Prosecuting Highway Maintenance Cases: Basic Principles

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INTRODUCTION

Prosecuting a single-vehicle accident on a Canadian highway is fraught with difficulty. These cases require considerable disbursements and often face a vigorous defense. Typically, expert evidence is required for both standard of care and causation. And, advancing through at least the examination for discovery is generally required to collect all the relevant facts.

This paper does not aim to provide an exhaustive set of best practices in this subject area. Rather, it modestly seeks to provide a brief legal and evidentiary analytical foundation to counsel wishing to advance such a case. Although this paper focuses on winter maintenance cases, it should be noted that highway maintenance cases are not restricted to maintaining against icy roads. Other maintenance activities such as drainage, roadside traffic signs, and structural maintenance, as well as general inspections and controls are not wholly dissimilar and should be considered in the same breath.

BASIC LEGAL PRINCIPLES: SEMINAL CASES

To appreciate the context of a highway-maintenance negligence claim, counsel must be familiar with two Supreme Court of Canada cases: *Just v. British Columbia*, [1989] 2 S.C.R. 1228; and *Brown v. British Columbia (Ministry of Transportation),* [1994] 1 S.C.R. 420.

The *Just* decision is important because it differentiates between policy and operational decisions that public authorities make. On the facts, Mr. Just and his daughter were driving to Whistler when a boulder fell from a wooded slope killing the daughter and seriously injuring Mr. Just. The issue was whether the Ministry's decision as to the frequency of inspections was a policy decision, or an operational decision.

In short, a public authority is under no duty of care to the public where it makes a *bona fide* policy decision. To be considered *bona fide,* the decision must be dictated by financial, economic, social, and political factors or constraints. For example, the decision to inspect a remote, rural highway for hazards every six months may be a *bona fide* policy decision that cannot attract liability. Conversely, a decision to inspect a road in downtown Vancouver for hazards only once every six months likely would not be *bona fide*. Once the public authority sets its operational standard (for example, to inspect a highway for hazards once per day and within three hours of receiving notice of a hazard), failing to comply with their operational standard may lead to a liability finding in a negligence action.

Brown is noteworthy because it applies the *Just* policy/operational distinction in the context of a single vehicle accident on an icy Canadian highway. Mr. Brown's accident happened in November, and at that time the Ministry was still on its "summer schedule" that involved less frequent maintenance. The Supreme Court of Canada ruled that the decision to maintain that schedule was one of policy because the decision involved considerations of financial resources and personnel, as well as negotiations with government unions. It was "truly a governmental decision involved in social, political, and economic factors."[1]

Further in *Brown*, the court found that conducting the "summer schedule" without accessible employee home telephone numbers was negligent. However, the trial judge and the BCCA's findings were that had the employee been reached at home, he still would not have been able to salt/sand the highway prior to Mr. Brown's accident. Therefore, breaching the standard of care was irrelevant because that breach would not have prevented the accident from happening. Without using the language of causation, the court dismissed the appeal.

Also worth mentioning is the frequently cited passage from the SCC that informs the analysis in many cases:

> "…However, the Department is only responsible for taking reasonable steps to prevent injury. Ice is a natural hazard of Canadian winters. It can form quickly and unexpectedly. Although it is an expected hazard it is one that can never be completely prevented. Any attempt to do so would be prohibitively expensive…."[2]

DEFINING THE STANDARD OF CARE

To prove that a maintenance company breached the standard of care, you must be able to define what the standard of care is. You should have a clear picture and be able to articulate the standard of care, and you will likely require expert evidence on point. You can anticipate the defence will take the position that there must be a clear evidentiary record defining the standard of care, including expert evidence, and the court may be persuaded by such an argument.[3]

As a matter of law, the standard of care applicable to a road maintenance contractor has been defined as follows: "…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. What is a reasonable state of repair is a question of fact, depending upon all the surrounding circumstances…"[4]

Frequently, public authorities outsource their maintenance functions to third party contractors, which is effectively a delegation of their operational duties. Maintenance contracts between the public authority and the third party have been accepted as the standard of care, though the legally correct view appears to be that the maintenance contract informs the standard of care.[5] Counsel for the maintenance contractor may argue that the terms of the contract define the upper limit of the standard of care, i.e., they define the ceiling of the standard of care, but not necessarily the floor. While meeting the letter of the contractual terms is indicative that the standard of care has been met, counsel should be alive to the fact these remain claims in negligence, not breach of contract. In some instances, the contractual terms do not clearly identify the breadth of operational duties. For example, it may say "ice as needed". Much of the analysis may go beyond the letter of the contract, and rather must be discussed in reference to the conditions present and decisions made on the ground by the contractor with foreseeability forefront in mind.

PARTIES

The Ministry has delegated its maintenance operational duties of provincial highways to various third party maintenance contractors. Municipalities may or may not do so. When a maintenance company is responsible for the operational compliance, counsel should query whether they require the Ministry/Municipality as a party. The downside of naming the extra party is there may be no liability whatsoever if your case is only an operational maintenance issue. However, an upside of naming the Crown early is additional document production. The documents from the Crown may include a fuller tender offer than the ones directly available from the maintenance company. You may also obtain other useful information about the highway and possibly witness statements. Keep in mind, there is no right to a jury when the Crown is involved.

DOCUMENTARY EVIDENCE

Through document discovery you can expect to obtain weather reports from Environment Canada and a private weather forecasting service. You should also obtain the maintenance contract that assists in defining the standard of care. Look for employee activity information such as, but not limited to, employee time cards, journal logs, and telephone dispatch records.

You may also be interested to find tender documents. These are the tender offers by a maintenance company for a contract with the ministry in a particular area, which are often a great source of information. They give you a certain insight into particular stretches of highway within a service area. However, representations in tender documents that offer services in excess of the ultimate maintenance contract do not raise the standard of care to that higher level.

EXPERT EVIDENCE

There are three general categories of experts that are qualified to opine on liability in a road maintenance case. They are engineers, meteorologists, and industry specialists. Counsel should assume that they require an expert on both standard of care and causation. Advance a highway maintenance case without proper expert evidence at your peril, see *Collins,* supra, since Courts are hesitant to speculate in an area beyond the knowledge of a layperson. For a good overview of how Courts treat various experts in a highway maintenance case, see generally *Belitchev v. Emcon Services Inc.*, *supra*; and *McPhee v. Her Majesty the Queen et al.*, 2007 BCSC 568; 2008 BCCA. 254. Note how some experts are only able to comment on either standard of care or causation, while some can comment on both.

CONCLUSION

Prosecuting highway maintenance cases are tough and expensive. It is important to compile the evidence, obtain your expert(s), and refine your theory of liability as the case proceeds through discoveries. Ensure you can define what the standard of care is. Be able to provide evidence that shows the defendants breached the standard of care. And ensure you can point to evidence, both expert and otherwise, which shows that the breach caused the accident. V

1 *Brown v. British Columbia (Ministry of Transportation),* [1994] 1 S.C.R. 420, paragraph 39

2 *Brown v. British Columbia (Ministry of Transportation), supra, paragraph 33*

3 *Collins v. Rees,* 2012 BCSC 1460, paragraphs 23, 36-39.

4 *Benoit v. Farrell Estates*, 2004 BCCA 348, paragraph 39, citing: *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235, 2002 SCC 33, paragraph 38; *Partridge v. Rural Municipality,* [1929 3]W.W.R. 555 at 558-59

5 *Nason v. Nunes et al.*, 2007 BCSC 266, paragraph 31-46; *Holbrook v. Argo Road Maintenance Inc.*, 1996 BCSC 3600 paragraphs 26 to 37

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