See para. 156

Case Name:

Herbert (Litigation guardian of) v. Brantford (City)

Between
Clara Herbert, infant Under the age of 18 years by her Litigation Guardian, Everill Muir, the said Everill Muir, Gary Muir, Kiri Lyn Muir, Kevin Muir and Kelly Baird, Plaintiffs, and
The City of Brantford, Defendant

[2010] O.J. No. 2174

2010 ONSC 2681

72 M.P.L.R. (4th) 108

189 A.C.W.S. (3d) 271

2010 CarswellOnt 3461

Court File No. C04-12047

Ontario Superior Court of Justice
Brantford, Ontario

A.C.R. Whitten J.

Heard: April 6-9, 14-17, 20-24 and 27-28, 2009.
Judgment: May 7, 2010.

(174 paras.)

Tort law -- Negligence -- Contributory negligence -- Apportionment of liability -- Plaintiff's knowledge of danger -- Action for damages for personal injuries suffered in a bicycle accident allowed in part -- Plaintiff rode bicycle on a recreational trail built by defendant City -- On part of trial where there was no recovery zone on side, plaintiff attempted to pass other cyclist, thereby going off trail and hitting a rock -- Plaintiff rendered a quadriplegic -- Plaintiff 60 per cent liable -- Plaintiff knew of trail conditions and attempting to pass the cyclist in that section was a serious lapse of judgment -- Plaintiff was speeding -- Combination of his speed and trail condition placed

his balance in jeopardy.

Tort law -- Occupier's liability -- Duty of occupier -- Knowledge of danger -- Action for damages for personal injuries suffered in a bicycle accident allowed in part -- Plaintiff rode bicycle on recreational trail built by defendant City -- In area with no recovery zone, plaintiff passed another cyclist, thereby gong off trial and hitting rock -- Failure of City's inspection system to pick up on and address the spalling of path in such a dangerous location given the absence of a recovery zone was a reckless disregard by City towards plaintiff -- As the site had no recovery zone due, it was imperative that the trail surface be as perfect as possible.

Action for damages for personal injuries suffered in a bicycle accident. The plaintiff was riding his bicycle on a recreational trail built by the defendant City. He was an experienced cyclist who knew the trail system well. On his way up hill, the plaintiff encountered two cyclists as he came around a corner of a bridge abutment in a hazardous section of the trial there was little room to pass. In order to pass the cyclist, the plaintiff moved to the side in a part where there was no recovery zone, his bicycle left the trail and hit a rock. The plaintiff was rendered a quadriplegic as a result of his injuries. The plaintiff alleged that the design and maintenance of the trail constituted a pattern of reckless disregard by the defendant City towards him. He alleged that the City knew the importance of a recovery zone or clear path shoulder and failed to maintain same and failed to note or repair a section of unravelling asphalt that existed at the time of the accident.

HELD: Action allowed in part. The plaintiff was found 60 per cent liable. The City should have been extra vigilant about sticking to its 30-day inspection schedule in this area of the trail which required particular attention. There was evidence of unravelling pavement at the accident scene which was not caught in the inspection before and after the accident. The City recognized that there was a danger of a collision between cyclists at that location. As the site had no recovery zone due to the geographical limitations, it was imperative that the trail surface be as perfect as possible in order to not contribute to the danger presented by the absence of the desired zone. The failure of the inspection system to pick up on and address the spalling in such a dangerous location given the absence of a recovery zone was a reckless disregard. As an experienced cyclist who knew this area of the trail well, the plaintiff had a duty to maintain a proper lookout, keep his bicycle under proper control, be prepared to yell or use a bell to alert others of his presence and alter his behaviour as necessary by slowing, stopping or adjusting his route to avoid accidents. Attempting to pass the cyclists on the trail in an area where there was no recovery zone, was a serious lapse in judgment on the plaintiff's part. There was also evidence that the plaintiff was speeding. The combination of his speed and that trail condition placed his balance in jeopardy.

Statutes, Regulations and Rules Cited:

Occupiers' Liability Act, R.S.O. 1980, c. O.2, s. 2, s. 3, s. 4, s. 4(4), s. 4(4)(f)

Counsel:

Mr. Robert Hooper and Mr. Lawrence Hatfield, counsel for the Plaintiffs.

Mr. C. Kirk Boggs and Mr. Stuart Zacharias, counsel for the Defendant.

JUDGMENT

A.C.R. WHITTEN J.:--

I Introduction

1 On the afternoon of September 23, 2003, Gary Muir set out for a bicycle ride along the scenic Gordon Glaves Memorial Pathway System (the Trail). The Trail is a recreational pathway, which runs along the north side of the Grand River in the City of Brantford (the City). Mr. Muir was a lifetime resident of Brantford and was familiar with the City's trail system and this Trail in particular. Specifically, Mr. Muir had passed under the Lorne Bridge on numerous occasions without difficulty. However, on the date in question, Mr. Muir went off the trail downstream of the Lorne Bridge, sustaining serious injuries.

II THE ISSUES

2 This Court must decide if the defendant, the City, acted with reckless disregard of the presence of the plaintiff, Mr. Muir, and hence breached a duty owed to him. The allegations are that the City acted with reckless disregard in designing, building and maintaining the Trail, but for which Mr. Muir would not have gone off the Trail and been rendered a quadriplegic.

3 In order to determine whether the City has fulfilled its obligation under the Occupiers' Liability Act, it is first necessary to establish, based on the evidence of Mr. Muir and several witnesses, exactly what happened on that fateful day.

4 If Mr. Muir proves a version of events that supports a potential cause of action against the City, this Court must determine whether there is a causal link between the City's actions or omissions and Mr. Muir's injuries.

5 The parties have agreed on the amount of damages payable should this Court find a causal link between the City's reckless disregard and the injuries of Mr. Muir; however, in the event that the City is found to be liable, this Court must decide whether Mr. Muir was contributorily negligent and consequently, whether there should be any apportionment of damages.

III THE APPLICABLE LAW

Occupiers' Liability Act

6 The law in Ontario surrounding the obligations of occupiers of premises to others while they are on the premises was drastically changed with the enactment of the Occupiers' Liability Act, R.S.O. 1980, c. O.2 (the "Act").

Common law duty of care superseded

7

2. Subject to section 9, this Act applies in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining the occupier's liability in law in respect of dangers to persons entering on the premises or the property brought on the premises by those persons. R.S.O. 1990, c. O.2, s. 2.

Occupier's duty

8

3.(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

Idem

(2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on the premises.

Idem

(3) The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty. R.S.O. 1990, c. O.2, s. 3.

Risks willingly assumed

9

4.(1) The duty of care provided for in subsection 3(1) does not apply in respect of risks willingly assumed by the person who enters on the premises, but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property.

Criminal activity

10

(2) A person who is on premises with the intention of committing, or in the commission of, a criminal act shall be deemed to have willingly assumed all risks and is subject to the duty of care set out in subsection (1).

Trespass and permitted recreational activity

11

(3) A person who enters premises described in subsection (4) shall be deemed to have willingly assumed all risks and is subject to the duty of care set out in subsection (1),

(a) where the entry is prohibited under the Trespass to Property Act;
(b) where the occupier has posted no notice in respect of entry and has not otherwise expressly permitted entry; or
(c) where the entry is for the purpose of a recreational activity and,

(i) no fee is paid for the entry or activity of the person, other than a benefit or payment received from a government or government agency or a non-profit recreation club or association, and
(ii) the person is not being provided with living accommodation by the occupier.

Premises referred to in subs. (3)

12

(4) The premises referred to in subsection (3) are,

(a) a rural premises that is,

(i) used for agricultural purposes, including land under cultivation, orchards, pastures, woodlots and farm ponds,
(ii) vacant or undeveloped premises,
(iii) forested or wilderness premises;

(b) golf courses when not open for playing;
(c) utility rights-of-way and corridors, excluding structures located thereon;
(d) unopened road allowances;
(e) private roads reasonably marked by notice as such; and
(f) recreational trails reasonably marked by notice as such. R.S.O. 1990, c. O.2, s. 4.

13 The Act defines and limits obligations with respect to the care and control of property. Significantly, rather than an occupier's liability being dependant on the rigid common law classifications of trespassers, licensees and invitees, section 3 sets out a general duty of care owed by an occupier of premises to others while they are on the premises. Namely, the occupier owes a duty to take such care as reasonable, in all the circumstances of the case, to see that persons entering on the premises are reasonably safe.

14 This duty of care is limited and the Act provides that persons shall be deemed to have willingly assumed all risks when they enter specific premises such as rural or recreational premises and where certain conditions are met. Pursuant to paragraph 4(4)(f) of the Act, the deeming provision applies to several types of premises that are outlined in section 4(4), including "recreational trails reasonable marked as such". The recent Court of Appeal decision Schneider v. St. Clair Region Conservation Authority (2009), 97 O.R. (3d) 81, stated:

Subsections 4(1), 4(3)(c) and 4(4)(f) of the Act work together such that:

A person who enters recreational trails, reasonably marked by notice as such, for the purpose of a recreational activity and without payment of any fee is deemed to have willingly assumed the risks associated with the

> activity. In such cases, the duty of the occupier to the person is "**to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with** reckless disregard **of the presence of the person or his or her property**" (Schneider at para. 28, emphasis mine).

15 There is no suggestion that the City created a danger with a deliberate intent of doing harm to the plaintiff, rather, the question for this Court is whether the City of Brantford acted with reckless disregard of the presence of the plaintiff and hence breached a duty owed to him. In order to answer the question, this Court must first determine the meaning of "reckless disregard".

Reckless Disregard

16 The Court of Appeal pronounced on the meaning of reckless disregard as contained in subsection 4(1) of the Act, in the 1989 case of Cormack v. Mara (Township), [1989] O.J. No. 647 (C.A.). The Court canvassed various interpretations of the word "reckless" in this context and found that it "has been given various meanings ranging from "exhibiting gross negligence towards" to "wilfully causing injury to" anyone who trespasses on the property.

