of care on the respondent toward persons travelling on Snake Hill Road. She then considered whether the respondent met the standard of care as delineated in [page289] s. 192 and the jurisprudence interpreting that section. She referred specifically to Partridge v. Rural Municipality of Langenberg, [1929] 3 W.W.R. 555 (Sask. C.A.), in which it was stated at p. 558 that "the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety". She also cited Shupe v. Rural Municipality of Pleasantdale, [1932] 1 W.W.R. 627 (Sask. C.A.), at p. 630: "[R]egard must be had to the locality ... the situation of the road therein, whether required to be used by many or by few; ... to the number of roads to be kept in repair; to the means at the disposal of the council for that purpose, and the requirements of the public who use the road." Relying on Galbiati v. City of Regina, [1972] 2 W.W.R. 40 (Sask. Q.B.), Wright J. observed that although the Act does not mention an obligation to erect warning signs, the general duty of repair nevertheless includes the duty to warn motorists of a hidden hazard.

89 Having laid out the relevant case law, Wright J. went on to discuss the character of the road. Relying primarily on the evidence of two experts at trial, Mr. Anderson and Mr. Werner, she found that the sharp right turning curve was a hazard that was not readily apparent to the users of the road. From their testimony she concluded (at para. 85):

> It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the maximum speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be safely negotiated at speeds greater [page290] than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet. [Emphasis in original.]

Wright J. then noted that, while it would not be reasonable to expect the respondent to construct the road to a higher standard or to clear all of the bush away, it was reasonable to expect the respondent to erect and maintain a warning or regulatory sign "so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86).

90 Wright J. then considered s. 192(3) of the Act, which provides that there is no breach of the statutory standard of care unless the municipality knew or should have known of the danger. Wright J. observed that between 1978 and 1990, there were four accidents on Snake Hill Road, three of which occurred "in the same vicinity" as the Nikolaisen rollover, and two of which were reported to the authorities. On the basis of this information, she held that "[i]f the R.M. [Rural Municipality] did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known" (para. 90). Wright J. also found significant the relatively low volume of traffic on the road, the fact that there were permanent residences on the road, and the fact that the road was frequented by young and perhaps less experienced drivers.

91 In respect to causation, Wright J. found that it was probable that a warning sign would have enabled Mr. Nikolaisen to take corrective action to maintain control of his vehicle despite the fact of his impairment. She concluded (at para. 101):

> Mr. Nikolaisen's degree of impairment only served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded [page291] a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him.

92 Wright J. also addressed the appellant's argument that the municipality was in breach of a common law duty of care which was not qualified or limited by any of the restrictions set out under s. 192. She held that Just v. British Columbia, [1989] 2 S.C.R. 1228, and the line of authority both preceding and following that decision did not apply to the case before her given the existence of the statutory duty of care. She also found that any qualifying words in s. 192 of the Act pertained to the standard of care and did not impose limitations on the statutory duty of care.

B. Saskatchewan Court of Appeal, [2000] 4 W.W.R. 173, 2000 SKCA 12

93 On appeal, Cameron J.A., writing for a unanimous court, dealt primarily with the trial judge's finding that the respondent's failure to place a warning sign or regulatory sign at the site of the acci-

dent constituted a breach of its statutory duty of road repair. He did not find it necessary to rule on the issue of causation given his conclusion that the trial judge erred in finding the respondent negligent.

94 Cameron J.A. characterized the trial judge's conclusion that the respondent had breached the statutory duty of care as a matter of mixed fact and law. He noted that an appellate court is not to interfere with a trial judge's findings of fact unless the judge made a "palpable and overriding error" which affected his or her assessment of the facts. With respect to errors of law, however, Cameron J.A. remarked that the ability of an appellate court to overturn the finding of the trial judge is "largely unbounded". Regarding errors of mixed fact and law, Cameron J.A. noted that these are typically subject to the same standard of review as findings [page292] of fact. One exception to this, according to Cameron J.A., occurs where the trial judge identifies the correct legal test, yet fails to apply one branch of that test to the facts at hand. As support for this proposition, Cameron J.A. cited (at para. 41) Iacobucci J. in Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, at para. 39:

> [I]f a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

95 Turning to the applicable law in this case, Cameron J.A. acknowledged that the standard of care set out in the Act and the jurisprudence interpreting it requires municipalities to post warning signs to warn of hazards that prudent drivers, using ordinary care, would be unlikely to appreciate. Based on the jurisprudence, Cameron J.A. set out (at para. 50) an analytical framework to be used in order to assess if a municipality has breached its duty in this regard. This framework requires the judge:

1. To determine the character and state of the road at the time of the accident. This, of course, is a matter of fact that entails an assessment of the material features of the road where the accident occurred, as well as those factors going to the maintenance standard, namely the location, class of road, patterns of use, and so on.
2. To assess the issue of whether persons requiring to use the road, exercising ordinary car[e], could ordinarily travel upon it safely. This is essentially a reasonable person test, one concerned with how a [page293] reasonable driver on that particular road would have conducted himself or herself. It is necessary in taking this step to take account of the various elements noted in the authorities referred to earlier, namely the locality of the road, the character and class of the road, the standard to which the municipality could reasonably have been expected to maintain the road, and so forth. These criteria fall to be balanced in the context of the question: how would a reasonable driver have driven upon this particular road? Since this entails the application of a legal standard to a given set of facts, it constitutes a question of mixed fact and law.

> 3. To determine either tha[t] the road was in a reasonable state of repair or that it was not, depending upon the assessment made while using the second step. If it is determined that the road was not in a reasonable state of repair, then it becomes necessary to go on to determine whether the municipality knew or should have known of the state of disrepair before imputing liability.

96 According to Cameron J.A., the trial judge did not err in law by failing to set out the proper legal test. She did, however, make an error in law of the type identified by Iacobucci J. in Southam, supra. In his view, when applying the law to the facts of the case, the trial judge failed to assess the manner in which a reasonable driver, exercising ordinary care, would ordinarily have driven on the road, and the risk, if any, that the unmarked curve might have posed for the ordinary driver. As noted by Cameron J.A., the trial judge "twice alluded to the matter, but failed to come to grips with it" (para. 57).

97 Cameron J.A. also found that the trial judge had made a "palpable and overriding" error of fact in determining that the respondent had breached the standard of care. According to Cameron J.A., the trial judge's factual error stemmed from her reliance on the expert testimony of Mr. Werner and Mr. Anderson. Cameron J.A. found that the evidence of both experts was based on the fundamental premise [page294] that the ordinary driver could be expected to travel the road at a speed of 80 km/h. In his view, this premise was misconceived and unsupported by the evidence.

98 Cameron J.A. concluded that although the trial judge was free to accept the evidence of some witnesses over others, she was not free to accept expert testimony that was based on an erroneous factual premise. According to Cameron J.A., had the trial judge found that a prudent driver, exercising ordinary care for his or her safety, would not ordinarily have driven this section of Snake Hill Road at a speed greater than 60 km/h, then she would have had to conclude that no hidden hazard existed since the curve could be negotiated safely at this speed.

99 Cameron J.A. agreed with the trial judge that a common law duty of care was not applicable in this case. His remarks in this respect are found at para. 44 of his reasons:

> Concerning the duty of care, it might be noted that unlike statutory provisions empowering municipalities to maintain roads, but imposing no duty upon them to do so, the duty in this instance owes its existence to a statute, rather than the neighbourhood principle of the common law: Just v. British Columbia, [1989] 2 S.C.R. 1228 (S.C.C.). The duty is readily seen to extend to all who travel upon the roads.

V. Issues

100 A. Did the Court of Appeal properly interfere with the trial judge's finding that the respondent was in breach of its statutory duty of care?

B. Did the trial judge err in finding the respondent knew or should have known of the alleged danger?

C. Did the trial judge err in finding that the accident was caused in part by the respondent's negligence?

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D. Does a common law duty of care coexist alongside the statutory duty of care?

VI. Analysis

A. Did the Court of Appeal Properly Interfere with the Decision at Trial?

(1) The Standard of Review

101 Although the distinctions are not always clear, the issues that confront a trial court fall generally into three categories: questions of law, questions of fact, and questions of mixed law and fact. Put briefly, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (Southam, supra, at para. 35).

102 Of the three categories above, the highest degree of deference is accorded to the trial judge's findings of fact. The Court will not overturn a factual finding unless it is palpably and overridingly, or clearly wrong (Southam, supra, at para. 60; Stein v. The Ship"Kathy K", [1976] 2 S.C.R. 802, at p. 808; Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 1 S.C.R. 114, at p. 121). This deference is principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand, and is therefore better able to choose between competing versions of events (Schwartz v. Canada, [1996] 1 S.C.R. 254, at para. 32). It is however important to recognize that the making of a factual finding often involves more than merely determining the who, what, where and when of the case. The trial judge is very often called upon to draw inferences from the facts that are put before the court. For example, in this case, the trial judge inferred from the fact of accidents having occurred on Snake Hill Road [page296] that the respondent knew or should have known of the hidden danger.

103 This Court has determined that a trial judge's inferences of fact should be accorded a similar degree of deference as findings of fact (Geffen v. Goodman Estate, [1991] 2 S.C.R. 353). In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. I respectfully disagree with the majority's view that inferences can be rejected only where the inference-drawing process itself is deficient: see Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487, at para. 45:

> When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact": Lester (W. W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, [1990] 3 S.C.R. 644, at p. 669 per McLachlin J.

An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. My colleagues recognize themselves that a judge is often called upon to make inferences of mixed law and fact (para. 26). While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact.

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104 My colleagues take issue with the above statement that an appellate court will verify whether the making of an inference can reasonably be supported by the trial judge's findings of fact, a standard which they believe to be less strict than the "palpable and overriding" standard. I do not agree that a less strict standard is implied. In my view there is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was not reasonably supported by those facts. The distinction is merely semantic.

105 By contrast, an appellate court reviews a trial judge's findings on questions of law not merely to determine if they are reasonable, but rather to determine if they are correct; Moge v. Moge, [1992] 3 S.C.R. 813, at p. 833; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, at p. 647; R. P. Kerans, Standards of Review Employed by Appellate Courts (1994), at p. 90. The role of correcting errors of law is a primary function of the appellate court; therefore, that court can and should review the legal determinations of the lower courts for correctness.

106 In the law of negligence, the question of whether the conduct of the defendant has met the appropriate standard of care is necessarily a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts. As stated by Kerans, supra, at p. 103, "[t]he evaluation of facts as meeting or not meeting a legal test is a process that involves law-making. Moreover, it is probably correct to say that every new attempt to apply a legal rule to a set of [page298] facts involves some measure of interpretation of that rule, and thus more law-making" (emphasis in original).

107 In a negligence case, the trial judge is called on to decide whether the conduct of the defendant was reasonable under all the circumstances. While this determination involves questions of fact, it also requires the trial judge to assess what is reasonable. As stated above, in many cases, this will involve a policy-making or "law-setting" role which an appellate court is better situated to undertake (Kerans, supra, at pp. 5-10). For example, in this case, the degree of knowledge that the trial judge should have imputed to the reasonably prudent municipal councillor raised the policy consideration of the type of accident-reporting system that a small rural municipality with limited re-

sources should be expected to maintain. This law-setting role was recognized by the United States Supreme Court in Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984), at note 17, within the context of an action for defamation:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes -- in terms of impact on future cases and future conduct -- are too great to entrust them finally to the judgment of the trier of fact.