17 After reviewing the case law in this area, the Court stated:

> I conclude that under the present wording of s. 4 of the Occupiers' Liability Act, the legislature has very significantly limited the duty of care owed by an occupier of premises to a snowmobiler who is deemed to accept all the risks of the premises. **The phrase "act with reckless disregard of the presence" of the snowmobiler means doing or omitting to do something which he or she should recognize as likely to cause damage or injury to the snowmobiler present on his or her premises, not caring whether such damage or injury results** (Cormack at paragraph 29, emphasis mine).

18 No cases were produced to this Court that describe reckless disregard as it relates to a recreational trail; however, there is nothing in the Court of Appeal decision in Cormack, which would confine its pronouncement on the meaning of reckless disregard to cases dealing with snowmobile accidents. To the contrary, the Court of Appeal in Schneider, a case involving a cross-country skier injured on a recreational trail, recently applied this definition of reckless disregard. At paragraph 42, the Court stated that the test for reckless disregard is the Cormack test: "doing or omitting to do something which he or she should recognize as likely to cause damage or injury to [the person] present on his or her premises, not caring whether such damage or injury results."

19 In coming to this conclusion, the Court considered the purpose and effect of section 4 of the Occupiers' Liability Act. In particular, the Court stated that the intent of the legislature in imposing a lesser duty of care on occupiers of recreational trails was to encourage occupiers to make their

land available for recreational activities, a public benefit that justifies holding occupiers of such premises to a more limited standard of care.

The Interaction between "Assuming all Risks" and the Occupier not acting with Reckless Disregard

20 As a starting point, the recreational trail user/cyclist can be assumed to accept the risks inherent in the activity. For example, Mr. Muir, as a cyclist is subject to certain risks of dangers wherever he may be as a cyclist. There is a risk he may lose his balance and fall off his bicycle. There is a risk that he, moving on a bicycle may come in contact with an immoveable object or moveable object (possibly another cyclist).

21 It can be assumed that a cyclist accepts that there are risks associated with a recreational trail; otherwise, he or she would not ride upon the trail. Those risks/challenges may very well be part of the charm or attraction associated with the trail.

22 Riding a recreational trail may cause a cyclist to encounter: elevations and descents, curves and straight paths, different topography and different viewpoints or lack thereof (i.e.: blind spots). The kiosk located at the entrance to D'Aubigny Creek reminds cyclists of some basic rules of the "road"; for example, share the path, keep to the right ... Think safety." Furthermore, under the heading "Please note" - it is stated "Trail condition can vary and may change quickly. Some sections may become damaged, flooded or impassable during bad weather. Stay alert." The map on the kiosk cautioned of steep grades in the area of the Lorne Bridge. (ref. Ex. 29, Vol. 2, Tab 28)

23 In McErlean v. Sarel et al. [1987] 61 O.R. (2d) 396, [1987] O.J. No. 873 the Ontario Court of Appeal ruled with respect to a situation which was pre-The Occupiers' Liability Act, R.S.O. 1980, therefore, the formalist classifications applied. However, the opinion is still of utility in that it recognized a base assumption of risk by users (licensees); namely that an occupier "is entitled to assume that ordinary people know and appreciate usual or common dangers and need not therefore, be warned or otherwise protected against them." (underlining mine).

Therefore, the panel proceeded to decide that the occupier's liability was limited to unusual dangers unique to the property.

24 "Unusual danger" was defined by Lord Porter in London Graving Dock Co. Ltd. v. Horton, [1951] A.C. 737 at p.745:

> I think "unusual" is used in the objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises ..." (as quoted at page 11 (Ibid).

25 The panel in McErlean v. Sarel concluded that:

> An occupier's duty is limited to "unusual dangers" on the theory that he or she is entitled to assume that ordinary reasonable people know and appreciate usual or common dangers and need not be therefore warned or otherwise protected against them ... In the final analysis, the issue of what is an unusual danger clearly must depend on the circumstances of the given case. (at p.11)

26 These conclusions have utility in interpreting "reckless disregard" as the concept includes an objective standard; namely, what he or she (the occupier) should recognize as something likely to cause damage. What is being referenced is something beyond what can be assumed by all of us, as ordinary people know, something unusual, something inherently harmful or dangerous. Whatever this danger it is clearly contextual. It may not be obvious. It may be hidden or concealed. It may contain an element of surprise for the user such that response times are diminished, if not eliminated. It may be that the user cannot extricate himself or herself from the situation. It may be of such a nature that, as some jurists have described (i.e.: Justice Potts in Onyschuk v. Silver Harbour Acres Ltd.) (1984), 49 O.R. (2d) 762), it is a "trap". The failure of the occupier to address a known danger of this magnitude would constitute "reckless disregard".

Causation

27 The leading case on causation is Athey v. Leonati (1996), 140 D.L.R. (4th) 235 (S.C.C.). In Athey, the Supreme Court reaffirmed the "but for" test, proven on a balance of probabilities, as the presumptive test for determining causation. Justice Major in Athey v. Leonati stated, at para. 14, "The general, but not conclusive test for causation is the "but for" test which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant".

28 Lewis Klar states one of the primary principles from Athey as follows:

> [T]he "but for" test does not require that the defendant's negligence be the only condition necessary to cause the plaintiff's injury. There will always in fact be other necessary causes that were conditions of the injury occurring. Defendants whose acts were necessary parts of the causal sequence will be fully liable for the injuries. Where the other causes were non-tortious, the defendants will bear the entire burden. Where the other causes were tortious, there can be apportionment between defendants, although in most jurisdictions each defendant will remain fully liable to the plaintiff. Where the other cause was the plaintiff's own fault, the rules of contributory negligence will apply (Klar at 393-394)

29 In some cases, however, the "but for" test will be a difficult if not impossible burden for would-be plaintiffs. Where the "but for" test is unworkable due to the unique factual circumstances, the "material contribution" test will apply.

30 In Resurfice v. Hanke, [2007] 1 S.C.R. 333, the Supreme Court did not alter any of the principles of causation. The Supreme Court emphasized that the "but for" test has never been

displaced and remains the primary test for causation in negligence actions (Resurfice at paras. 21-22). There must be a "substantial connection" between the injury and the defendant's conduct (Resurfice at para. 23). The Court clarified the circumstances when the "but for" test can be abandoned in favour of the "material contribution" test. Namely, when two requirements are met:

> First, it must be **impossible** for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care [page 344] owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach (Resurfice at para. 25, (emphasis mine).
>
> It should be emphasized that according to the first criterion set out in Resurfice it must be "impossible" for the plaintiff to lead evidence proving causation, not "merely difficult" or "understandably difficult" (B.S.A Investors Ltd v. DSB (2007), 283 D.L.R. (4th) 220 (B.C.C.A.), at para. 39).

31 I find, and the parties agree, that the circumstances of this matter do not present the uncertainties that would require the use of the material contribution test. Thus, the plaintiff, Mr. Muir, must demonstrate that his injuries would not have occurred but for the reckless disregard of the City.

III THE EVIDENCE

32 Gary Muir was born on July 9, 1939. He is a retired secondary school teacher and prior to the accident, he worked part-time for the Brantford Expositor and had been involved in the writing and publishing of several books about the City. Joining him as plaintiffs in this action are his wife of 44 years, an adult son and daughter, a daughter-in law and a grandchild.

33 At the time of the accident, Mr. Muir was 64 years old and an experienced cyclist who had been riding bicycles all his life. Mr. Muir would typically ride two or three times a week for fitness.

34 On September 23, 2003, Mr. Muir was riding a 21-gear hybrid bike made by Giant that he had purchased in the early 1990s. There were no mechanical problems with the bike and the brakes were operating properly. The bike was equipped with "rat trap" pedals, which hold the foot in place but was not equipped with a bell. Mr. Muir was not aware that a bell was required and preferred to

make his presence known by using his voice.

35 Mr. Muir testified that on the day of the accident, September 23, 2003, he arrived and parked in D'Aubigny Creek Park around 2:30 or 3:00 pm. It was a sunny fall day and he was wearing biking shorts, running shoes, a cycling shirt, riding gloves and a helmet. His plan was to pick up a trail towards the Lorne Bridge and, ultimately, back to where he started. He estimated that this ride would take 45 minutes to one hour at a comfortable pace. He was not out to break any records and described himself as being a cautious rider.

36 Mr. Muir testified that on this day, he proceeded east on the Trail without incident for about 25 minutes until he came to the Lorne Bridge. As to his observation of the Trail, Mr. Muir described it as being mostly gravel but stated that the section under the Lorne Bridge is paved. He explained that west of the Lorne Bridge the Trail descends towards the river. The Trail then levels out under the Bridge, before proceeding up an incline east of the Bridge.

37 Mr. Muir has some recollection of going down the hill, having moved from the gravel section of the path to the paved section along the decent. He explained that as the Trail switches to pavement, there is a tendency to speed. He does not remember what he did on the day in question, but stated that he is usually cautious (as there is a risk someone may be coming from the opposite direction) and slows down as he nears the bottom due to the curve in the path.

38 Mr. Muir testified that on the day of the accident, he saw two pedestrians walking together coming down on the other side of the hill (See ink mark on Exhibit 3, Photograph 4, which shows the place where Mr. Muir said he first saw the pedestrians). He described them as walking side by side and talking and said that one of them was over the centre line, slightly in the right lane (his lane) and the other was in the centre of the left lane. He thinks that the person in the left lane was a woman and the person in the right was a man, but he cannot be sure. He is vehement that he did not pass anyone going the opposite direction until he encountered the pedestrians.

39 When he saw the two people, he moved to his right as far over as he could to try to get by the person in his lane. Mr. Muir realized that the person was not moving out of his way and continued to slow down; his pedalling slowed and he lost his forward momentum and control of the bike about one to three bike lengths from the pedestrian. He stated that he fell sideways to the right going face first into some rubble at the side of the path. Once he fell, he remembers saying, to whoever was around, "don't move me, I have fallen on my face and I can't move".

40 Mr. Muir testified that prior to the fall there was no conversation between him and the pedestrians. He estimates that at the most five seconds passed between him seeing the people and his fall. Despite acknowledging that he had time to yell to them and make his presence known, he admits that he did nothing to attract their attention. He explained that it all happened very quickly and his focus was on maintaining his balance. He agreed that he also had time to brake, but he elected to take another course of action by pedaling up the hill rather than stopping. He testified that while this may not have been a perfect decision, he did not have time to think through all of his

options. It was suggested to Mr. Muir that the rat traps were part of the reason that he could not just brake and step down. Mr. Muir agreed that the rat traps impeded him and that trying to get his feet out of the rat traps would have required more concentration than he had at the time he was trying to pedal up the hill and avoid the pedestrians.

41 Mr. Muir testified that he was likely in a high gear at the top of the hill. As to how fast he was going, he said that he could not say but he was probably not going that fast because he knew what was coming up ahead. His usual practice was to alternate between braking, pedalling and coasting but he does not remember what he did on that specific day. When he saw the pedestrians, he would likely have been going down into the lowest gear in order to get up the hill although he does not have a specific recollection of changing his gears that day. Mr. Muir agrees that whatever his speed was, from the time at the top of the hill and then proceeding down through the flat area under the bridge and up the hill to the left, there was time to slow the bike down to a comfortable speed.

42 The person who was in his lane eventually moved over and Mr. Muir thinks that if he had not started to wobble, he would have been able to clear the pedestrians by passing them on his right. Mr. Muir testified that when he began to wobble he was approximately three bicycle lengths away from the pedestrians. He agreed with the suggestion that once he began to wobble it would have been easier for him to put his feet down if he had not had his feet in the rat traps. Instead, when he was approximately one bike length from the pedestrians, he went off the path, tipped over and fell to his right. The next thing he recalls is straddling his bike and not being able to move.

43 There are some gaps in Mr. Muir's version of events that must be filled. In order to determine what actually happened it is helpful to look at the evidence of those who were witnesses to the event and those who arrived on the scene shortly after the accident.

Christina Murray

44 Christina Murray, who lives in Brantford, was a witness to the accident. Ms. Murray testified that on the day in question, she was biking with her friend, Mr. Dutil. Ms. Murray is not very familiar with the area and is not an avid cyclist. Mr. Dutil and Ms. Murray were travelling on the Trail, against the flow of the River. When they approached the Lorne Bridge area, Mr. Dutil told her to stay behind him through the area under the Bridge. She testified that as she started to go down the hill, she saw a cyclist approaching her from the other direction. She testified that from the time she first saw Mr. Muir, just past the arrows on the path, "he was up that part of the hill very quickly".

45 Regarding her left-right positioning in her lane, she rejected the suggestion that she was over the centre line. She said that Mr. Muir was in the centre of his lane and that she was in the centre of her lane. Ms. Murray said her left side possibly could have been on the line, including at the point when she and Mr. Muir were side by side when he went off the path but that she was not over the line.

46 Ms. Murray testified that Mr. Muir was "going fast" and that all of a sudden he jerked to the

right. She acknowledged that in 2004, she told an adjuster, "I saw him steer towards the right; I believe he was riding in the middle of his lane, it was like he steered too straight". With respect to the reference to "steered too straight", Ms Murray testified that this is the same as turning to the right "if there is a bend" and she believes that the path goes slightly to the left at this location. She agrees that "steered" to the right is a more accurate description than "jerked" to the right.

47 Ms. Murray testified that she believes that if Mr. Muir had not turned his handlebars, he would have likely passed her safely. Instead, Mr. Muir went off the path and seconds later, he crashed. She stopped and asked if he was okay but there was no answer. At that point, her friend, Mr. Dutil, came back up the path.

48 Ms. Murray places Mr. Muir's location as being approximately two and a half to three feet off the path and parallel to the path with his head pointing downstream and bicycle between his legs. Ms. Murray stated that the ground below him was gravel and his face was just about in the gravel. There were also small stones around him. Ms. Murray stated that it did not appear to her that Mr. Muir lost consciousness during the one hour or more she spent at the scene.

49 In 2004, Ms. Murray placed a notebook by the Trail to identify the location where Mr. Muir left the Trail. In a photograph (Exhibit 1, Photograph 2), there is a large boulder at the edge of the Trail beside the notebook. At trial, Ms. Murray testified that she now believes that Mr. Muir went off the Trail further up the hill rather than at the location in the picture. Although she did not adopt her original identification of the location as being the place where Mr. Muir went off the trail, I find that this initial belief, as documented in Exhibit 1, Photograph 2, is most likely the correct one. In addition to the real evidence, the likelihood that this location is correct is reinforced by the evidence of Mr. Dutil as well as the evidence of emergency workers on the scene, many of whom noted the presence of a boulder and small rocks in the area where Mr. Muir was found. Because Ms. Murray did not place this notebook at the time of the accident, and in fact, this series of pictures was taken approximately 10 months after the accident, I do not find the change in her evidence to be any reflection on the credibility of her testimony generally. As can be observed in the pictures, the area looks quite different (in terms of lushness of vegetation, placement of rocks and orange fencing) in June of 2004 than it did in September of 2003, and Ms. Murray is not intimately familiar with this trail.

50 With respect to the appearance of the bicycle, Ms. Murray testified that "the tires were really bald, very worn, and the bike itself was a very worn bicycle, well used". This evidence is inconsistent with the photos of the bicycle tendered by Mr. Muir's family and it would appear that Ms. Murray might be mistaken on this point. Ms. Murray did not encounter any signs before the incident advising of the necessity to slow down, of visibility issues, or of a sharp curve ahead.

Mike Dutil

51 Mr. Dutil is 55 years old and lives in Brantford. He was cycling on the trail with Ms. Murray at the time of Mr. Muir's accident and gave evidence with respect to his observations. Mr. Dutil and

Ms. Murray were travelling on the trail and as they approached the Lorne Bridge from the downstream side, Mr. Dutil told Ms. Murray that they had to go single file in the area of the Lorne Bridge and that he would go first. Mr. Dutil testified that he subsequently encountered Mr. Muir and that they passed each other near the top of the hill on the upstream side of the Lorne Bridge. Mr. Dutil stated that Mr. Muir "wasn't going too fast" and was travelling at a "moderate speed". Once Mr. Dutil had reached the top of the hill, he heard a crash and hurried back. He was worried that perhaps Ms. Murray and Mr. Muir had collided. When asked whether the sound he heard was consistent with someone having just tipped over Mr. Dutil replied, "No, it was a crash, for sure."

52 Mr. Dutil found Mr. Muir lying face down on the ground, right around the bend beyond the Lorne Bridge abutment. (See Exhibit #2, Photo #7) Mr. Dutil testified that he was on a flat spot, just off the trail, maybe six inches to a foot, and that there was a big rock in the area. He described the rock as being two feet high and two feet round and in front of Mr Muir's head although he does not remember where exactly it was in front of him. Mr. Dutil believes that Mr. Muir's bicycle was beside him but he is not sure. Mr. Muir had a cut to his forehead.

Evidence of Others on the Scene

53 The Court heard from Dale Vining, an off-duty paramedic who helped Mr. Muir following the accident. Vining places Mr. Muir's body three feet from the path between the path and the rocks on the edge of the river. The ground beneath him was gravel and weeds. He says that Mr. Muir's bike slightly to the side and behind Mr. Muir and the front wheel was bent to some extent. He said Mr. Muir seemed oriented to what was going on and said he could not move his arms or legs. Mr. Muir had wounds to his face.

54 This Court also heard from Captain John Gignac, who had been employed by the City Fire Department for 33 years at the time of the trial. He testified that Mr. Muir was lying in a pile of rocks, face down, three to five feet off the bike path, facing the same angle as the river. He says that Mr. Muir was breathing and speaking, saying that he could not feel his legs.

55 Tom Smith, a firefighter for 10 years, placed Mr. Muir in a little rocky area just at the edge of the path. He said his face was downish and his feet were towards the bridge. Mr. Muir had a cut on his face and mentioned that he could not feel his extremities.

56 Kevin Bibby, a firefighter for six years, said Mr. Muir was in a grassy area with some stones and larger sized rocks. He was a foot and a half off the edge of the path with his head pointed towards the uphill part of path. He said that the wheel was bent and the bike did not look normal. He was unable to say on which level Mr. Muir was conscious but that he was conscious. Mr. Muir had a cut to his face.

57 Kevin Robinson has been a paramedic for 23 years. He testified that Mr. Muir was lying prone on rocks with his head pointing downstream from the bridge. His helmet was broken and he had a one or two inch laceration above his right eye and under the left. In his notes he wrote, "Bike rider

went off trail landing on head", which is a recording of his assumption of what happened at the time. Mr. Robinson testified that Mr. Muir was "fully alert", but appeared mildly distressed and complained of shortness of breath and a headache.

58 Wayne Buckley, a paramedic for 21 years, testified that Mr. Muir was lying face down with head pointing south. He was off to the side lying on broken rock. His bicycle was lying on the asphalt part of the trail, that it had "thin tires rather than thick tires", and that the front wheel was bent. There were facial injuries, which included a laceration to the forehead.