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108 My colleagues assert that the question of whether or not the standard of care was met by the defendant in a negligence case is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law (para. 36). I disagree. In many cases, it will not be possible to "extricate" a purely legal question from the standard of care analysis applicable to negligence, which is a question of mixed fact and law. In addition, while some questions of mixed fact and law may not have "any great precedential value" (Southam, supra, at para. 37), such questions often necessitate a normative analysis that should be reviewable by an appellate court.

109 Consider again the issue of whether the municipality knew or should have known of the alleged danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality having regard to the duties of the ordinary, reasonable and prudent municipal councillor. If the trial judge applies a different legal standard, such as the reasonable person standard, it is an error of law. Yet even if the trial judge correctly identifies the applicable legal standard, he or she may still err in the process of assessing the facts through the lens of that legal standard. For example, there may exist evidence that an accident had previously occurred on the portion of the road on which the relevant accident occurred. In the course of considering whether or not that fact satisfies the legal test for knowledge the trial judge must make a number of normative assumptions. The trial judge must consider whether the fact that one accident had previously occurred in the same location would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the ordinary, reasonable and prudent councillor would have been alerted to the previous accident by an accident-reporting system. In my view, the question of whether the fact of a previous accident having occurred fulfills the applicable knowledge [page300] requirement is a question of mixed fact and law and it is artificial to characterize it as anything else. As is apparent from the example given, the question may also raise normative issues which should be reviewable by an appellate court on the correctness standard.

110 I agree with my colleagues that it is not possible to state as a general proposition that all matters of mixed fact and law are reviewable according to the standard of correctness: citing Southam, supra, at para. 37 (para. 28). I disagree, however, that the dicta in Southam establishes that a trial judge's conclusions on questions of mixed fact and law in a negligence action should be accorded deference in every case. This Court in St-Jean v. Mercier, [2002] 1 S.C.R. 491, 2002 SCC 15, a medical negligence case, distinguished Southam on the issue of the standard applicable to questions of mixed fact and law where the tribunal has no particular expertise. Gonthier J., writing for a unanimous Court, stated at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (Southam, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. Such is the standard for medical negligence. There is no issue of expertise of a specialized tribunal in a particular field which may go to the determination of facts and be pertinent to defining an appropriate standard and thereby call for some measure of deference by a court of general appeal (Southam, supra, at para. 45; and Nova Scotia Pharmaceutical Society, supra, at p. 647).

111 I also disagree with my colleagues that Jaegli Enterprises Ltd. v. Taylor, [1981] 2 S.C.R. 2, is authority for the proposition that when the question [page301] of mixed fact and law at issue is a finding of negligence, that finding should be deferred to by appellate courts. In that case the trial judge found that the conduct of the defendant ski instructor met the standard of care expected of him. Moreover, the trial judge found that the accident would have occurred regardless of what the ski instructor had done (Taylor v. The Queen in Right of British Columbia (1978), 95 D.L.R. (3d) 82). Seaton J.A. of the British Columbia Court of Appeal disagreed with the trial judge that the ski instructor had met the applicable standard of care (Taylor (Guardian ad litem of) v. British Columbia (1980), 112 D.L.R. (3d) 297). Seaton J.A. recognized nevertheless that the "final question" was whether "the instructor's failure to remain was a cause of the accident" (p. 307). On the issue of causation, a question of fact, Seaton J.A. clearly substituted his opinion for that of the trial judge's without regard to the appropriate standard of review. His concluding remarks on the issue of causation at p. 308 highlight his lack of deference to the trial judge's conclusion on causation:

> On balance, I think that the evidence supports the plaintiffs' claim against the instructor, that his conduct in leaving the plaintiff below the crest was one of the causes of the accident.

112 This Court, which restored the finding of the trial judge, did not clearly state whether it did so on the basis that the appellate court was wrong to interfere with the trial judge's finding of negligence or whether it did so because the appellate court wrongly interfered with the trial judge's conclusions on causation. The reasons suggest the latter. The only portion of the trial judgment that this

Court referred to was the finding on causation. Dickson J. (as he then was) remarks in Jaegli Enterprises, supra, at p. 4:

> At the end of a nine-day trial Mr. Justice Meredith, the presiding judge, delivered a judgment in which he [page302] very carefully considered all of the evidence and concluded that the accident had been caused solely by Larry LaCasse and that the plaintiffs should recover damages, in an amount to be assessed, against LaCasse. The claims against Paul Ankenman, Jaegli Enterprises Limited and the other defendants were dismissed with costs.

113 The Court went on to cite a number of cases, some of which did not involve negligence (see Schreiber Brothers Ltd. v. Currie Products Ltd., [1980] 2 S.C.R. 78), for the general proposition that "it [is] wrong for an appellate court to set aside a trial judgment where [there is not palpable and overriding error, and] the only point at issue [was] the interpretation of the evidence as a whole" (p. 84). Given that the Court focussed on the issue of causation, a question of fact alone, I do not think that Jaegli Enterprises establishes that a finding of negligence by the trial judge should be deferred to by appellate courts. In my view, the Court in Jaegli Enterprises merely affirmed the longstanding principle that an appellate court should not interfere with a trial judge's finding of fact absent a palpable and overriding error.

(2) Error of Law in the Reasons of the Court of Queen's Bench

114 The standard of care set out in s. 192 of The Rural Municipality Act, 1989, as interpreted within the jurisprudence, required the trial judge to examine whether the portion of Snake Hill Road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Having identified the correct legal test, the trial judge nonetheless failed to ask herself whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident occurred. To neglect entirely one branch of a legal test when applying the facts to the test is to misconstrue the law (Southam, supra, at para. 39). The Saskatchewan Court of Appeal was therefore right to characterize this failure as an error of law and to consider the factual findings made by the trial judge in light of the appropriate legal test.

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115 The long line of jurisprudence interpreting s. 192 of The Rural Municipality Act, 1989 and its predecessor provisions clearly establishes that the duty of the municipality is to keep the road "in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety" (Partridge, supra, at p. 558; Levey v. Rural Municipality of Rodgers, No. 133, [1921] 3 W.W.R. 764 (Sask. C.A.), at p. 766; Diebel Estate v. Pinto Creek No. 75 (Rural Municipality) (1996), 149 Sask. R. 68 (Q.B.), at pp. 71-72). Legislation in several other provinces establishes a similar duty of care and courts in these provinces have interpreted it in a similar fashion (R. v. Jennings, [1966] S.C.R. 532, at p. 537; County of Parkland No. 31 v. Stetar, [1975] 2 S.C.R. 884, at p. 892; Fafard v. City of Quebec (1917), 39 D.L.R. 717 (S.C.C.), at p. 718). This Court, in Jennings, supra, interpreting a similar provision under the Ontario Highway Improvement Act, R.S.O. 1960, c. 171, remarked at p. 537 that: "[i]t has been repeatedly held in Ontario that where a

duty to keep a highway in repair is imposed by statute the body upon which it is imposed must keep the highway in such a condition that travellers using it with ordinary care may do so with safety".

116 There is good reason for limiting the municipality's duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. As stated by this Court in Fafard, supra, at p. 718: "[a] municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety". Correspondingly, appellate courts have long held that it is an error for the trial judge to find a municipality in breach of its duty merely because a danger exists, regardless of whether or not that danger poses a risk to the ordinary user of the road. The type of error to be guarded against was described by Wetmore C.J. in Williams v. [page304] Town of North Battleford (1911), 4 Sask. L.R. 75 (en banc), at p. 81:

> The question in an action of this sort, whether or not the road is kept in such repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, is, it seems to me, largely one of fact ... I would hesitate about setting aside a finding of fact of the trial Judge if he had found the facts necessary for the determination of the case, but he did not so find. He found that the crossing was a "dangerous spot without a light, and that if the utmost care were used no accident might occur, but it was not in such proper or safe state as to render such accident unlikely to occur." He did not consider the question from the standpoint of whether or not those requiring to use the road might, using ordinary care, pass to and fro upon it in safety. The mere fact of the crossing being dangerous is not sufficient ... . [Emphasis added.]

117 From the jurisprudence cited above, it is clear that the mere existence of a hazard or danger does not in and of itself give rise to a duty on the part of the municipality to erect a sign. Even if a trial judge concludes on the facts that the conditions of the road do, in fact, present a hazard, he or she must still go on to assess whether that hazard would present a risk to the reasonable driver exercising ordinary care. The ordinary driver is often faced with inherently dangerous driving conditions. Motorists drive in icy or wet conditions. They drive at night on country roads that are not well lit. They are faced with obstacles such as snow ridges and potholes. These obstacles are often not in plain view, but are obscured or "hidden". Common sense dictates that motorists will, however, exercise a degree of caution when faced with dangerous driving conditions. A municipality is expected to provide extra cautionary measures only where the conditions of the road and the surrounding circumstances do not signal to the driver the possibility that a hazard is present. For example, the ordinary driver expects a dirt road to become slippery when wet. By contrast, paved [page305] bridge decks on highways are often slick, though they appear completely dry. Consequently, signs will be posted to alert drivers to this unapparent possibility.

118 The appellant in this case argued, at para. 27 of his factum, that the trial judge did, in fact, assess whether a reasonable driver using ordinary care would find the portion of Snake Hill Road on which the accident occurred to pose a risk. He points in particular to the trial judge's comments at paras. 85-86 that:

> There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard... .
>
> ... where the existence of ... bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation. [Emphasis added.]

119 The appellant's argument suggests that the trial judge discharged her duty to apply the facts to the law merely by restating the facts of the case in the language of the legal test. This was not, however, sufficient. Although it is clear from the citation above that the trial judge made a factual finding that the portion of Snake Hill Road on which the accident occurred presented drivers with a hidden hazard, there is nothing in this portion of her reasons to suggest that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. The finding that a hazard, or even that a hidden hazard, exists does not automatically give rise to the conclusion that the reasonable driver exercising ordinary care could not [page306] travel through it safely. A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question. My colleagues state that it was open to the trial judge to draw an inference of knowledge of the hazard simply because the sharp curve was a permanent feature of the road (para. 61). Here again, there is nothing in the reasons of the trial judge to suggest that she drew such an inference or to explain how such an inference accorded with the legal requirements concerning the duty of care.

120 Nor did the trial judge consider the question in any other part of her reasons. Her failure to do so becomes all the more apparent when her analysis (or lack thereof) is compared to that in cases in which the courts applied the appropriate method. The Court of Appeal referred to two such cases by way of example. In Nelson v. Waverley (Rural Municipality) (1988), 65 Sask. R. 260 (Q.B.), the plaintiff argued that the defendant municipality should have posted signs warning of a ridge in the middle of the road that resulted from the grading of the road by the municipality. The trial judge concluded that if the driver had exercised ordinary care, he could have travelled along the roadway with safety. Instead, he drove too fast and failed to keep an adequate look-out considering the maintenance that was being performed on the road. In Diebel Estate, supra, the issue was whether the municipality had a duty under s. 192 to post a sign warning motorists that a rural road ended abruptly in a T-intersection. The question of how a reasonable driver exercising ordinary care would have driven on that road was asked and answered by the trial judge in the following passage at p. 74:

> His [the expert's] conclusions as to stopping are, however, mathematically arrived at and never having been on [page307] the road, from what was described in the course of the trial, I would think the intersection could be a danger at night to a complete stranger to the area, depending on one's reaction time and the possibility of being confused by what one saw rather than recognizing the T intersection to be just that. On the other hand I would think a complete stranger in the area would be absolutely reckless to drive down a dirt road of the nature of this

> particular road at night at 80 kilometres per hour. [Emphasis added; emphasis in original deleted.]

121 The conclusion that Wright J. erred in failing to apply a required aspect of the legal test does not automatically lead to a rejection of her factual findings. This Court's jurisdiction to review questions of law entitles it, where an error of law has been found, to take the factual findings of the trial judge as they are, and to assess these findings anew in the context of the appropriate legal test.

122 In my view, neither Wright J.'s factual findings nor any other evidence in the record that she might have considered had she asked the appropriate question, support the conclusion that the respondent was in breach of its duty. The portion of Snake Hill Road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the conditions of Snake Hill Road in general and the conditions with which motorists were confronted at the exact location of the accident signalled to the reasonable motorist that caution was needed. Motorists who appropriately acknowledged the presence of the several factors which called for caution would have been able to navigate safely the so-called "hidden hazard" without the benefit of a road sign.

123 The question of how a reasonable driver exercising ordinary care would have driven on Snake Hill Road necessitates a consideration of the nature and locality of the road. A reasonable motorist will not approach a narrow gravel road in the country in the same way that he or she will approach a paved highway. It is reasonable to expect a motorist to drive more slowly and to pay greater attention to the potential presence of hazards when driving on a [page308] road that is of a lower standard, particularly when he or she is unfamiliar with it.

124 While the trial judge in this case made some comments regarding the nature of the road, I agree with the Court of Appeal's findings that "[s]he might have addressed the matter more fully, taking into account more broadly the terrain through which the road passed, the class and designation of the road in the scheme of classification, and so on ... " (para. 55). Instead, the extent of her analysis of the road was limited to the following comments, found at para. 84 of her reasons:

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

125 In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road. The trial judge's analysis focussed almost entirely on the use of the road, without considering the sort of conditions it presented to drivers. It is perhaps not surprising that the trial judge did not engage in this fuller analysis, given that she did not turn her mind to the question of how a reasonable driver would have approached the road. Had she considered this question, she likely would have engaged in the type of assessment that was made by the Court of Appeal at para. 13 of its judgment:

> The road, about 20 feet in width, was classed as "a bladed trail," sometimes referred to as "a land access road," a classification just above that of "prairie trail". As such, it was not built up, nor gravelled, except lightly at one end of it, but

simply bladed across the terrain following the path of least resistance. Nor was it in any way signed.

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Given the fact that Snake Hill Road is a low standard road, in a category only one or two levels above a prairie trail, one can assume that a reasonable driver exercising ordinary care would approach the road with a certain degree of caution.

126 Having considered the character of the road in general, and having concluded that by its very nature it warranted a certain degree of caution, it is nonetheless necessary to consider the material features of the road at the point at which the accident occurred. Even on roads which are of a lower standard, a reasonable driver exercising due caution may be caught unaware by a particularly dangerous segment of the road. That was, in fact, the central argument that the appellant put forward in this case. According to the appellant's "dual nature" theory, at para. 8 of his factum, the fact that the curvy portion of Snake Hill Road where the accident occurred was flanked by straight segments of road created a risk that a motorist would be lulled into thinking that the curves could be taken at speeds greater than that at which they could actually be taken.

127 While it is not clear from her reasons that the trial judge accepted the appellant's "dual nature" theory, it appears that her conclusion that the municipality did not meet the standard of care required by it was based largely on her observation of the material features of the road at the location of the Nikolaisen rollover. Relying on the evidence of two experts, Mr. Anderson and Mr. Werner, she found the portion of the road on which the accident occurred to be a "hazard to the public". In her view, the limited sight distance created by the presence of uncleared bush precluded a motorist from being forewarned of the impending sharp right turn immediately followed by a left turn. Based on expert testimony, she concluded that the curve could not be negotiated at speeds greater than 60 km/h under favourable conditions, or 50 km/h under wet conditions.

128 Again, I would not reject the trial judge's factual finding that the curve presented motorists with an [page310] inherent hazard. The evidence does not, however, support a finding that a reasonable driver exercising ordinary care would have been unable to negotiate the curve with safety. As I explained earlier, the municipality's duty to repair is implicated only when an objectively hazardous condition exists, and where it is determined that a reasonable driver arriving at the hazard would be unable to provide for his or her own security due to the features of the hazard.

129 I agree with the trial judge that part of the danger posed by the presence of bushes on the side of the road was that a driver would not be able to predict the radius of the sharp right-turning curve obscured by them. In my view, however, the actual danger inherent in this portion of the road was that the bushes, together with the sharp radius of the curve, prevented an eastbound motorist from being able to see if a vehicle was approaching from the opposite direction. Given this latter situation, it is highly unlikely that any reasonable driver exercising ordinary care would approach the curve at speeds in excess of 50 km/h, a speed which was found by the trial judge to be a safe speed at which to negotiate the curve. Since a reasonable driver would not approach this curve at speeds in excess of which it could safely be taken, I conclude that the curve did not pose a risk to the reasonable driver.

130 One need only refer to the series of photographs of the portion of Snake Hill Road on which the accident occurred to appreciate the extent to which visual clues existed which would alert a driver to approach the curve with caution (Respondent's Record, vol. II, at pp. 373-76). The photographs, which indicate what the driver would have seen on entering the curve, show the presence of bush extending well into the road. From the photographs, it is clear that a motorist approaching the curve would not fail to appreciate the risk presented by the curve, which is simply that it is impossible to see around it and to gauge what may be coming in the opposite direction. In addition, the danger posed [page311] by the inability to see what is approaching in the opposite direction is somewhat heightened by the fact that this road is used by farm operators. At trial, the risk was described in the following terms by Mr. Sparks, an engineer giving expert testimony:

> ... if you can't, if you can't see far enough down the road to, you know, if there's somebody that's coming around the corner with a tractor and a cultivator and you can't see around the corner, then, you know, drivers would have a fairly strong signal, in my view, that due care and caution would be required.

131 The expert testimony relied on by the trial judge does not support a finding that the portion of Snake Hill Road on which the accident occurred would pose a risk to a reasonable driver exercising ordinary care. When asked at trial whether motorists, exercising reasonable care, would enter the curve at a slow speed because they could not see what was coming around the corner, Mr. Werner agreed that he, himself, drove the corner "at a slower speed" and that it would be prudent for a driver to slow down given the limited sight distance. Similarly, Mr. Anderson admitted to having taken the curve at 40-45 km/h the first time he drove it because he "didn't want to get into trouble with it". When asked if the reason he approached the curve at that speed was because he could not see around it, he replied in the affirmative: "[t]hat's why I approached it the way I did."

132 Perhaps most tellingly, Mr. Nikolaisen himself testified that he could not see if a vehicle was coming in the opposite direction as he approached the curve. The following exchange which occurred during counsel's cross-examination of Mr. Nikolaisen at trial is instructive:

> Q. ... You told my learned friend, Mr. Logue, that your view of the road was quite limited, that is correct? The view ahead on the road is quite limited, is that right?

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> A. As in regards to travelling through the curves, yes, that's right, yeah.
> Q. Yes. And you did not know what was coming as you approached the curve, that is correct?
> A. That's correct, yes.
> Q. There might be a vehicle around that curve coming towards you or someone riding a horse on the road, that is correct?
> A. Or a tractor or a cultivator or something, that's right.
> Q. Or a tractor or a cultivator. You know as a person raised in rural Saskatchewan that all of those things are possibilities, that is right?
> A. That's right, yeah, that is correct.

133 Nor do I accept the appellant's submission that the "dual nature" of the road had the effect of lulling drivers into taking the curve at an inappropriate speed. This theory rests on the assumption that the motorists would drive the straight portions of the road at speeds of up to 80 km/h, leaving them unprepared to negotiate suddenly appearing curves. Yet, while the default speed limit on the road was 80 km/h, there was no evidence to suggest that a reasonable driver would have driven any portion of the road at that speed. While Mr. Werner testified that a driver "would be permitted" to drive at a maximum of 80 km/h, since this was the default (not the posted) speed limit, he later acknowledged that bladed trails in the province are not designed to meet 80 km/h design criteria. I agree with the Court of Appeal that the evidence is that "Snake Hill Road was self-evidently a dirt road or bladed trail" and that it "was obviously not designed to accommodate travel at a general speed of 80 kilometres per hour". As I earlier remarked, the locality of the road and its character and class must be considered when determining whether the reasonable driver would be able to navigate it safely.

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134 Furthermore, the evidence at trial did not suggest that drivers were somehow fooled by the so-called "dual nature" of the road. The following exchange between counsel for the respondent and Mr. Werner at trial is illustrative of how motorists would view the road:

Q. Now, Mr. Werner, would you not agree that the change in the character of this road as you proceeded from east to west was quite obvious?
A. It was straight, and then you came to a hill, and you really didn't know what might lie beyond the hill.
Q. That's right. But I mean, the fact that the road went from being straight and level to suddenly there was a hill and you couldn't see -- you could see from the point of the top of the hill that the road didn't continue in a straight line, couldn't you?
A. Yes, you could, from the top of the hill, it's a very abrupt hill, yes.
Q. And as you proceeded down though the hill it became quite obvious, did it not, that the character of the road changed?
A. Yes, it changed, yes.
Q. Now you were faced with something other than a straight road?
A. M'hm. Yes.
Q. Now you were on -- and at some point along there the surface of the road changed, did it not?
A. Yes.
Q. And, of course, the road was no longer, I use the term built-up to refer to a road that has grade and it has some drainage. As you proceeded from west to east, you realized, you could see, it was obvious that this was not longer a built-up road?
A. It was a road essentially that was cut out of the topography and had no ditches, and there was an abutment or shoulder right to the driving surface. It was different than the first part.
Q. Yes. And all those differences were obvious, were they not?

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A. Well, I -- they were clear, satisfactorily clear to me, yes. [Emphasis added.]

135 Although they may be compelling factors in other cases, in this case the "dual nature" of the road, the radius of the curve, the surface of the road, and the lack of superelevation do not support the conclusion of the trial judge. The question of how a reasonable driver exercising ordinary care would approach this road demands common sense. There was no necessity to post a sign in this case for the simple reason that any reasonable driver would have reacted to the presence of natural cues to slow down. The law does not require a municipality to post signs warning motorists of hazards that pose no real risk to a prudent driver. To impose a duty on the municipality to erect a sign in a case such as this is to alter the character of the duty owed by a municipality to drivers. Municipalities are not required to post warnings directed at drunk drivers and thereby deal with their inability to react to the cues that alert the ordinary driver to the presence of a hazard.