IV

THE POSSIBLE INFERENCES ABOUT THE HAPPENING OF THE EVENT/TO BE DRAWN FROM THE EVIDENCE

59 There are some glaring discrepancies between the evidence of Ms. Murray and Mr. Dutil on the one hand and Mr. Muir on the other. It seems clear that Mr. Muir's evidence, that the people he encountered on the Trail were pedestrians, is mistaken. There is no question that both Ms. Murray and Mr. Dutil were riding bicycles. It is also clear that despite Mr. Muir's assertion that he did not pass anyone going the opposite direction until he encountered the pedestrians, Mr. Dutil did in fact pass by Mr. Muir a short distance below the top of the hill on the upstream side of the Lorne Bridge. Mr. Muir is adamant that his memory is not faulty but there is other reliable evidence before the Court suggesting otherwise. Sometimes memories vary, even where all of the witnesses are acting with the utmost good faith. While a witness may genuinely believe something to be true, the job of the Trier is to absorb and assess a myriad of information and influences in order to determine what is fact. Given the circumstances of trauma and the emotional nature of the events of that fateful day, it is likely that Mr. Muir's observation and recording of the event is skewed and on this point, I prefer the evidence of Mr. Dutil and Ms. Murray.

60 The other issue with Mr. Muir's testimony is his evidence that he had not started up the incline when he saw the pedestrians and that he was moving very slowly. Based on the totality of the evidence, it seems more likely that Mr. Muir came around the corner of the Bridge abutment at some significant speed. A lack of attention paired with excessive speed meant that Mr. Muir did not notice Ms. Murray until he closed in on her.

61 To be fair, there are also some issues with the evidence of Ms. Murray. She asserts that she was in her own lane or possibly that her left side was touching the centre line between the two lanes; however, it seems likely that when Mr. Muir came upon her, Ms. Murray was in the wrong lane. There is some photographic evidence taken close in time to the accident, which shows that there was some foliage encroaching on Ms. Murray's lane. This encroaching foliage, may have led an inexperienced biker to ride closer to the centre line (Exhibit 1, Tab 5, Photograph 3). In any event, it appears that she was over the centre line, encroaching into Mr. Muir's lane and that her presence startled Mr. Muir. Although he tried to take evasive action by passing her on his right, the combination of his excessive speed, mis-Judgment and several aspects of the Trail itself (which will

be discussed in detail below), resulted in him leaving the Trail and crashing. Once off the Trail, he landed, face first on a boulder or some small rocks.

62 In addition to the evidence of Ms. Murray, other credible evidence adduced at trial supports this version of events. For example, although Mr. Dutil stated that when he passed Mr. Muir, Muir was travelling at a moderate speed, Ms. Murray, who observed Mr. Muir closer in time to the crash, testified that he was going fast. Furthermore, Mr. Dutil's evidence regarding the relative distances the two men travelled after they passed each other before Mr. Dutil heard the noise from the crash suggests that Mr. Muir was travelling at a significant speed. The fact that Mr. Dutil heard the crash from some distance away would seem to suggest that Mr. Muir was travelling at some speed.

63 By his own evidence, Mr. Muir was in the highest gear at the top of the hill. Although he stated that his usual practice is to brake, pedal and coast down the hill, he does not know how fast he was going on the day of the accident or whether he braked. It is logical that he would want to maintain the speed generated from going down the hill, in order to carry him up the next hill.

64 Mr. Muir's version of events, namely that he lost all momentum, began to wobble, ran out of pavement on the right and tipped over, is inconsistent with the evidence regarding the damage to his bicycle. According to the emergency personnel who arrived on the scene, the front wheel of the bicycle was bent and the bicycle did not look normal.

65 Kevin Muir, the son of Mr. Muir, picked the bike up the day after the incident, and took it to a friend who in turn had the bicycle repaired to a rideable condition. Mr. Muir gave evidence that the front rim of the bicycle was damaged, the handlebars were twisted, the brake lever was bent out of place and brake pads were beyond repair. The bike, in its repaired state, can be seen in pictures at Exhibit 1, Tab 33.

66 There is also the medical evidence. Dr. Michel Rathbone, who was qualified as an expert in neurology and gave evidence regarding spinal cord injury including the mechanism of Mr. Muir's injury, testified that one could not place much weight on Mr. Muir's story of what had happened. He explained that often when individuals strike their head, they are quite confused and their memory is not good.

67 Dr. Rathbone described the mechanism of injury as being a hyperextension injury of the cervical spine propelled by the force of an impact to the right eye. Specifically, Dr. Rathbone testified that Mr. Muir probably fell on his face and that he struck his eye on an object, likely a small boulder or larger boulder with a curvature, which pushed his neck back beyond its range of movement.

68 Dr. Rathbone agreed that Mr. Muir's hyperextension injury was not a good fit with Mr. Muir's description of the accident and was more consistent with him going over the handlebars or sideways off the bicycle head first, in a trajectory forwards with a substantial forward speed.

69 This Court also heard from Dr. San-Yu Lok, who was qualified as an expert in the field of radiology including the reading and interpretation of x-rays, CT scans and MRIs.

70 Dr. Lok testified that Mr. Muir suffered a three column disruption of the cervical spine at C4-C5. Dr. Lok also noted a blow out fracture, which likely resulted from pressure being applied directed on the globe of the eye, causing the eye to expand and push against the thin surrounding bone. Dr. Lok did not identify any other fracture to Mr. Muir's face, head or skull.

71 Dr. Lok was of the view that Mr. Muir's injuries were compatible with hyperextension of the neck. He described the hyperextension mechanism in terms of the neck being pushed back relative to the lower portion of the neck, resulting in "over-bending backwards of the cervical spine". Dr. Lok based this opinion on the widening of the anterior disc space at C4-C5, the pulling off of a piece of bone attached to the ligament, and the presence of a compression fracture implying a vertical force.

V <u>EVIDENCE ABOUT THE TRAIL</u>

72 Terry Spiers, an engineer employed by the City since 1976, and the City's current Director of Environmental Services, gave evidence as to the flooding and related conditions within the City of Brantford, the history of the dike system and the origin of the trails built on the dikes.

73 Mr. Spiers explained that the Grand River system is prone to flooding. He described how much of Brantford was inundated by a flood in 1974 and how, as a result, the City took measures to reduce future damage including the construction of an updated dike system. The first section of the dike system was built in 1979. The sections above and below the Lorne Bridge, the main bridge in Brantford, were built in the mid-1980s and the final section of dike was completed in about 1990.

74 Mr. Spiers described how at this juncture of the Grand River there had been a dam, the Lorne Dam. This dam had been built in the 1800's to feed water into a canal system. (See Ex. #29, Vol.2, Tab 4 photos). The canal was filled in and the dam was removed. Armour stone was put in on the shore line because at this particular location there is a significant bend in the river to the south. Apparently, whenever a river is forced to change direction it tends to erode the outer bank. "riprap" which are oversized rocks or pieces of concrete was installed along the bank up to the Lorne Bridge. This product is of such a size that it will not be discharged by the water. This would have been immediately beside the trail where Mr. Muir left it

75 Some of the newspaper photographs (See Ex. #29, Vol. 2, Tab 6) demonstrate the extent of the flooding back in 1986. The present day path under the Lorne Bridge would, in fact, be underwater.

76 Mr. Spiers testified that there would generally be two river floodings per annum, the first caused by the spring snow melt and the second in the fall with tropical storm run-off. The river swelled and the velocity of the water was quite high at the point of the Lorne Bridge as the river was just coming off a straight section. Right under the bridge and immediately downstream was

particularly prone to erosion.

77 During the summer, flooding is not a problem and the trail is well above the river level. The Grand River Conservation Authority has rules with respect to the flood plain of the river. Nothing can be constructed which compromises the integrity of the river. When shown Exhibit #2, photo #7, Mr. Spier opined that any sloping by the application of rock and grass of the river side of the path would encroach upon the flood plain and would not be acceptable to the Authority. In any event, such material could be completely removed within a year by the flooding river bank. Mr. Spier did acknowledge that the grass on the river bank north of the bridge did appear to be intact.

78 Photos 5(j) and 5(l) of Exhibit #5 are of the "riprap" armour stone on the east bank. Orange paint has accentuated the existence of reinforcing rods. Mr. Spier was not aware of these rods. He opined that it was an old type of reinforcing rod as it was smooth and possibly came from the demolishment of the old railway station, which used to be immediately beside the Lorne Street Bridge on the south-east corner. Having noted these rods, I note that none of the witnesses who discovered Mr. Muir, nor Mr. Muir himself, made any reference to these rods as being pertinent to what happened September 23, 2003.

79 While the sole purpose for which the dikes were constructed was as protection from flood damage, the public found it pleasant to walk and cycle on the dike tops. Brantford welcomed this activity and many of the first pathways of Brantford's trail system were developed on the flat surfaces of the dikes (Exhibit 28, Photograph 1).

80 The growth of the Brantford trail system, named the Gordon Glaves Memorial Pathway in 1993, has been a continuing process. The Trail in question is a multi-use recreational trail intended for a wide range of users including cyclists, joggers, and walkers. The area of the Trail around the Lorne Bridge, where Mr. Muir's accident occurred, was constructed in May 1997.

81 Prior to the construction of the area of the Trail under the Lorne Bridge, the discontinuity of the dikes meant that people who wished to move from the Eagle Place section below the Lorne Bridge to the Holmedale section above the Bridge had to exit the trail system (a general map of Brantford can be seen in Exhibit 5, Tab 1).

82 Obviously, this was less than ideal and there was a lot of interest in finding a solution that would allow people to travel from one section of the dike to the other.

83 The Core Area Waterfront Group, which had done the design and construction of a similar crossing/trail connection called Brant's Crossing, met to discuss, amongst other things, the gap in the Trail on August 23, 1996. The Group identified one option as being running the Trail under the Lorne Bridge between the railway tracks and the concrete retaining wall; however, this was dependent on the railway, who was concerned that the Trail would be too close to the railway line.