136 My colleagues assert that the trial judge properly considered all aspects of the applicable legal test, including whether the curve would pose a risk to the reasonable driver exercising ordinary care. They say that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. Secondly, they note that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Thirdly, the fact that the trial judge apportioned negligence to Nikolaisen indicates, in their view, that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter (para. 40).

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137 I respectfully disagree that it is explicit in the trial judge's reasons that she considered whether the portion of the road on which the accident occurred posed a risk to the ordinary driver exercising reasonable care. As I explained above, the fact that the trial judge restated the legal test in the form of a conclusion in no way suggests that she turned her mind to the issue of whether the ordinary driver would have found the curve to be hazardous.

138 Nor do I agree that a discussion of the conduct of an ordinary motorist in the situation was somehow "implicit" in the trial judge's reasons. In my view, it is highly problematic to presume that a trial judge made factual findings on a particular issue in the absence of any indication in the reasons as to what those findings were. While a trial judge is presumed to know the law, he or she cannot be presumed to have reached a factual conclusion without some indication in the reasons that he or she did in fact come to that conclusion. If the reviewing court is willing to presume that a trial judge made certain findings based on evidence in the record absent any indication in the reasons that the trial judge actually made those findings, then the reviewing court is precluded from finding that the trial judge misapprehended or neglected evidence.

139 In my view, my colleagues have throughout their reasons improperly presumed that the trial judge reached certain factual findings based on the evidence despite the fact that those findings

were not expressed in her reasons. On the issue of whether the curve presented a risk to the ordinary driver, my colleagues note that "in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses" (para. 46). The problem with this statement is that although the trial judge relied on the evidence of Mr. Anderson and Mr. Werner to conclude that the portion of Snake Hill Road on which the accident occurred was a hazard, it is impossible from her reasons to discern what, if [page316] any, evidence she relied on to reach the conclusion that the curve presented a risk to the ordinary driver exercising reasonable care. In the absence of any indication that she considered this issue, I am not willing to presume that she did.

140 My colleagues similarly presume findings of fact when discussing the knowledge of the municipality. On this issue, they reiterate that "it is open for a trial judge to prefer some parts of the evidence over others, and to re-assess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court" (para. 62). At para. 64 of their reasons, my colleagues review the findings of the trial judge on the issue of knowledge and conclude that the trial judge "drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question". I think that it is improper to conclude that the trial judge made a finding that the municipality's system of road inspection was inadequate in the absence of any indication in her reasons that she reached this conclusion. My colleagues further suggest that the trial judge did not impute knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road (para. 65). They even state that it was not necessary for the trial judge to rely on the accidents in order to satisfy s. 192(3) (para. 67). This, in my view, is a reinterpretation of the trial judge's findings that stands in direct contradiction to the reasons that were provided by her. The trial judge discusses other factors pertaining to knowledge only to heighten the significance that she attributes to the fact that accidents had previously occurred on other portions of the road (at para. 90):

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> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. [Emphasis added.]

141 My colleagues refer to the decision of Van de Perre v. Edwards, [2001] 2 S.C.R. 1014, 2001 SCC 60, in which I stated that "an omission [in the trial judge's reasons] is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (para. 15). This case is however distinguishable from Van de Perre. In Van de Perre, the appellate court improperly substituted its own findings of fact for the trial judge's clear factual conclusions on the basis that the trial judge had not considered all of the evidence. By contrast, in this case my colleagues assert that this Court should not interfere with the "findings of the trial judge" even where no findings were made and where such findings

must be presumed from the evidence. The trial judge's failure in this case to reach any conclusion on whether the ordinary driver would have found the portion of the road on which the accident occurred hazardous, in my view, gives rise to the reasoned belief that she ignored the evidence on the issue in a way that affected her conclusion.

142 Finally, I do not agree that the trial judge's conclusion that Mr. Nikolaisen was negligent equates to an assessment of whether a motorist exercising ordinary care would have found the curve on which the accident occurred to be hazardous. It is clear from the trial judge's reasons that she made a factual finding that the curve could be driven safely at 60 km/h in dry conditions and 50 km/h in wet conditions and that Mr. Nikolaisen approached the curve at an [page318] excessive speed. As earlier stated, what she failed to consider was whether the ordinary driver exercising reasonable care would have approached the curve at a speed at which it could be safely negotiated, or, stated differently, whether the curve posed a real danger to the ordinary driver.

B. Did the Trial Judge Err in Finding that the Respondent Municipality Knew or Should Have Known of the Danger Posed by the Municipal Road?

143 Pursuant to s. 192(3) of The Rural Municipality Act, 1989, fault is not to be imputed to the municipality in the absence of proof by the plaintiff that the municipality "knew or should have known of the disrepair".

144 The trial judge made no finding that the respondent municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to the respondent on the basis that it should have known of the danger. This is apparent in her findings on knowledge at paras. 89-91 of her reasons:

> Breach of the statutory duty of care imposed by section 192 of the Rural Municipality Act, supra, cannot be imputed to the R.M. unless it knew of or ought to have known of the state of disrepair on Snake Hill Road. Between 1978 and 1990 there were four accidents on Snake Hill Road. Three of these accidents occurred in the same vicinity as the Nikolaisen rollover. The precise location of the fourth accident is unknown. While at least three of these accidents occurred when motorists where travelling in the opposite direction of the Nikolaisen vehicle, they occurred on that portion of Snake Hill Road which is the most dangerous -- where the road begins to curve, rather than where it is generally straight and flat. At least two of these accidents were reported to authorities.
>
> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance [page319] given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.

> I find that by failing to erect and maintain a warning and regulatory sign on this portion of Snake Hill Road the R.M. has not met the standard of care which is reasonable in the circumstances. Accordingly, it is in breach of its duty of care to motorists generally, and to Mr. Housen in particular. [Emphasis added.]

145 Whether the municipality should have known of the disrepair (here, the risk posed in the absence of a sign) involves both questions of law and questions of fact. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor (Ryan v. Victoria (City), [1999] 1 S.C.R. 201, at para. 28). The question is then answered through the trial judge's assessment of the facts of the case.

146 I find that the trial judge made both errors of law and palpable and overriding errors of fact in determining that the respondent municipality should have known of the alleged state of disrepair. She erred in law by approaching the question of knowledge from the perspective of an expert rather than from the perspective of a prudent municipal councillor. She also erred in law by failing to appreciate that the onus of proving that the municipality knew or should have known of the alleged disrepair remained on the plaintiff throughout. The trial judge clearly erred in fact by drawing the unreasonable inference that the respondent municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of Snake Hill Road.

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147 The trial judge's failure to determine whether knowledge should be imputed to the municipality from the perspective of what a prudent municipal councillor should have known is implicit in her reasons. The respondent could not be held, for the purposes of establishing knowledge under the statutory test, to the standard of an expert analysing the curve after the accident. Yet this is precisely what the trial judge did. She relied on the expert evidence of Mr. Anderson and Mr. Werner to reach the conclusion that the curve presented a hidden hazard. She also implicitly accepted that the risk posed by the curve was not one that would be readily apparent to a lay person. This is evident in the portion of her judgment where she accepts as a valid excuse for not filing a timely claim against the respondent the appellant counsel's explanation that he did not believe the respondent to be at fault until expert opinions were obtained. The trial judge stated in this regard: "[i]t was only later when expert opinions were obtained that serious consideration was given to the prospect that the nature of Snake Hill Road might be a factor contributing to the accident" (para. 64). Her failure to consider the risk to the prudent driver is also apparent when one considers that she ignored the evidence concerning the way in which the two experts themselves had approached the dangerous curve (see para. 54 above).

148 Had the trial judge considered the question of whether the municipality should have known of the alleged disrepair from the perspective of the prudent municipal councillor, she would necessarily have reached a different conclusion. There was no evidence that the road conditions which existed posed a risk that the respondent should have been aware of. The respondent had no particular reason to inspect that segment of the road for the presence of hazards. It had not received any complaints from motorists respecting the absence of signs on the road, the lack of superelevation on

the curves, or the presence of [page321] trees and vegetation which grew up along the sides of the road.

149 In addition, the question of the respondent's knowledge is linked inextricably to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is a duty to repair. The trial judge should not have expected the respondent in this case to have knowledge of the road conditions that existed at the site of the Nikolaisen rollover since that road condition simply did not pose a risk to the reasonable driver. In addition to the evidence that was discussed above in the context of the standard of care, this conclusion is supported by the testimony of the several lay witnesses that testified at trial. Craig Thiel, a resident on the road, testified that he was not aware that Snake Hill Road had a reputation of being a dangerous road, and that he himself had never experienced difficulty with the portion of the road on which the accident occurred. His wife, Toby, also testified that she had experienced no problems with the road.

150 The trial judge also clearly erred in fact by imputing knowledge to the municipality on the basis of the four accidents that had previously occurred on Snake Hill Road. While her factual findings regarding the accidents themselves have a sound basis in the evidence, these findings simply do not support her conclusion that a prudent municipal councillor ought to have known that a risk existed for the normal prudent driver. As such, the trial judge erred in drawing an unreasonable inference from the evidence that was before her. As stated above, the standard of review for inferences of fact is, above all, one of reasonableness. This is reflected in the following passage from Joseph Brant Memorial Hospital v. Koziol, [1978] 1 S.C.R. 491, at pp. 503-4:

> ... "it is a well-known principle that appellate tribunals should not disturb findings of fact made by a trial judge [page322] if there were credible evidence before him upon which he could reasonably base his conclusion". [Emphasis added.]

151 As I stated above, there was no evidence to suggest that the respondent had actual knowledge that accidents had previously occurred on Snake Hill Road. To the contrary, Mr. Danger, the administrator of the municipality, testified that the first he heard of the accidents was at the trial.

152 Implicit in the trial judge's reasons, then, was the expectation that the municipality should have known about the accidents through an accident-reporting system. The appellant put forward that argument explicitly before this Court, placing significant emphasis on the fact that respondent "has no regularized approach to gathering this information, whether from councillors or otherwise". The argument suggests that, had the municipality established a formal system to find out whether accidents had occurred on a given road, it would have known that accidents had occurred on Snake Hill Road and would have taken the appropriate corrective action to ensure that the road was safe for travellers.

153 I find the above argument to be flawed in two important respects. First, the argument that the other accidents on Snake Hill Road were relevant in this case is based on the assumption that there was an obligation on the respondent municipality to have a "regularized" accident-reporting system, and that the informal system that was in place was somehow deficient. In my view, the appellant did not meet its onus to show that the system relied on by the municipality to discharge its obligations under s. 192 of the The Rural Municipality Act, 1989 was deficient. The evidence shows that, prior to 1988, there was no formal system of accident reporting in place. There was, nonetheless, an in-

formal system whereby the municipal councillors were responsible for finding out if there were road hazards. Information that hazards existed came to the attention of the councillors via complaints, and from their own familiarity [page323] with the roads within the township under their jurisdiction. The trial judge made a palpable error in finding that this informal system was deficient in the absence of any evidence of the practice of other municipalities at the time that the accidents occurred and what might have been a reasonable system, particularly given the fact that the rural municipality in question had only six councillors. There is no evidence that a rural municipality of this type requires the sort of sophisticated information-gathering process that may be required in a city, where accidents occur with greater frequency and where it is less likely that word of mouth will suffice to bring hazards to the attention of the councillors.

154 The respondent municipality now has a more formalized system of accident reporting. Since 1988, Saskatchewan Highways and Transportation annually provides the municipalities with a listing of all motor vehicle accidents which occur within the municipality and which are reported to the police. While I agree that this system may provide the municipality with a better chance of locating hazards in some circumstances, I do not accept that the adoption of this system is relevant on the facts of this case. Only one accident, which occurred in 1990, was reported to the respondent under this system. The appellant adduced no evidence to suggest that this accident occurred at the same location as the Nikolaisen rollover, or that this accident occurred as a result of the conditions of the road rather than the negligence of the driver.

155 Secondly, and perhaps more importantly, it was simply illogical for the trial judge to infer from the fact of the earlier accidents that the respondent should have known that the site of the Nikolaisen rollover posed a risk to prudent drivers. The three accidents, which took place in 1978, 1985, and 1987, occurred on different curves, while the vehicles involved were proceeding in the opposite [page324] direction. The accidents of 1978 and 1987 occurred on the first right-turning curve in the road with the drivers travelling westbound, at the bottom of the hill. The accident in 1985 took place on the next curve in the road with the driver also travelling westbound, again on a different curve from the one where the Nikolaisen rollover took place. If anything, these accidents signal that the municipality should have been concerned with the curves that were, when travelling westbound, to the east of the site of the Nikolaisen rollover. The evidence disclosed no accidents that had occurred at the precise location of the accident that is the subject of this case.

156 Furthermore, the mere occurrence of an accident does not in and of itself indicate a duty to post a sign. In many cases, accidents happen not because of the conditions of the road, but rather because of the negligence of the driver. Illustrative in this regard is Mr. Agrey's accident on Snake Hill Road in 1978. Mr. Agrey testified that, just prior to the accident, he had turned his attention away from the road to talk to one of the passengers in the vehicle. Another passenger shouted to him to "look out", but by the time he was alerted it was too late to properly navigate the turn. Mr. Agrey was charged and fined for his carelessness. As was discussed in the context of the standard of care, a municipality is not obligated to make safe the roads for all drivers, regardless of the care and attention that they are exercising when driving. It need only keep roads in such a state of repair as will allow a reasonable driver exercising ordinary care to drive with safety.

157 In addition to the substantial errors discussed above, I would also note that, in my view, the trial judge was inattentive to the onus of proof on this issue. When reviewing the evidence pertaining to other accidents on Snake Hill Road, the trial judge remarked, at para. 31: "Cst. Forbes does not recall [page325] any other accident on Snake Hill Road during her time at the Shellbrook

RCMP Detachment, from 1987 until 1996. Cpl. Healey had heard of one other accident. Forbes and Healey are only two of nine members of the RCMP Detachment at Shellbrook" (emphasis added). By this comment, the trial judge seems to imply that there may have been more accidents on Snake Hill Road that had been reported and that the respondent should have known about this. With all due respect to the trial judge, if there had been accidents other than the ones that were raised at trial, it was up to the appellant to bring evidence of these accidents forward, either by calling the RCMP members to whom they had been reported, or by calling those who were involved in the accidents, or by any other available means. Furthermore, the significance that the trial judge attributed to the other accidents that occurred on Snake Hill Road was dependent on her assumption that the respondent should have had a formal accident-reporting system in place. The respondent did not bear the onus of demonstrating that it was not obliged to have such a system; there was, rather, a positive onus on the appellant to demonstrate that such a system was required and that the informal reporting system was inadequate.

C. Did the Trial Judge Err in Finding that the Accident was Caused in Part by the Failure of the Respondent Municipality to Erect a Sign Near the Curve?

158 The trial judge's findings on causation are found at para. 101 of her judgment, where she states:

> I find that this accident occurred as a result of Mr. Nikolaisen entering the curve on Snake Hill Road at a speed slightly in excess of that which would allow successful negotiation. The accident occurred at the most dangerous segment of Snake Hill Road where a warning or regulatory sign should have been erected and maintained to warn motorists of an impending and hidden hazard. Mr. Nikolaisen's degree of impairment only [page326] served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him. I am satisfied on a balance of probabilities that had Mr. Nikolaisen been forewarned of the curve, he would have reacted and taken appropriate corrective action such that he would not have lost control of his vehicle when entering the curve.

159 The trial judge's above findings in respect to causation represent conclusions on matters of fact. Consequently, this Court will only interfere if it finds that in coming to these conclusions she made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence, or drew erroneous conclusions from it (Toneguzzo-Norvell, supra, at p. 121).

160 In coming to her conclusion on causation, the trial judge made several of the types of errors that this Court referred to in Toneguzzo-Norvell. To the extent that the trial judge relied on the evidence of Mr. Laughlin, the only expert to have testified on the issue of causation, I find that she either misunderstood his evidence or drew erroneous conclusions from it. The only other testimony in respect to causation was anecdotal evidence pertaining to Mr. Nikolaisen's level of impairment provided by Craig Thiel, Toby Thiel and Paul Housen. Although their testimonies provided some evidence in respect to causation, for reasons I will discuss, it was not evidence on which the trial judge

could reasonably rely. Nor do I find that the trial judge was entitled to rely on evidence that Mr. Nikolaisen successfully negotiated the curve from the Thiel driveway onto Snake Hill Road. The inference that the trial judge drew from this fact was unreasonable and ignored evidence that Mr. Nikolaisen swerved even on this curve. In addition, the trial judge clearly erred by ignoring other relevant evidence in respect to causation, in particular the fact that Mr. Nikolaisen had driven on the [page327] road three times in the 18 to 20 hours preceding the accident.

161 I cannot agree with the trial judge that the testimony of Mr. Laughlin, a forensic alcohol specialist employed by the RCMP supports the finding that Mr. Nikolaisen would have reacted to a sign forewarning of the impending right-turning curve on which the accident occurred. The preponderance of Mr. Laughlin's testimony establishes that persons at the level of impairment which Mr. Nikolaisen was found to be at when the accident occurred would be unlikely to react to a warning sign. In addition, Mr. Laughlin's testimony points overwhelmingly to the conclusion that alcohol was the causal factor which led to this accident. The trial judge erred by misapprehending one comment in Mr. Laughlin's testimony and ignoring the significance of his testimony when taken as a whole.

162 Based on blood samples obtained by Constable Forbes approximately three hours after the accident occurred, Mr. Laughlin predicted that Mr. Nikolaisen's blood alcohol level at the time of the accident ranged from 180 to 210 milligrams percent. Mr. Laughlin commented at length on the effect that this level of blood alcohol could be expected to have on a person's ability to drive, testifying:

> Well, My Lady, this alcohol level that I've calculated here is a very high alcohol level. The critical mental faculties [that] are important in operating a motor vehicle will be impaired by the alcohol. And any skill that depends on these mental faculties will be affected. These include anticipation, judgment, attention, concentration, the ability to divide attention among two or more areas of interest. Because these are affected to such a degree, it would be unsafe for anybody to operate a motor vehicle with this level of alcohol in their body.

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When asked about his knowledge of research pertaining to the effects of alcohol on the risk of being involved in an automobile accident, Mr. Laughlin had this to say:

> At this level the moderate user of alcohol risk of causing crash is tremendously high, probably 100 times that of a sober driver, or even higher. And in some cases at this level, I've seen scientific literature indicating that the risk of causing a fatal crash is 2 to 300 times that of a sober driver... . if an impaired person is an experienced drinker there -- it won't be that high. However, there will be an increased risk compared to a sober state... . But above 100 milligrams percent, regardless of tolerance, a person will be impaired with respect to driving ability.

Following these comments, Mr. Laughlin discussed the ability of a severely impaired person to react to the presence of a hazard when driving:

> My Lady, I would like to add that the driving task is a demanding one and involves many multi-various tasks occurring at the same time. The hazard for a person under the influence of alcohol is it takes longer to notice a hazard or danger if one should occur; it takes longer to decide what corrective action is appropriate, and it takes longer to execute that decision and the person may tend to make incorrect decisions. So there is increased risk in that process. As well, if the impairment has progressed to the point where the motor skills are affected, the execution of that decision is impaired. So it's not a very graceful attempt at a corrective action. As well, some people tend to make more risks under the influence of alcohol. They do not apply sound reasoning and judgment. They are not able to properly assess the impairment of their driving skills, they are not able to properly assess the risk, not able to properly assess the changing road and weather conditions and adjust for that. But even if they do recognize those as hazards, they may tend to take more risks than a sober driver would.

163 The above comments support the conclusion that the accident occurred as a result of Mr. Nikolaisen's impairment and not as a result of any failure on the part of the respondent. Indeed, when the portions of Mr. Laughlin's testimony that the trial judge relied [page329] on are considered in their context, they do not support her conclusion that Mr. Nikolaisen would have been able to react to a sign had one been posted. When asked by counsel whether it was possible for an individual with Mr. Nikolaisen's blood alcohol level to perceive and react to a road sign, Mr. Laughlin responded:

> Yes, it's possible that a person will see and react to it and maybe react properly. It's possible that they will react improperly or may miss it altogether. I think what's key here is that at this level of alcohol, it's more likely that the person under this level of alcohol will either miss the sign or not react properly compared to the sober driver. That the driver with this level of alcohol will make more mistakes than will the sober driver. [Emphasis added.]

In the passage above, it is clear that Mr. Laughlin is merely admitting that anything is possible, while solidly expressing the view that drivers at this level of intoxication are more likely to not react to a sign or other warning. This view is also apparent in the following passage, in which Mr. Laughlin expands on the ability of an intoxicated driver to react to signs and other road conditions:

> What happens with respect to perception under the influence of alcohol is a driver tends to concentrate on the central field of vision, and miss certain indicators on the periphery, that's called tunnel vision. As well, drivers tend to concentrate on the lower part of that central field of view and therefore they don't have a very long preview distance in the course of operating a motor vehicle and looking down the road. And so studies indicate that under the influence of alcohol drivers tend to miss more signs, warnings, indicators, especially those in the peripheral field of view or farther down the road. [Emphasis added.]

164 In argument before this Court, the appellant emphasized that although Mr. Laughlin was the only expert to testify with respect to causation, lay witnesses testified that Mr. Nikolaisen was not visibly impaired prior to leaving the Thiel residence. [page330] It is not clear from the trial judge's

reasons that she relied on testimony to this effect given by Craig Thiel, Toby Thiel and Paul Housen. To the extent that she did rely on such evidence to establish that the accident was caused in part by the respondent's negligence, I find this reliance to be unreasonable. Whereas the lay witnesses in this case were qualified to give their opinion on whether they, as ordinary drivers, could safely negotiate the segment of Snake Hill Road on which the accident occurred, they were not qualified to assess the degree of Mr. Nikolaisen's impairment. The reason for their lack of qualification in this regard was explained by Mr. Laughlin in the following response to counsel's question on whether it is possible to draw a conclusion from the fact that an individual does not exhibit any impairment of their motor skills and speech:

> No, Your Honour, because, My Lady, when you're looking at motor skill impairment or for signs of motor skill impairment, you're looking for signs of intoxication, not impairment. Remember I mentioned that the first components affected by alcohol are cognitive and mental faculties. These are all important in driving. However, it is very difficult when you look at an individual who has been consuming alcohol to tell that they have impaired in attention or divided attention, or concentration, or judgment. So as an indicator of impairment, motor skills are not reliable. And if you think about the Criminal Code process, they've been abandoned 30 years ago as a useful indicator of impairment. No longer do we rely on police officers subjective assessment of person's motor skills to determine impairment. [Emphasis added.]