84 A second option was to get the Trail users up to street level, but this solution was found to be

unworkable because it would require users to cross the railway tracks and take stairs up to a sidewalk. Cyclists would have to either carry their bicycles or back track. Clearly, this would be difficult for cyclists and not adequate from an accessibility standpoint. (Photographs in Exhibit 1, Tab 16 demonstrate both the location of the railway track with respect to the Bridge abutment and the River, and the view from street level in the location of the Lorne Bridge).

85 Because of problems with the first two options, the City investigated the possibility of constructing a connecting link path under the Lorne Bridge parallel to the river between the upstream and downstream dike tops. The City contacted Joe Cohoon, a local consulting engineer. Ms. Sinclair and Ms. Armitage, City staff members, met Mr. Cohoon on site and asked him whether such a connecting link under the bridge would be possible. Mr. Cohoon thought it was a possibility and directed the City to talk to Mr. Cooper, a local excavating contractor, about creating the trail connection. There was a site meeting with Mr. Cooper during which a proposed alignment was walked and it was agreed that a path could be achieved in that location. The City ultimately constructed the Trail along this proposed alignment in May 1997. The location of this section of the Trail relative to the Bridge and the River can be seen clearly in the pictures that make up Exhibit 2.

VI <u>ANALYSIS: RECKLESS DISREGARD</u>

86 Mr. Muir alleges that the design and maintenance of the Trail constitute a pattern of reckless disregard by the City towards him. These criticisms of the Trail focus on four distinct aspects of the Trail:

1) Standards in designing the Trail
2) Location chosen for the Trail
3) Geometric design and traffic control devices
4) Improper maintenance and inspection

87 Mr. Muir alleges that each one of these aspects of the Trail alone constitutes reckless disregard, or, in the alternative, that the cumulative effect of these items meets the test for reckless disregard to Mr. Muir.

88 To aid in its assessment of whether the City acted with reckless disregard, this Court heard from Barry Raftery of Raftery Engineering Investigations Ltd. who testified as to the configuration of the bike path generally and about the physical dimensions of the Trail in the location where the accident occurred (Exhibit 5, Figure 2A). This evidence was based on Mr. Raftery's site visits and a survey of the site, which was done at Raftery's request.

89 This Court also heard evidence from two experts. Gerry Forbes is a transportation engineer who gave opinion evidence with respect to how the trail compares to literature and guidelines regarding trail design that existed in 1991 and subsequently.

90 Victor Ford is a landscape architect, who gave evidence regarding the design and construction

parameters that municipalities were using and the extent to which municipalities were making use of guidelines and literature in the design and construction of multiple-use pathways in and around 1997. He then gave his opinion on how this section of the Trail compared to these design and construction parameters.

1) Standards in designing the Trail

91 Mr. Muir submitted that the City simply estimated the location of the Trail without doing any site plan, designs or diagrams and that this constitutes reckless disregard in the design of the Trail. This Court heard evidence about the design and construction process from Vicky Armitage, a Parks Technician within the Parks Department, whose main role was to assist Maureen Sinclair, the Division Manager of Parks Operations and Development in the City's Parks and Recreation Department, with the development of parks. This included landscaping, planting, as well as the development of some trails through parks. Ms. Armitage was very involved with the placement of the Trail. Ms. Armitage explained that she met on site with Mr. Cohoon and Mr. Cooper, that she walked the site many times, placed flags to mark the proposed alignment and then finalized the alignment by painting a line on the ground. Ms. Armitage had talked about the alignment with Maureen Sinclair. She did not consult with Mr. Spiers, the City's technical committee, or the Grand River Conservation Authority about the placement of her flags.

92 The plaintiff argued that Ms. Armitage was not qualified to stake the alignment because she had not taken any specific courses on building bicycle trails or multi-use pathways. The plaintiff also suggested that she failed to take advantage of the resources that were available to her, for example, by consulting people working for the City, such as Mr. Spiers, who had some expertise relevant to trail alignment.

93 Ms. Sinclair and Ms. Armitage defended the design and construction process. Ms. Armitage explained that in addition to her Bachelor's degree in landscape architecture, she had gained knowledge with respect to paving from her work in the field over time, including her involvement with the development of Brant's Crossing.

94 Ms. Sinclair explained that the City's Engineering Department was not consulted with respect to the connection of the upstream and downstream dike trails because "We had worked for a couple years at Brant's Crossing. I felt we understood the conditions for this area of the trail we were developing, so I didn't consult Terry (Terry Spiers)".

95 The evidence from Ms. Armitage and Ms. Sinclair in respect of the design and construction of the Trail is consistent with the evidence of Mr. Ford, who explained how, in his experience, municipalities generally designed and constructed recreational trails. He stated that multi-use trails were usually laid out in the field by staking or walking the alignment and that most of this was done internally. Sometimes municipalities would hire consultants, most of whom were trained as landscape architects, to design and stake the pathways.

96 Mr. Muir also alleged that the failure of Ms. Armitage to refer to any literature regarding the development of multi-use pathways constitutes reckless disregard in the designing of the Trail.

97 Ms. Armitage confirmed that she did not refer to any outside documents or literature for design purposes and explained that she was designing a trail connection rather than an entire trail so she used the existing Trail itself as a guideline when designing the connection.

98 Mr. Forbes gave evidence about the various guidelines that were published at the time the Trail was designed and constructed. He referred to a number of publications including Trails for the 21st Century, Planning Design and Management for Multi-Use Trails, the American Association of State Highway and Transportation Officials Guidelines, the Canadian Institute of Planners guidelines, the Ministry of Transportation guidelines and the Velo Quebec guidelines. Proper practice according to Mr. Forbes would be to refer to the publication in advance of the design of a pathway.

99 Regarding the manner in which the City went about designing its trails in the 1990s, Ms. Sinclair, testified that the City did not have in its possession the reference materials mentioned by Mr. Forbes. As far as she is aware, the City's practices in relation to its trails were not different from any other municipalities with which she interacted. The plaintiff challenged the evidence of Ms. Sinclair, i.e. that the City did not have these reference materials in its possession, on the basis that in 1997, the City hired consultants to conduct a transportation study prepared by IMC Consulting (the Report) (Exhibit #36). It was completed and in the City's possession prior to the Trail being built under the Lorne Bridge. The Report speaks of numerous guidelines for developing cycling transportation facilities, including some of the aforementioned guidelines. However, one notes that the report itself did not provide any in depth analysis of multi-use bike trails. Ms. Sinclair testified that the references to trail guidelines such as AASHTO and MTO were contained in the sub-heading "on-road bikeway standards" and therefore did not appear to be applicable to recreational trail design. She recognized that "Trails for the 21st Century" was cited in the Report as a key reference for planning, design and maintenance of multi-use trails, but stated that she did not believe there was anything inconsistent with that particular guideline and the City's trail system.

100 The City also commissioned another engineering study, from Stantec Consulting Ltd. That report (Exhibit #29, Vol 1, Tab 11) was delivered March 2000. The Stantec Report also references the key publications mentioned by Mr. Forbes. The report does contain detailed references and diagrams of a multi-use bike trail. Specifically, in Chapter 5 entitled "Design Details" the width of such trails and clear zones is discussed. The authors prefaced their remarks (at page 29 of the Report) with the following:

> "These trails and bikeways and their minimum and recommended widths are described below and illustrated in Figures 5.1 to 5.7. Which type of trail or bikeway is appropriate at a given location depends on <u>issues of site characteristics</u>, safety, the type of uses that will be expected to be using the

facility, and the commitment to design and maintenance." (underlining mine)

101 This reference demonstrates that the topography or terrain over which a trail passes is not inconsequential. It would impact on location and possibly the design/dimensions of the trail. The efforts of Ms. Armitage and Ms. Sinclair were, as they testified, in response to the realities of the site. Although, the Stantec Report sets out the applicable guidelines there is no reference to the trail being deficient per se relative to these guidelines.

102 Mr. Forbes explained that some guidelines were more widely available than others were. Moreover, on Mr. Ford's evidence, even where the guidelines were accessible, municipalities did not generally avail themselves of them in the early to mid-90s. The guidelines did not have the force of law in 1997, when the Trail was designed and there were differences of opinion on several key design issues between the published guidelines. In fact, to this day, there are no mandated design guidelines.

103 It is impossible to conclude that the failure to follow the published guidelines throughout this linkage of the trail, in particular immediately downstream of the Lorne Bridge, is in itself evidence of a "reckless disregard". It would appear that generally at the time of the construction of the path, municipalities took an "ad hoc" approach to paths based on topographical realities.

2) Location Chosen for the Trail

104 Mr. Muir submits that the trail was built in the wrong place and this constitutes reckless disregard on the part of the City in that they did not look at alternatives in any complete way nor did they have a feasibility study done. This Court heard from Maureen Sinclair and Vicky Armitage about why the City chose this location for the Trial.

105 Mr. Forbes supported Mr. Muir's position and stated that alternatives should have been fully considered by the City. In his opinion, the depth of analysis before the construction of the Trail was inadequate. Although he could not comment directly on whether the chosen location for this section of the Trial was preferable to alternative locations, he did concede that issues such as traffic, proximity to the railway, in terms of the trail itself and in terms of vulnerability to crime, would all be considerations when choosing a route.

106 Mr. Ford did a more in depth analysis of alternative routing options and considered the various alternatives available at the Lorne Bridge site. Based on his experience, he found that the street level option was not feasible. He described the area as having a lot of very busy traffic and a lot of truck traffic, which he thought would be particularly dangerous for inexperienced cyclists. He also considered the option of having the Trail go by the railway but he explained that in his experience working with railways, he has found them to be extremely nervous about having crossings over their tracks due to the obvious dangers posed by trains, pedestrians and cyclists mixing. Mr. Ford determined that the Trail connection, as built, is in the proper location because it follows the "desire line' for users. In other words, the path takes them where they want to go.

Moreover, he found that the other options were neither feasible nor safe.