165 It is also clear from the trial judge's reasons that she relied to some extent on evidence that Mr. Nikolaisen successfully negotiated the curve at the point where the driveway to the Thiel residence intersected the road. I agree with the respondent that this fact is simply not relevant. The ability of Mr. Nikolaisen to negotiate this curve does not establish that his driving ability was not impaired. As noted by the respondent, at para. 101 of its factum, he may [page331] have been driving more slowly at this point, or he may simply have been lucky. More importantly, this evidence contributes nothing to the issue of whether or not Mr. Nikolaisen would have reacted to a sign on the curve where the accident occurred, had one been present. There was no sign on the curve one faces upon leaving the driveway, just as there was no sign on the curve where the accident took place.

166 At any rate, the trial judge's reliance on Mr. Nikolaisen's successful negotiation of the curve at the location of the Thiel driveway ignores relevant evidence that he had swerved or "fish-tailed" when leaving the Thiel residence. A reasonable inference to be drawn from this evidence is that while Mr. Nikolaisen was able to negotiate this curve, he did not do so free from difficulty. While this evidence may not be significant in and of itself, it should have been enough to alert the trial judge to the problems inherent in the inference she drew from his ability to navigate this earlier curve.

167 In addition to ignoring the relevant evidence of the fish-tail marks, the trial judge failed to consider the relevance of the fact that Mr. Nikolaisen had travelled Snake Hill Road three times in the 18 to 20 hours preceding the accident. In her review of the evidence, she noted at para. 8 of her reasons that: "Mr. Nikolaisen was unfamiliar with Snake Hill Road. While he had in the preceding 24 hours travelled the road three times, only once was in the same direction that he was travelling upon leaving the Thiel residence."

168 I simply cannot see how the trial judge found accidents which occurred when motorists were travelling in the opposite direction relevant to the issue of the respondent's knowledge of a risk to motorists while at the same time suggesting that the fact that Mr. Nikolaisen had driven the road in the opposite direction twice was irrelevant to the issue of whether [page332] or not he would have recognized that the curve posed a risk or that he would have reacted to a warning sign. This discrepancy aside, I find the fact that Mr. Nikolaisen had travelled Snake Hill Road in the same direction when he left the Thiel residence to go to the Jamboree the evening before the accident highly relevant to the causation issue. The finding that the outcome would have been different had Mr. Nikolaisen been forewarned of the curve ignores the fact that he already knew that the curve was there. I agree with the respondent that the obvious reason Mr. Nikolaisen was unable to safely negotiate the curve on the afternoon of the 18th, despite having negotiated this curve and others without difficulty in the preceding 18 to 20 hours was the combined effect of his drinking, lack of sleep and lack of food.

169 In conclusion on the issue of causation, I wish to clarify that the fact that the trial judge referred to some evidence to support her findings on this issue does not insulate those findings from review by this Court. The standard of review for findings of fact is reasonableness, not absolute deference. Such a standard entitles the appellate court to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion. The logic of this approach was aptly explained by Kerans, supra, in the following passage at p. 44:

> The key to the problem is whether the reviewer is to look merely for "evidence to support" the finding. Some evidence might indeed support the finding, but other evidence may point overwhelmingly the other way. A court might be able to say that reliance on the "some" in the face of the "other" was not what the reasonable trier of fact would do; indeed, it might say that, in all the circumstances it was convinced that to rely on the one in the face of the other was quite unreasonable. To say that "some evidence" is enough, then, without regard to that "other [page333] evidence" is to turn one's back on review for reasonableness.

D. Did the Courts Below Err in Finding that no Common Law Duty of Care Exists Alongside the Statutory Duty Imposed Under Section 192 of The Rural Municipality Act, 1989?

170 The appellant urges this Court to find that a common law duty of care exists alongside the statutory duty of care imposed on the respondent by s. 192 of The Rural Municipality Act, 1989. According to the appellant, the application of the common law duty of care would free the Court from the need to focus on how a reasonable driver exercising ordinary care would have navigated the road in question. The appellant submits that the Court would instead apply the "classic reasonableness formulation" which, in its view, would require the Court to take into account the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost of preventing that harm. The appellant argues that the respondent would be held liable under this test.

171 The courts below rejected the above argument when it was put to them by the appellant. I would not interfere with their ruling on this issue for the reason that it is unnecessary for this Court

to impose a common law duty of care where a statutory one clearly exists. In any event, the application of the common law test would not affect the outcome in these proceedings.

172 I agree with the respondent's submissions that in this case, where the legislature has clearly imposed a statutory duty of care on the respondents, it would be redundant and unnecessary to find that a common law duty of care exists. The two-part test to establish a common law duty of care set out in Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2, simply has no application where the legislature has defined a statutory duty. As was stated by this Court in Brown [page334] v. British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420, at p. 424:

> ... if a statutory duty to maintain existed as it does in some provinces, it would be unnecessary to find a private law duty on the basis of the neighbourhood principle in Anns v. Merton London Borough Council, [1978] A.C. 728. Moreover, it is only necessary to consider the policy/operational dichotomy in connection with the search for a private law duty of care.

All of the authorities cited by the appellant as support for the imposition of an independent common law duty of care can be distinguished from the case at hand on the basis that no statutory duty of care existed (Just, supra; Brown, supra; Swinamer v. Nova Scotia (Attorney General), [1994] 1 S.C.R. 445; Ryan, supra).

173 In addition, I find that the outcome in this case would not be different if the case were determined according to ordinary negligence principles. First, were the Court to engage in a common law analysis, it would still look to the statutory standard of care as laid out in The Rural Municipality Act, 1989, as interpreted by the case law in order to assess the scope of liability owed by the respondent to the appellant. As this Court stated in Ryan, supra, at para. 29:

> Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

174 Moreover, even under the common law analysis, this Court would be called upon to question the type of hazards that the respondent, in this case, ought to have foreseen. Whatever the approach, it is only reasonable [page335] to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver.

175 The courts have long restricted the standard of care under the statutory duty to require municipalities to repair only those hazards which would pose a risk to the reasonable driver exercising ordinary care. Compelling reasons exist to maintain this interpretation. The municipalities within the province of Saskatchewan have some 175,000 kilometres of roads under their care and control, 45,000 kilometres of which fall within the "bladed trail" category. These municipalities, for the most part, do not boast large, permanent staffs with extensive time and budgetary resources. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard. Accordingly, it is a change that I would not be prepared to make.

VII. Disposition

176 In the result, the judgment of the Saskatchewan Court of Appeal is affirmed and the appeal is dismissed with costs.

cp/e/qllls

TAB J

Case Name:

Waxman v. Waxman

Between
Morris Waxman and Morriston Investments Limited, plaintiffs (respondents), and
Chester Waxman, Chester Waxman in trust, Chesterton Investments Limited, Robert Waxman, Gary Waxman, Warren Waxman, I. Waxman & Sons Limited, The Greycliffe Holdings Limited, Robix Financial Corporation Limited, Circuital Canada Inc., RKW Standardbred Associates Inc., RKW Standardbred Management Inc., and Glow Metal Trading Inc., defendants (appellants)
And between
I. Waxman & Sons Limited and Chester Waxman, plaintiffs by counterclaim, and
Morris Waxman, Michael Waxman, Shirley Waxman, Douglas Waxman, The Waxman Holding Corporation Inc., Morriston Investments Limited, Solid Waste Reclamation Limited, Solid Waste Reclamation Inc. and General Environmental Technologies Corporation, defendants to counterclaim
And between
Morris Waxman, plaintiff (respondent), and
I. Waxman & Sons Limited, defendants (appellants)
And between
Morris Waxman, Michael Waxman and Solid Waste Reclamation Limited, plaintiffs (respondents), and
Chester Waxman, Robert Waxman, Gary Waxman and I. Waxman & Sons Limited, defendants (appellants)
And between
Chester Waxman, Warren Waxman, Robert Waxman, Gary Waxman, Brenda Halberstadt and I. Waxman & Sons Limited, plaintiffs by counterclaim, and
Morris Waxman, Michael Waxman, Douglas Waxman, Solid Waste Reclamation Limited and The Waxman Holding Corporation Inc., defendants by counterclaim
And between
Morris Waxman and Morriston Investments Limited, plaintiffs (respondents), and
Taylor Leibow, Wayne Linton and I. Waxman & Sons Limited, defendants (appellants)

And between
Morris Waxman and Morriston Investments Limited, plaintiffs (respondents), and
Paul Ennis, Q.C. and Ennis & Associates, defendants (appellants)
And between
Morris Waxman and Morriston Investments Limited, plaintiffs (appellants), and
Taylor Leibow, Wayne Linton and I. Waxman & Sons Limited, defendants (respondents)

[2004] O.J. No. 1765

186 O.A.C. 201

44 B.L.R. (3d) 165

132 A.C.W.S. (3d) 1046

Docket Nos. C38611, C38616 and C38624

Ontario Court of Appeal
Toronto, Ontario

Doherty, Laskin and Goudge JJ.A.

Heard: April 22-25, 28-30 and May 1-2, 5-8, 2003.
Judgment: April 30, 2004.

(752 paras.)

Civil procedure -- Appeals -- Grounds for review -- Misapprehension of or failure to consider evidence -- Standard of review -- Pleadings -- Amendment of -- Statement of claim -- Contracts -- Breach of contract -- Remedies -- Damages -- Consensus, lack of -- Undue influence -- Corporations and associations law -- Corporations -- Directors -- Duties -- Fiduciary duties -- Damages for breach -- Actions -- Against corporations and directors -- Shareholders -- Rights -- Sale of shares -- Liability -- To other shareholders -- Shares -- Transfer -- Damages -- For torts -- Breach of fiduciary duty -- Civil evidence -- Witnesses -- Credibility -- Legal profession -- Liability -- Standard of care and negligence -- Professional responsibility -- Professions -- Other -- Auditors -- Professional duties -- Fiduciary duties -- Tort law -- Interference with economic relations -- Breach of fiduciary obligation -- Contracts -- Breach of -- Inducing breach.

Appeal by the defendant brother Chester Waxman from a judgment substantially allowing the plaintiff brother Morris Waxman's claims against Chester and others. Morris had alleged that Chester had breached his fiduciary duty by cheating Morris out of his half of IWS, the family scrap metal busi-

ness. Morris claimed that Chester had engineered a surreptitious sale to himself of Morris' interest in the company, had wrongfully dismissed Morris as president of IWS, and had runn IWS to Chester and his sons' personal advantage between 1979 and 1998. At trial, it was determined that Morris was entitled to half of the profits and equity realized by IWS over the 19-year period in question, as well as punitive damages and two years' salary for wrongful dismissal. Morris also recovered damages from the family lawyer for the latter's role in the sale and transfer to Chester of Morris' shares in IWS. Morris also recovered $2.6 million in damages for Chester's interference in the economic relations of SWRI. Morris also succeeded in his claim against the IWS' comptroller, but was unsuccessful in his claim against the family's accountants. Chester appealed, arguing that the judge's factual errors were so numerous as to undermine the entire judgment. Morris appealed the holding that the family accountants did not breach their duty to him.