107 The City's position is that alternate routes were considered. The fact that at the very least a cursory investigation of alternate routes was performed is evidenced by the letter at Exhibit #29, Volume 2, Tab 12 in which Gloria Yeung of the Grand River Conservation Authority (GRCA) wrote:

> "We understand the constraints the presence of the rail line creates for the walkway to be otherwise located at the top of the slope. Although you may find some yearly maintenance is required and at times, the trail may be closed due to high water, the safety aspects are preferred for the slope route when compared to a situation of close proximity to the rail line."

108 With respect to the layout under the Lorne Bridge, Ms. Sinclair testified that the City tried to get the Trail as far away as possible from the abutment, without extending into the river itself. The key issue with this location was visibility and she explained that the Trail had to be moved away from the abutment to improve sight lines. At the same time, the GRCA and Ministry of Natural Resources would not let the Trail protrude into the river. Ms. Sinclair does not recall having a specific discussion with Ms. Yeung about how far the Trail could go into the river, and the documentation is silent on this issue. The plaintiff argued that the GRCA did allow the city to go 2.5 meters into the riverbed with armour stone at Brant's Crossing and it was suggested that the same could have been done at the Lorne Bridge location. Ms. Sinclair says she did not interpret this prior approval to be equally applicable to the area under the Lorne Bridge and she does not recall discussing this with the GRCA. There is nothing in the documentation to confirm whether any discussion about extending the Trail into the riverbed took place, however, there is no question that there were constraints on what could be done in this area.

109 A similar explanation about the difficulty of aligning the Trail in the area near the Lorne Bridge was expressed by Ms. Armitage, who described the limitations of the site itself as being the narrowness, the seasonal flooding and erosion issues as well as the GRCA's concerns about encroaching onto the river's edge. Ms. Armitage described how she "tried to get a feel for the natural flow, and then work within the confines of the space available." She described the balance sought between staying as far away as she could from the bridge abutment to get a good site line and staying as far away as she could from encroaching on the river's edge.

110 From the evidence, it appears that other alternatives were considered and weighed and the consensus was that the chosen location, under the Lorne Bridge was the most appropriate location for the connecting link. Although it is possible that the City could have gone further with its investigations into alternatives, there is sufficient evidence to demonstrate that alternatives were explored and found to be impracticable or undesirable. There is no reckless disregard with respect to the location chosen for the Trail.

3) Geometric Design

111 This Court heard evidence about the specific design features or "geometric design" of the Trail from Barry Raftery, Gerry Forbes and Victor Ford.

112 The evidence given by all of the experts about the design features of the trail was quite technical. This Court heard about various aspects of trail design and safety including: grade, design speed, stopping sight distance, super elevation, trail surface, lane width, horizontal curvature, traffic control devices and path-side clearance and hazards.

113 The measurements in the Barry Raftery report (Exhibit #5) underlie the opinion of Mr. Forbes, who considered aspects of the Trail's geometric design and opined on whether the condition of the Trail was in accordance with the parameters suggested in the guidelines that were available at the time.

114 Mr. Forbes gave opinions on each of these aspects of the design of the trail and testified that in his opinion, the City provided less than the minimum dimensions for several of the elements of design. Mr. Forbes found that the section of the trail where the accident occurred was not designed in accordance with the prevailing reference materials. Moreover, he found that the City made no attempt to co-ordinate the elements of the trail design. He found that the City did not take into consideration the impact on user safety that the combination of all of these elements would have.

115 Mr. Ford also commented on the design of the pathway and was asked whether this section of the trail conforms to the reality of trails built during the time and whether there was anything inherently dangerous about it. Mr. Ford took issue with Mr. Forbes's approach with respect to the geometric design analysis. Mr. Ford stated that, contrary to several comments by Mr. Forbes, this was not a transportation "roadway" and that although Mr. Forbes referred to "standards", in fact, there are no standards for the design for recreational pathways.

116 I find that the differences in their opinions can be attributed largely to their contrasting backgrounds. Mr. Forbes is a transportation engineer who is very comfortable discussing aspects of geometric design and doing related calculations. Mr. Ford approached his analysis from the viewpoint of a landscape architect who is familiar with the day-to-day aspects of trail planning and design, but less familiar with the geometric design concept, which in his experience, was rarely used by municipalities.

117 The other issue that arises with respect to the evidence about geometric design is the fact that the experts acknowledged relying on the Barry Raftery measurements. The measurements in the Raftery Report, taken closest in time to the date of the accident, are based on site visits (the first of which was in April 20, 2005) and a June 2005 survey. Mr. Muir's accident took place September 23, 2003. Furthermore, the onsite observations and additional measurements of Mr. Forbes and Mr. Ford are even further removed from the date of the accident. This time lapse between the date of the accident and date measurements were taken is significant because the accuracy of the measurements is key to the accuracy of the conclusions made by Mr. Ford and Mr. Forbes, particularly with respect to the technical areas of geometric design.

118 Mr. Raftery acknowledged that all of the measurements, which formed part of his investigation, were taken between 21 months and three years after the accident and that any damage or change to the path caused by weather conditions and the river in the interim would lead to potential inaccuracy in terms of what existed at the trail in September 2003.

119 This gap of 21 months is significant, particularly in an area prone to erosion changes due to the presence of the river and weather conditions such as ice events. Most significant is evidence that the trail had to be reconstructed due to significant damage by the flow of the Grand River, which occurred in the Winter/Spring of 2004. The photos in Exhibit 1, Tab 5, were taken on July 15, 2004, and show posts and orange plastic fencing that City staff installed because of this damage. Another example is Exhibit 2/28, Photograph 4, which was taken in October 2003, just after the accident. In the photo one can clearly see an area of asphalt and a layer of rocks on the outside edge of the trail beneath the Bridge which Mr. Raftery acknowledged appears to have been severely damaged by the time he arrived on the scene in 2005. His measurements do not include this additional area of asphalt. He testified that the southbound area of the asphalt surface in 2005 is different than it was in 2003.

120 In light of my serious concerns about the accuracy of the measurements that underlie the evidence regarding geometric design and the lack of any other evidence regarding the particularities of the trail as it existed at the time of the accident, I find it difficult to determine whether the trail conformed with available guidelines. Moreover, even if the Raftery measurements were indicative of the state of the trail at the time, it is not at all clear that municipalities, in the designing of trails, used the guidelines and even if they were used, the guidelines were and are just that, guidelines, lacking the force of law.

121 Geometric design and guidelines aside, there are two aspects of the trail that I must comment on, which can be discussed without reliance on precise measurements.

Signage

122 Both Ms. Sinclair and Ms. Armitage testified that once the trail was constructed she felt that it was safe for reasonable use, with reasonable precautions. As the City recognized that visibility was limited for a short stretch on the approaches to the Lorne Bridge abutment, cautionary signs were put up to warn users that an accident could occur if they were not using the trail in its intended way, following precautions and proper trail etiquette. The signs were designed to convey, in as few words as possible, the message that users should slow down, take care and use caution. The signs were 60 cm X 60 cm and made of reflective material.

123 The plaintiff alleges that the downstream signage is deficient in several aspects. First, the plaintiff claims that the location and height of the sign is inappropriate based on guideline and engineering principles. Mr. Forbes stated that there is a distinction between whether or not you would notice the sign coming down the trail and whether you can see it if you are looking for it. The City explained that the sign placement was chosen because of flooding, ice and erosion that would

have affected the sign if it were placed elsewhere. Another criticism of the sign relates to its distance from the hazard. Putting the sign on the abutment when the user is about to take a corner does not give the trail user enough time to look at the sign, review the sign and understand its meaning.

124 The location of the sign on the Bridge abutment seems appropriate based on the City's concern about it being damaged or displaced due to weather or human interference. Although I find that this sign is clearly visible to the user approaching from downstream, it seems that it would have been possible and beneficial to have advanced signage, which would remind users to reduce speed and warn of a curve ahead and in particular warn that there is no path side clearance.

125 The second issue with the sign is the message. Mr. Forbes testified that the message was somewhat confusing and that the sign tells the user what might happen i.e.: head on collision between cyclists, but does not explain the hazard that must be avoided. In other words, the sign should have told users that there is a curve, there is no path side clearance and that they should reduce their speed. While I find that the message could be more descriptive, if the sign was too detailed it is possible that it would be even more confusing. Perhaps this is where the user would benefit from a multitude of signs, in advance, warning of the upcoming hazard. Out of an abundance of caution, it may even be appropriate to have a sign on the abutment advising all cyclists to dismount their bicycles and walk. Having so opined, the graphic nature of the sign cannot be underestimated. It is definitely a warning of a possibility/or risk of collision. At the very least, it would cause a cyclist to be cautious, open to the possibility of the presence of a cyclist coming from the opposite direction.

126 In terms of other traffic control devices, the City placed a centre line and directional arrows on the Trail in the section underneath the Lorne Bridge because the City understood that there was a restriction on visibility in this area.

127 The plaintiff attacked this centre line for being the wrong colour (i.e. white instead of yellow) and stated that the centre line was not in the exact centre of the line. This finding came from the evidence of Mr. Raftery that the centre line deviates from the actual centre of the trail (Exhibit 5, Photographs 5A and 5C).

128 In response to the allegation regarding the lane widths and positioning of the center line, Ms. Sinclair testified that the City had used the line painting company previously and as such, the City was comfortable with their work. She testified that her belief is that the deviation of the line was contributed to by ice damage in 2004, which changed the edge of the path.

129 I find that the addition of a center line and directional arrows by the City was aimed at increasing safety for users in a hazardous section of the Trail. The colour of the pavement markings was not inconsistent with the practice on other trails and the unevenness of the lanes is slight and based on measurements that cannot be relied upon due to the previously mentioned issue regarding the timing of the measurements and storm damage in 2004.