HELD: Appeal allowed in part. While there was no basis upon which to interfere with the significant findings of fact or of liability, the quantum of damages was slightly reduced. The case turned on credibility. The trial judge's credibility assessments flowed from a detailed consideration of the entirety of the evidence. Her conclusion that Chester had fabricated a case against Morris while attempting to prevent Morris from pursuing his action was not unreasonable. There was no evidence that the trial judge reasoned from a predetermined conclusion. There was no clear of palpable error in the trial judge's reasoning. Morris' appeal was dismissed. The family accountants did not owe Morris personally a duty of care in tort, as auditors, as fiduciaries, or based on its historical relationship with the brothers. Indeed, it would have been inappropriate for the accountants to report Chester's activities to Morris, absent a specific request from Morris that they do so, as they would then have been placed in a conflict of interest. The accountants owed a duty of care to IWS and the shareholders collectively.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 6(1), 134(4).

Ontario Business Corporations Act, R.S.O. 1990, c. B.16 , s. 129(1), 248(1), 248(2), 248(3).

Appeal From:

On appeal from the judgments of Justice Mary Anne Sanderson of the Superior Court of Justice dated June 27, 2002, reported at (2002) 25 B.L.R. (3d) 1.

Counsel:

Alan Lenczner, Q.C. and Lorne Silver, for Chester Waxman et al. and Wayne Linton.
Barbara Murchie, for Paul Ennis and Ennis & Associates (C38611) and Paul Ennis.
Frank Bowman, Chris Hluchan and Sandy M. DiMartino, for Taylor Leibow. (C38616, C38611 and C38624)
Robert S. Harrison and Richard B. Swan, for Morris Waxman et al. (C38611 and C38616)

Table of Contents

The following judgment was delivered by

THE COURT:--

I

INTRODUCTION

1 Isaac Waxman arrived in Canada from Poland in 1911. Within a few years, he was providing for his growing family by selling scrap metal and other junk he collected using a horse and wagon. By the time Isaac died in 1972, his modest enterprise had become a multi-million dollar family business operating as I. Waxman and Sons Ltd. ("IWS").

2 Isaac's sons, Morris and Chester, began to work in the business in the 1940s. Blessed with strong work ethics, different and complementary skills, and a complete trust in each other, the brothers played a large role in the growth and prosperity of the business throughout the 1950s and 1960s. In the years immediately following Isaac's death in 1972, Morris and Chester continued to run the business together. Each owned fifty per cent of the shares of IWS and for all intents and purposes, treated the business as a partnership. It continued to grow and prosper. There was every reason to believe that this remarkable family success story would continue into a third generation of Waxmans, Morris' two sons and Chester's three sons.

3 By 1988, everything had changed. The love and mutual respect between Chester and Morris were gone, replaced by the powerful animosity that only a bitter lawsuit among family members can generate. The brothers and their sons have spent much of the last fifteen years and many, many millions of dollars trying to prove that each was cheated by the other. The accusations and recriminations run the full gamut from the dishonourable through the dishonest to the downright criminal. Whatever the eventual legal outcome, Isaac's dream that his two sons should "share and share alike" in the business he started has been shattered.

4 These appeals are the latest round in this protracted and bitter fight. Chester and those aligned with him were largely unsuccessful at trial. They challenge almost every aspect of the trial judgments. Morris and his supporters resist Chester's appeals and appeal against the one part of the trial judgment that went against Morris and his supporters.

5 Because of the length of the trial and the complexity of the issues, these reasons are lengthy and, on occasion, repetitive. In essence, we have concluded that:

* there is no basis upon which to interfere with any of the significant findings of fact;
* there is no basis upon which to interfere with the findings of liability;
* the quantification of damages flowing from those findings should be varied downward to a relatively minor degree; and
* Morris' appeal should fail.

II

OVERVIEW OF THE PROCEEDINGS

6 In December 1998, some ten years after Morris Waxman first commenced legal proceedings, five actions proceeded to trial before Sanderson J. The trial lasted over two hundred court days. In June 2002, Sanderson J. delivered lengthy reasons in which she found in Morris' favour on most claims.

7 Three of the actions involved claims by Morris against Chester, his sons Robert, Warren and Gary, and IWS. In two of those actions Chester counterclaimed against Morris and his family, including his son Michael. In addition to these three actions, Morris commenced a fourth action against Paul Ennis, his lawyer, and a fifth action against IWS' accountants, Taylor Leibow, and IWS' comptroller, Wayne Linton.

8 The claims and counterclaims in the five actions revolve around the operations of two corporate entities, IWS and Solid Waste Reclamation Inc. ("SWRI"). The claims concerning IWS ("the IWS claims" or "the main action"), relate to the ownership of the shares in that company after December 1983, and the operation of IWS between 1979 and 1988. In essence, Morris alleged that Chester breached his fiduciary duty to Morris by cheating Morris out of his fifty per cent interest in IWS and further breached that duty by operating IWS between 1979 and 1988 to the personal advantage of Chester and his sons, and to the exclusion of the legitimate interests of Morris and his sons. Morris claimed that Chester and/or his sons:

* caused Morris unwittingly to sign documents transferring Morris' fifty per cent interest in IWS to Chester in December 1983; at the same time caused Morris, again unwittingly, to sign lease documentation purporting to lease properties jointly owned by Morris and Chester to IWS on terms that were grossly unfair to Morris' interests; (For convenience we will refer to these purported transactions as the "share sale" and the "lease".)
* after 1983, excluded Morris from his fifty per cent participation in the equity and profits of IWS;
* improperly distributed the equity of IWS to themselves by way of bonuses in 1979, 1981 and 1982;

* under the guise of providing trucking services to IWS, improperly diverted assets belonging to IWS to corporate entities owned by Chester's sons, Robert and Gary, and controlled by Robert; and
* improperly fired Morris as president of IWS in October 1988.

9 Morris also advanced his IWS claims relying on the oppression provisions of the Ontario Business Corporations Act, R.S.O. 1990, c. B.16 ("OBCA").

10 Morris' suit against Ennis arose out of the share sale in December 1983. He contended that Ennis, who was his long-time lawyer, acted negligently and in breach of the duty that he owed to Morris in connection with the share sale and lease in December 1983.

11 Morris claimed against Taylor Leibow and Linton in relation to both the share sale and the alleged improper diversion of the assets and equity of IWS to Chester and his sons. Morris alleged that Taylor Leibow and Linton breached the duty of care they owed to Morris in connection with those transactions.

12 Chester denied the IWS claims. He contended that far from misappropriating IWS assets or diverting profits from the company after 1979, he and his sons led IWS to an era of unparalleled prosperity. Chester claimed that during a difficult recession in 1982, Morris decided that he wanted to sell his interest in IWS. After lengthy negotiations, Chester agreed to buy Morris' shares. Morris did not want to tell his family about the sale, so he and his brother agreed that he would keep the office of president and many of the benefits connected with that position to preserve appearances. Chester contended that Morris came to regret the sale of his shares when IWS flourished under the leadership of Chester and his sons. Instead of taking responsibility for the decision he made to sell his shares, Morris, urged on by his son Michael, falsely accused Chester, Ennis, Linton and Taylor Leibow of misleading him and taking advantage of him. Lastly, Chester argued that IWS had ample cause to fire Morris in October 1988 as by that time he was actively working against the business interests of IWS.

13 Morris' SWRI claims arise out of events which occurred in 1988 and 1989, after the business and personal relationship between Morris and Chester had broken down. Morris and Michael ran SWRI from 1982 onward. SWRI was in the refuse business and had extensive dealings with Philip Environmental Inc. ("Philip"). Morris alleged that in 1988 Chester set out to destroy the business of SWRI as part of a strategy to impoverish Morris so that he could not pursue his IWS claims against Chester. Morris alleged that Chester and Robert, using various means, including applying economic pressure on Philip and forging documents, caused Philip to stop doing business with SWRI, thereby leading to the breach of Philip's agreement with SWRI and ruining the business of SWRI.

14 Chester denied the SWRI claims, and in counterclaims advanced his own SWRI claims. Chester contended that he and Robert learned of the business affairs of SWRI in 1988 and became concerned that Morris was operating his own business to the detriment of IWS. Chester testified that he became aware of the SWRI operation before Morris sued him. Chester contended that Morris issued the IWS claims as a pre-emptive strike only after Morris learned that Chester and Robert had discovered that Morris and Michael were using SWRI to steal business from IWS. In the counterclaim Chester alleged that Morris and Michael used SWRI to divert business opportunities and profits from IWS to themselves between 1982 and 1989. He also advanced several relatively minor miscellaneous claims against Morris and Michael. In a second counterclaim brought by Chester in the inducing breach of contract action, Chester alleged that his children owned fifty per cent of the SWRI

shares and that Morris had attempted to falsify the books and records of SWRI to make it appear as though his two sons owned all of the shares of the company.

15 Morris was largely successful at trial. On the IWS claims, the trial judge held that Morris had not sold his shares to Chester in December 1983 and that Chester held those shares in trust for Morris from December 1983 onward. She ordered the shares returned to Morris. In addition, she held that:

* Morris was entitled to fifty per cent of the profits generated by IWS and fifty per cent of any equity distributed by IWS to Chester and his sons between December 1983 and the release of her reasons in June 2002. She directed a reference to determine the amount of those profits and provided formulae for that determination;
* Morris was entitled to punitive damages of $350,000 from Chester and IWS;
* Morris was entitled to recover fifty per cent (minus certain payments that had been made to him) of bonuses paid to Chester and his sons by IWS in the years 1979, 1981 and 1982;
* Morris was entitled to recover certain profits ($1,180,073) improperly diverted from IWS to corporate entities that provided trucking services to IWS and were controlled by Robert;
* Morris was improperly dismissed as president of IWS in October 1988 and was entitled to damages from IWS equal to two years salary; and
* Morris was entitled to recover $98,000 for Chester's breach of contract in relation to the transfer by Morris in 1986 of his property in Ancaster, Ontario to Warren, Chester's oldest son.

16 Morris' claims against IWS under the oppression provisions of the OBCA also succeeded. The trial judge held that Morris could recover from IWS his share sale damages, the damages arising from the improper bonus payments, and the damages related to the improper diversion of IWS profits to trucking companies controlled by Robert.

17 The trial judge made tracing orders with respect to the distributions of profit from IWS between December 22, 1983 and June 27, 2000, the improper payment of bonuses, and the wrongful diversion of IWS profits to companies owed by Chester's sons. She declared that for the purposes of the tracing orders, Chester's sons were not bona fide purchasers for value without notice.

18 Morris also succeeded on his IWS claim against his lawyer, Ennis. The trial judge concluded that Ennis was liable for breach of fiduciary duty, breach of contract and negligence in connection with the share sale transaction and that Morris was entitled to damages from Ennis measured in the same way as the damage assessment made against Chester in connection with the share sale.