130 With respect to the signage and traffic control devices, it seems that the City could improve the signage in this area given the potential hazard that exists. However, this need for improvement does not translate into "a reckless disregard" as the City had obviously addressed the possible danger and taken steps to communicate that to users/cyclists. It is not without significance that Mr. Muir was familiar with the trail, he had ridden it several times, including one week prior to the accident and there is no suggestion that he had not seen the sign. In fact, he explained that he was aware of the danger posed by the area of the Trail and knew he had to slow down and watch for on-coming users. Mr. Forbes agreed that where the user is well aware of the risk, he does not need a sign, although undoubtedly it can be a good reminder.

Trail Shoulder

131 Mr. Forbes explained that path side clearance refers to the section of the trail side that is contiguous to the paved trail. These areas provide a clear zone for recovery, they keep cyclists from feeling as if objects pinch them in and they are important for visibility. This area may alternatively be referred to as a clear zone, recovery zone or path side clearance. He explained that, in fact, there are two separate concepts that may overlap. A recovery zone allows a cyclist some potential opportunity to regain control and a clear zone is an area next to the path, clear of obstructions. Mr. Forbes testified, "there are a number of different factors and theories floating around in this concept of clearance zone", and that it is "not as clear in these guidelines as it is understood in the engineering world".

132 Some of the guidelines discuss the importance of the clear zone feature which, depending on the guideline, should range from .5 meters to 1 meter. Often, the graded area or clear area is said to improve visibility around curves, but if you make a mistake in steering and run off the path it also provides an opportunity to recover before colliding. Mr. Forbes agreed that a reasonable designer could conclude that clearance zone of .5 to .6 m was acceptable in short sections of the Trail with restricted geography. With respect to photograph 7 of Exhibit 2/28, Mr. Forbes testified that the vegetation made it difficult to tell whether there is any obstruction within .6m of the edge of the trail.

133 With respect to clear zones and the Trail, Ms. Armitage testified that she understands the concept of a clear zone and stated that she tried to make these flat and at least two feet wise. Clear zones were provided on the upstream side of the Lorne Bridge. Photographs 1, 2 and 3 of Exhibit 2 taken in October 2003 show the grassy clear zone on either side of the Trail.

134 On the downstream side of the Lorne Bridge the site presented several challenges. The Raftery picture 4(b) (Exhibit 1, Tab 21) reveals a retaining wall on the right side, Ms. Sinclair believed that wall was likely part of the old railway building and could not be moved. It was quite substantial and close to the track. It provided a separation between the Trail and the track. On the left hand side, a vertical wall from a culvert can be seen.

135 From Ms. Armitage's point of view, she wanted to maintain the stability of the slope,

therefore she tried to stay as close as possible to the railway wall and maintain a distance from the Bridge abutment. Generally, the site had gravel, rubble and brick. On both sides of the proposed trail there was concrete, rubble and large rocks. The Trail had to be centered in an extremely tight place. It was difficult (if not impossible) to maintain a path shoulder.

136 All of the experts agree that there is very little to no recovery zone at locations of the Trail immediately to the south (downstream) of the Bridge. Specifically, in the area where Mr. Muir is believed to have gone off the path, there are loose rocks and boulders. That area is certainly neither graded nor traversable. (Exhibit #21)

137 The question becomes was this lack of clear/recovery zone evidence of a "reckless disregard" on the part of the City?

4) Improper Maintenance and Inspection

138 The Plaintiff alleges that the City failed to adhere to its own maintenance and inspection system and that this failure constitutes reckless disregard. As described in the parks sign, at Exhibit 1, Tab 7, the Trail is not maintained by the City in the winter. However, as Ms. Sinclair explained, there is maintenance and inspection of the Trail throughout the non-winter months.

139 According to Ms. Sinclair, the City maintains a regime of maintenance over the Tail whereby approximately every 30 days Parks and Recreation staff go along the trail system looking for issues of upkeep and maintenance. With standardized documents, they identify sections of damage and debris, and they inspect the shoulders and any visibility issues along with litter, graffiti, fallen trees and over-hanging tree limbs. Where possible, staff members do the repairs right then and there and they carry shovels with them to do immediate work. Where this is not possible, they flag the situation on an inspection sheet and rate the degree of urgency that is necessary to address the issue. Separate from the day to day maintenance, there have been requirements over the years for major repairs under the Lorne Bridge.

140 Mr. Muir has classified two specific failures of the maintenance and inspection systems as they relate to this area of the Trail. First, the plaintiff alleges that the City knew the importance of a recovery zone or clear path shoulder and failed to maintain same and second, the City failed to note and/or repair a section of unravelling asphalt that existed at the time of Mr. Muir's accident.

a) Trail Shoulder

141 With respect to the condition of the Trail shoulder, the plaintiff's position is that the City acted in reckless disregard in failing to maintain a clear path shoulder or recovery zone. The plaintiff alleges that if there ever was a recovery zone, it was not adequately maintained. Based on the evidence of Ms. Armitage, it would appear that the design of the Trail contemplated having a clear shoulder, free of obstacles, for errant users to travel on. This was in fact the case over most other portions of the Trail, which have a clear shoulder.

142 The absence of a clear path shoulder in the area of the accident is a function of the geography of this area. Maintenance of the trail shoulder in this specific area is somewhat academic given this absence. Perhaps the vegetation on the railway side of the trail could have been trimmed back to prevent encroachment upon the trail. Perhaps the river side could have provided for soil or other material i.e.: sod to cover the rocks and other material used to stabilize the shoreline. However, soil or grass as an insulator to the hard rocks would be vulnerable to being washed away with the annual flooding. The essential fact remains there is no clear/recovery zone.

b) Unravelling of the Pavement

143 Ms. Sinclair's attention was directed to the photo that was taken in October 2003 (Photo Exhibit 2, Photograph 7). Ms. Sinclair noted that there was some unravelling in the bottom right corner and that the photo shows the unravelling of the pavement. She said that it should have been noted and repaired. Interestingly, Ms. Sinclair visited the site, shortly after the accident and presumable observed the pavement in this condition and yet, she stated that at the time she did not observe anything that would cause any trouble to a cyclist.

144 Ms. Sinclair agreed that if someone left the right side of the Trail, the user would encounter steepness and uneven pavement, which would prevent them from returning onto the Trail. The significance of this pavement damage was that near this portion of the Trail there were some obstacles. The pictures documenting the section of the Trail are from various dates and at the time of the accident; it appears as though the obstacle was in the nature of rocks or a boulder.

145 She says that if the pavement damage had been recorded in August 2003, it is possible that it could have been repaired before September 23, 2003 i.e. the date of Mr. Muir's accident.

146 Although Ms. Sinclair states that the City tried to do an inspection of the Trail on a monthly basis, according to Exhibit 29, Volume 2, Tab 26, there was an inspection on August 11th and then not again until October 3rd. Ms. Sinclair cannot explain why there was such a gap in the inspection. The Trail inspection sheets do not note any problems; in particular, they do not note the problem of the sprawling pavement that is observable in Photograph 7 at Exhibit 2/28.

147 In various photographs over the period from 2002 to 2008 there are maintenance issues on this path. One can see obstructions such s foliage, extending onto the pathway and obscuring warning signs, rocks and even rebar. These hazards can be observed on the sides of the Trail, sometimes even in the area that would usually be reserved for a recovery or clear zone. Much of this evidence is not directly relevant to Mr. Muir's accident because the bulk of these obstructions appear in photographs taken years after the accident, however, they do evince the type of attitude that the City has about maintenance and inspection of this area, which is an admitted hazard.

148 The hazardous nature of the section of the Trail was recognized when the Trail was built and the City looked at alternative routes. It was recognized by the placement of the sign and directional arrows. Moreover, the City knew it would require special maintenance (see GRCA letter advising

this area would require maintenance).

149 The City decided that inspections every 30 days would be appropriate to deal with the hazard and set up a system for inspection and maintenance. The City should have been extra vigilant about sticking to this schedule in this area of the Trail, which required particular attention. The evidence with respect to the Trail condition at the time of Mr. Muir's accident comes from the testimony of the witnesses, most of whom describe him lying a few feet off the trail in either a pile of rocks or near a large jagged rock or boulder. Other evidence is the photos taken 17 days after the accident, which show sprawling or unravelling pavement that was not caught in the August inspection or in the October inspection. If this sprawling or unravelling pavement was weather or use related, which Ms. Armitrage insinuates that it was when she says that it appeared to have been damaged over time and that "we wouldn't have paid the contractor for that kind of work", it is hard to understand how it went unnoticed and unrepaired throughout the summer months.

150 Based on this evidence, I find that the inspections needed to be made more frequently or the inspections were not done properly. Still there is a question of whether this failure in the inspection and maintenance system is properly characterized as reckless disregard.

VII ADVERSE INFERENCES

151 The Plaintiff asserts that this Court should draw an adverse inference because the City did not call certain witnesses. In particular, Gloria Yeung, the representative of the GRCA, Mr. Cohoon, the engineer, Mr. Cooper, the contractor or and Amber and Rob, the trail stewards. In reply, The City alleges that the plaintiff failed to call Dr. Reddy, one of Mr. Muir's doctors.

152 A trial judge can draw an unfavourable inference where a party fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. This unfavourable inference will be even stronger where a party, without providing an explanation, does not call a material witness over whom he or she has exclusive control.

153 This is an inference that a judge may make but is not required to make: Vieczorek v. Piersma (1987), 58 O.R. (2d) 583 (C.A.). It follows that the failure to call evidence may reasonably be open to different interpretations.

154 The Ontario Court of Appeal decision in R. v. Lapensee, 2009 ONCA 646 dealt with the various inference that may be taken when a witness is not called:

> Since the inference is one of "ordinary logic and experience", it may only be drawn where there is not a plausible reason for nonproduction, i.e. where it would be natural for the party to produce the evidence if the facts exposable by the witness had been favourable: Jolivet at para. 24; R. v. Solomon, 2002 CanLII 8965 (On. S.C.), per Hill J., at para. 32; R. v. Rooke (1988), 40 C.C.C. (3d) 484 (B.C.C.A.), at pp. 512-13. As Binnie J. explained in Jolivet, [2000] 1 S.C.R. 751,

> at para. 28; there are many reasons for not calling certain evidence that are unrelated to the truth of the witness' testimony.
>
> The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate "adverse inference". Experienced trial lawyers will often decide against calling an available
>
> witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanour, or other factors unrelated to the truth of the testimony.
>
> In addition, evidence may not be called if it would be unimportant to the case, cumulative, or inferior to the evidence already available on the relevant point: see Solomon at para. 32*;* Rooke at p. 518; *R. v. C.R.S. (1998), 133 C.C.C. (3d) 559 (N.S.C.A.), at p. 571.*
>
> *Further, the inference is stronger where the "missing proof" lies in the "peculiar power" of the party against whom the adverse inference is sought to be drawn: Jolivet at para. 27. (Lapensee at paras. 42-43)*

155 Ms. Armitage and Ms. Sinclair, who had ultimate responsibility with the Parks Department, testified about the matters in issue and they also testified about the involvement of the "missing" parties". In addition, relevant business records were filed.

156 Thus, the evidence was adduced in another equally reliable way and if the plaintiff was not satisfied, it could have called any of the individuals who the City did not call as witnesses. Similarly, I find that Dr. Reddy did not need to be called when the evidence of Dr. Rathbone sufficed with respect to causation and medical issues. My impression regarding the witnesses that were called is that both parties adopted a reasonable approach, striking a balance between the need to put forth sufficient evidence but to refrain from adducing unnecessary evidence.

VIII CONCLUSIONS ON RECKLESS DISREGARD

157 This is a high threshold imposed by Section 4 of the Occupiers' Liability Act, and, as mentioned, can only be found in clearly egregious situations. There is no doubt that the portion of the Trail upstream from the Lorne Bridge has many features consistent with a focus on safety. That said, that area of the Trail immediately downstream of the Bridge where Mr. Muir left the Trail is problematic.

158 There is no doubt that the City recognized that there was a danger of a collision between cyclists at that location; hence, the signage on both sides of the Bridge abutment. The City knew that, if it was possible, there should be a clear/recovery zone on either side of the trail. That zone was installed upstream. Downstream, it was physically impossible given the confines of the space available, dictated on the one hand by the presence of a railway retaining wall and on the other by a shoreline that required stabilization and could not be encroached upon. The City knew that the section under the bridge itself and immediately downstream would require seasonal maintenance given the annual flooding and ravages of winter. The City had been warned to that effect by the G.R.C.A. A regime of maintenance was a given. The City had initiated a regular system of inspection.

159 One would think that this inspection system would be key in an area that is inherently dangerous as it does not have a clear/recovery zone. In fact, the shoulders, the river side in particular, were composed of rocks and rubble. This is a site which required a degree of attentiveness. At the very least, it would be imperative to have as perfect as possible trail surface in order to not contribute to the danger presented by the absence of the desired zone. The spalling on that pathway was acknowledged by Ms. Sinclair as uneven and would contribute to a cyclist not being able to return to the Trail. That spalling as demonstrated in picture #7 of Exhibit #2 continued beyond the abutment, it was certainly within the approach to the point of Mr. Muir's departure from the Trail as evidenced in photos #3 and 5 of Tab 5, Exhibit #2. In fact, the latter photograph has that point within the spalled edge.

160 The spalling was of such a nature that Ms. Armitage was of the view that if that phenomenon existed after the paving of the trial, the City would not have paid the contractor. In other words it was a deficiency. Ms. Sinclair has no explanation for why this spalling was not reported during the inspection regime.

161 If, as it can be expected, a cyclist proceeding downstream had picked up speed descending, possibly to facilitate the downstream ascension, the reaction time of such a cyclist to the spalling would be diminished. That assumes the cyclist was able to distinguish the spalling, grey asphalt beside more grey asphalt. Mr. Muir was observed by Ms. Murray to be proceeding at speed. His front wheel was bent out of shape, consistent with his bike hitting a rock at high speed. His injuries were consistent with him having been projected by his momentum.

162 For all of the above, it can be said that the failure of the inspection system to pick up on and address the spalling in such a dangerous location given the absence of a free/recovery zone was a "reckless disregard".

IX <u>ANALYSIS: CAUSATION</u>

163 This Court finds that this "reckless disregard" in the location and approach to where Mr. Muir left the trail was substantially connected to the injury experienced by Mr. Muir. It may not have been the only cause, but it was a contributing cause, such that it can be said that but for the

reckless disregard, the injury could not have occurred.

Underlying Issues

164 Gary Muir's spine was congenitally fused at C2-3, meaning the C2-3 are rigid and this would throw more force onto the joints below C2-3. He also had minimal osteopenia, which would have made him more likely to have a fracture. However, this congenital defect is not relevant given the "but for" test.

Contributory Negligence

165 Mr. Muir's position is that he is not contributorily negligent in any way for the accident that occurred on September 23, 2003. Plaintiffs in occupiers' liability cases must also have regard for their own safety. Accidents often occur due to a combination of lapses. Where visitors do not exercise caution, contributory negligence principles are applicable.

166 Section 3 of the *Negligence Act*, R.S.O. 1990, c. N.1, provides as follows:

> In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

167 Mr. Muir was an experienced cyclist who was intimately familiar with the Trail and cognizant of the conditions of the road. From his experience on the Trail, not to mention the warning sign on the Bridge abutment, he knew that there was a risk of encountering others on the Trail at any time. Seeing as he had ridden this portion of the Trail a week before, it is not a stretch to assume he was aware of the sprawling pavement and boulders, rock and lack of a recovery zone. Knowing what he knew, it was his duty to maintain a proper lookout, keep his bicycle under proper control, be prepared to yell or use a bell to alert others of his presence and alter his behaviour as necessary by slowing, stopping or adjusting his route to avoid accidents. It would have been apparent to anyone who had used the Trail before that there was very little room to pass someone on the riverside of the Trail and that any error could result in injury. And yet, Mr. Muir claims he chose to take this course of action when he encountered Ms. Murray on the Trail. This was a serious lapse in judgment on his part. Moreover, as explained above, based on all of the evidence it seems that Mr. Muir was speeding.

168 The City urges this Court to find that the failure of Mr. Muir to use a bell and his use of the rat traps are also relevant to the issue of contributory negligence. While I find that Mr. Muir, as an experienced cyclist, should have know of the requirement to have a bell and should have had one, Mr. Muir's failure to have a bell on his bicycle has no causal connection with the fall or the injury that he suffered. Without this nexus, there can be no contributory negligence assigned on this basis.

169 Similarly, although one may question the plaintiff's decision to ride with rattraps in an area that had little to no room for error, the use of rattraps is part of common cycling practice. Rattraps were not involved with Mr. Muir leaving the pathway and I am unable to determine, based on the diverging of evidence, whether his feet were still in the rattraps when he fell or whether they increased the extent of his injuries when he crashed.

170 In Danco v. Thunder Bay (City), [2000] O.J. No. 1208, 96 A.C.W.S. (3d) 334 (S.C.J. affirmed by the C.O.A., [2001] O.J. No. 3442) the Court discussed the contributory negligence of the Plaintiff, Terry Danco and found that he was 70% liable. The Court stated at paragraph 24:

> There is little question, in reviewing the evidence, that the Plaintiff Terry Danco, was also negligent in the circumstances. He was an experienced cyclist and was familiar with the situation at the rail crossing in question. He admitted that he knew the proper way to cross any railway tracks was to cross perpendicular to the tracks. He has no explanation as to why he did not do that on the day in question. He admits that he could have done it. It appears that through inattention or poor judgment he failed to navigate the crossing safely. So, even though the Defendant Railway, established the danger in the first place, and both Defendants failed to warn the Plaintiff of the danger, he must share a large part of the responsibility for the accident and ensuing damages, which could have been avoided.

171 Similarly in Kennedy v. London (City) 2009 CarswellOnt 1328 (S.C.J.), the Court considered the issue of contributory negligence against a cyclist who struck a bollard. At paragraph 76-78, the Court, in deciding to apportion the degree of Mr. Kennedy's fault at 60% stated:

> Mr. Kennedy had ridden past the bollard on two occasions. One of those occasions was on his trip out to Meadow Lilly. The accident occurred on his way back from Meadow Lilly. Mr. O'Connor acknowledged that if a rider rode past the bollard, the rider should expect it riding back. I accept that proposition even though it was asserted on behalf of Mr. Kennedy that passing the bollard going the opposite way would not attract his attention the same way because of all the room on that side of the pathway.
>
> I am satisfied that Mr. Kennedy contributed to his own damages by failing to use reasonable care and take proper precautions for his own safety. I find that he was not paying sufficient attention as he rode along the Pathway. Had he been more attentive he could have avoided the accident by stopping, riding around the bollard on the right, or exiting the Pathway to the left where there was a lot of open space.

172 Despite his recollection to the contrary, there is evidence of speeding on part of Mr. Muir.

That speed would diminish his reaction time to the presence of Ms. Morrow and to the deteriorated river side edge of the trail. The combination of his speed and that trail condition placed his balance in jeopardy. Mr. Muir was contributorily negligent in this accident, which significantly altered his lifestyle.

X CONCLUSION

173 Having found the City displaying a certain reckless disregard and Mr. Muir contributorily negligent, this Court apportions the degree of Mr. Muir's fault at 60%.

174 If counsel are unable to agree as to the level and quantum of costs payable, submissions limited to five pages (independent of a Bill of Costs) are to be exchanged and submitted to the court within 45 days of the release of this Judgment.

A.C.R. WHITTEN J.

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