19 The trial judge concluded that Morris had made out his IWS claims against Linton and that Morris was entitled to recover from Linton the amounts awarded in connection with the share sale, the improper bonus payments and the improper diversion of IWS profits to corporate entities controlled by Chester's sons.

20 Morris' claims against Taylor Leibow were dismissed.

21 Morris also succeeded on the SWRI claims. The trial judge held that Chester, Robert and IWS had induced Philip to breach its contracts with SWRI. She awarded damages in the amount of $2.5 million plus punitive damages of $100,000. Chester's counterclaims were dismissed save for some limited success on the miscellaneous components of his counterclaim. He was awarded damages totalling about $76,000.

22 Chester appeals. He challenges most, if not all, of the critical findings of fact made by the trial judge. Chester also raises many legal issues relating to liability, the appropriateness of the non-pecuniary remedies awarded by the trial judge, and her damage assessments.

23 Ennis appeals. He attacks the trial judge's findings of fact and further argues that even if those findings stand, the trial judge erred in awarding a "trust" level of damages against him.

24 Linton appeals. He also challenges the trial judge's findings of fact and specifically contends that the finding that he was liable for knowing assistance or collusion with Chester and his sons in the structuring of the share sale, the improper payment of bonuses, and the diversion of profits from IWS was unfounded in fact and unavailable in law.

25 Morris appeals the dismissal of the action against Taylor Leibow. He argues that the trial judge erred in law in holding that Taylor Leibow did not owe him a duty of care in connection with the improper diversion of IWS profits and the improper payment of bonuses by IWS. Morris also contends that the trial judge erred in law in finding that Taylor Leibow did not owe him a fiduciary duty. Lastly, Morris submits that the trial judge erred in holding that an undertaking given by Morris after the litigation started foreclosed his claim against Taylor Leibow. Taylor Leibow supports the holding of the trial judge and, in what it refers to as a cross-appeal, advances arguments rejected by the trial judge, which if successful would also lead to the dismissal of the action against Taylor Leibow.

26 The appeals were heard over thirteen days in April and May 2003. The number and complexity of the grounds of appeal necessitated lengthy facta, multi-volume compendia, and many volumes of legal authorities. The material filled the courtroom. In the course of oral argument, which extended over some sixty hours, counsel made extensive reference to this material and filed substantial additional written material. The industry, forensic skills and civility of counsel throughout the appellate process were greatly appreciated by the court. Like the trial judge, we commend counsel for reflecting the finest tradition of the bar, in what for their clients is a very bitter dispute.

III

THE EVIDENCE: AN OVERVIEW

27 The evidence at trial was extensive, detailed and contentious. Counsel left no evidentiary stone unturned and no forensic blow unstruck. The evidence ranged over the entire lives of Morris and Chester, but concentrated on the events between the mid-1970s and the late 1980s. It included not only detailed evidence from those involved in the events, but also copious and complex expert evidence. Some of the specific events, standing alone, would have led to a relatively complex commercial trial.

28 The trial judge had a daunting task. She had to resolve a myriad of difficult factual and legal questions. In the main, the evidence presented dramatically opposed versions of the key events. The trial judge had to make critical credibility assessments, which often left her with no realistic choice but to choose one of the two versions of events placed before her. Whatever may be said about the

correctness of the trial judge's conclusions, her reasons, which extend over 2,618 paragraphs, are a model of organization, thoroughness, and clarity. They provide a detailed examination of virtually every issue raised at trial, fully inform the parties about why she decided the issues the way she did, and afford the dissatisfied parties with a full and complete opportunity to challenge the result on appeal. The trial judge's reasons also provided valuable assistance to this court in gaining an understanding of this factually and legally complex litigation.

29 Many of the grounds of appeal challenged findings of fact, thereby requiring a close review of the evidence. Others, which raise legal issues, also require a clear understanding of the factual substrata underlying those issues. To facilitate our review of the evidence, we begin with a brief description of the principal individuals, corporate entities, and properties referred to repeatedly in the evidence.

The Waxmans

Morris Waxman: Born in 1925, son of Isaac and older brother of Chester. Married Shirley in 1954. Father of Michael, Douglas and Shirley.

Michael Waxman: The older son of Morris, born in 1956. After obtaining an MBA in 1981, he wanted to become involved in the business of IWS. Morris also wanted Michael to be involved. Michael operated SWRI with his father after 1982. He is the prime mover on Morris' side of the litigation and is despised by Chester and Robert, who blame him for many of the problems that developed between the families.

Douglas Waxman: Morris' second son, born in 1963. A shareholder of SWRI. Only peripherally involved in the relevant events.

Chester Waxman: Son of Isaac Waxman born in 1926, a little more than a year after his brother, Morris. Married Bailey in 1951. Father of Warren, Robert, Gary and Brenda.

Warren Waxman: Born in 1953. Oldest son of Chester. Began to work full-time at IWS in 1974 as a salesman/buyer. He was principally involved in the ferrous division (iron scrap) of the business.

Robert Waxman: Chester's middle son, born in 1955. He began to work full-time at IWS in 1975 or 1976. Soon he was running the non-ferrous division of IWS. In Morris' eyes, Robert took over many of the functions that he had previously performed. Robert also controlled various corporate entities that supplied trucking services to IWS between 1978 and 1984. Chester and Robert are the prime movers on Chester's side of the litigation.

Gary Waxman: Born in 1956. The youngest son of Chester. He began to work full-time at IWS in 1977. Worked primarily as a salesman in the ferrous division of the IWS operation.

The Lawyers and Accountants

Paul Ennis: A partner at Ennis & Associates. Lawyer for IWS, Morris and Chester from early 1970s until 1988.

Kevin Hope: An associate in the Ennis law firm. Assisted Morris in the preparation of a will in late December 1983.

Ramsay Evans and Ralph Hayman: Partners at the law firm of Evans Husband, who were involved in the incorporation of SWRI.

Taylor Leibow: Accounting firm that acted for Morris, Chester, IWS and related companies from the 1940s until at least 1989.

Sam Taylor: The accountant at Taylor Leibow responsible for IWS-related accounts until 1977. He was also a close friend of both Chester and Morris.

Steven Wiseman: Accountant at Taylor Leibow responsible for the IWS-related accounts from 1977 to 1988.

Wayne Linton: Comptroller at IWS from August 1979 to 1988.

Others

Ian Campbell: A business valuator. Prepared valuation of IWS as of December 31, 1978 and December 31, 1979.

Sheldon Kumer: Brother-in-law of Chester and Morris. Long-time employee of IWS and/or related entities.

Allen Fracassi: Principal of Philip, which had extensive business dealing with SWRI in the 1980s. In 1993, Philip purchased the IWS operation from Chester in exchange for cash and shares in Philip.

Corporate Entities

I. Waxman and Sons Ltd. ("IWS"): Initially an unincorporated proprietorship. Incorporated in 1956. As of December 1983, Chester and Morris each held half of the shares of IWS. Before 1981, IWS had three divisions: the ferrous division, which reclaimed and sold iron scrap; the non-ferrous division, which reclaimed and sold metal scrap other than iron, especially copper; and the refuse division, which collected and disposed of garbage. The ferrous and refuse divisions were sold in 1981.

Solid Waste Reclamation Inc. ("SWRI"): Originally incorporated when IWS attempted unsuccessfully to obtain the Hamilton-Wentworth garbage contract. It remained inoperative until 1982. Operated in the refuse business by Michael and Morris between 1982 and 1989.

Lasco: Owned a steel mill that smelted scrap steel. In September 1981, it purchased the assets of the IWS ferrous division and thereafter operated the division as a joint venture with IWS.

IW & S Ferrous Ltd. ("IWS Ferrous"): The joint venture company co-owned by Lasco and IWS after September 1981.

Laidlaw, Superior Sanitation Ltd. ("Laidlaw/Superior"): Purchased the assets, goodwill and customers list of the IWS refuse division in June 1981.

Morriston Investments Ltd. ("Morriston"), Chesterton Investments Ltd. ("Chesterton"): Holding companies of Morris and Chester respectively.

Windermere Investments ("Windermere"): A partnership of Morriston and Chesterton.

Greycliffe Holdings Ltd. ("Greycliffe"): A company incorporated in 1978, owned by Robert and Gary, and controlled by Robert. It provided trucking services for IWS. Continued to do so until February 1984. Morris alleged that Greycliffe grossly overcharged IWS for its services.

Icarus Leasing Inc., Robix Financial Corp., Big Rig Trucking Services Ltd., Servetross: Related companies under the control of Robert and also involved in providing trucking and other services to IWS.

Waxman Resources Inc. ("Waxman Resources"): In September 1993, about five years after this litigation began, Chester caused IWS to transfer substantially all of its assets to Waxman Resources in exchange for shares in that company.

Philip Environmental Inc. ("Philip"): Controlled by Allen Fracassi and his brother operated as a joint venture/subcontractor with SWRI in the refuse business from 1982 until 1989. In September 1993, Philip purchased the shares of Waxman Resources for $12 million plus shares in Philip. By 1997, Waxman Resources had sold the Philip shares for $18.4 million.

Properties

Windermere Road: A property located near Stelco and Dofasco purchased in two separate transactions in the 1950s and put in the names of Morris and Chester. Property was transferred to Morriston and Chesterton in 1963. IWS conducted its business from this property and Morris had an office there until he was fired in 1988. In 1981 when IWS sold its ferrous division, it leased part of Windermere Road to IWS Ferrous. A building referred to as the "Blue Building" and surrounding lands, which were used for the non-ferrous operations, were not included in the lease to IWS Ferrous.

80 Glow Avenue: A property bought by Chester and Morris personally in 1972. The IWS maintenance department was located on this property and it was the operational base for the refuse division of IWS. After September 1981, IWS Ferrous leased this property.

500 Centennial Parkway: This property consisted of 13 acres purchased in 1980, referred to as the "Front 13 Acres", and 7.7 acres purchased in 1981, referred to as the "Back 7.7 Acres". Title in the Front 13 Acres was initially held by IWS. The IWS non-ferrous division operated out of the Front 13 Acres as did SWRI after 1982. Robert and Michael had offices at this location. Title to the Back 7.7 Acres was held in trust for Morriston and Chesterton.

Ancaster property: Property located in Ancaster, Ontario and purchased in 1956. Morris transferred the property to Warren Waxman for $1 in 1986. According to Morris, Chester promised to "straighten out" the share transfer if Morris gave the Ancaster property to Warren so that he could build a home on it.

IV

THE NARRATIVE OF THE IWS CLAIMS

30 For our purposes, we divide the story underlying the IWS claims into eight chapters:

A. the IWS operation up to 1979;
B. the proposed estate freeze;
C. the 1979 bonuses;
D. the sale of the IWS ferrous and refuse divisions in 1981;
E. the 1981-82 bonuses;
F. the Greycliffe trucking operation (1978-84);
G. the share sale and related lease in December 1983; and
H. the descent into litigation (1984-93).

31 Parts of all of these chapters will be revisited when we address various grounds of appeal arising out of separate episodes. At this stage of our reasons, we provide an outline of the relevant evidence, a description of the competing positions of the parties, and a summary of the trial judge's findings of fact.