Davies v. Clarington (Municipality), [2006] O.J. No. 1307

Ontario Judgments

Ontario Superior Court of Justice

J.E. Ferguson J.

Heard: April 4-8, 11-15, 18-21, 25-29; May 9-13,

16-20, 24-27; June 6-10, 13-16; October 24, and November

14-17, 2005.

Judgment: April 5, 2006.

Court File No. 1075/00

[2006] O.J. No. 1307 | 266 D.L.R. (4th) 375 | 147 A.C.W.S. (3d) 151 | [2006] O.T.C. 320 | 2006 CanLII 10212

Between Bonnie Davies, plaintiff, and The Corporation of the Municipality of Clarington, VIA Rail Canada Inc., Canadian National Railway Company, Timothy Garnham, The BLM Group Inc., Apache Specialized Equipment Inc., Apache Transportation Services Inc., Blue Circle Canada Inc., Hydro One Networks Inc., defendants And between Via Rail Canada Inc. and Canadian National Railway Company, plaintiffs, and Timothy Garnham, The BLM Group Inc., Apache Specialized Equipment Inc., Apache Transportation Services Inc., Blue Circle Canada Inc., Hydro One Networks Inc., defendants, and The Corporation of the Municipality of Clarington, third party

(90 paras.)

Case Summary

Tort law — Occupiers' liability — Legislation — Determination as to one defendant's liability in relation to settlements reached between other parties to two actions — Class action and action by rail companies arose in response to train and tractor trailer collision — Issue before the court was whether or not liability attached to Blue Circle so that it was obliged to contribute an apportioned amount pursuant to the terms of settlement — Actions were dismissed as against Blue Circle — Blue Circle did not meet and one of the four branches that defined an "occupier" under s. 1 — Claim that Blue Circle had common law duty to warn also failed — No duty arose as Blue Circle played no part in the creation of the risk of harm.

Class action brought in the name of Davies claiming damages for negligence, breach of occupier's duties and breach of contract, arising from personal injuries allegedly suffered by passengers on the VIA train -- Action by CN and VIA for recovery of property damages to the CN train and infrastructure and the VIA train -- Incident giving rise to proceeding was collision between CN freight train and a 65-foot tractor trailer -- VIA passenger train struck remnants of the truck -- All parties, other than the defendant Blue Circle, had entered into a settlement agreement in each action -- Settling parties' submission was that liability would be apportioned globally amongst the settling parties -- Issue before the court was whether or not liability attached to Blue Circle so that it was obliged to contribute an apportioned amount -- Subject railway corridor was comprised of land owned by CN, the railway tracks, the rail bed, and the railway crossing upon the land -- Blue Circle was the owner of land on the south side of the railway corridor and had a deeded right-of-way to use a farm crossing CN was obligated to maintain -- Settling parties maintained that Blue circle shared in their liability and therefore had to pay an apportioned share of the settlement agreement in each action -- HELD: Actions dismissed as against Blue Circle -- Occupiers' Liability Act did not apply to Blue Circle as an adjacent landowner to the premises comprised of the railway corridor -- Blue Circle did not meet and one of the four branches that defined an "occupier" under s. 1 --

Had occupiers' duty attached, standard of care would not have been breached -- Not foreseeable that experienced professional rig driver would operate vehicle in manner he did -- Not foreseeable that CN operators would choose not to slow down when they first saw reflective material across corridor or apply brakes immediately upon knowing object was a rig -- Claim that Blue Circle had common law duty to warn also failed -- No duty arose because Blue Circle played no part in the creation of the risk of harm.

Statutes, Regulations and Rules Cited:

Municipal Act, R.S.O. 1990, c. M.45,

Occupiers' Liability Act, s. 1, s. 2(b), s. 3(1)

Counsel

Michael F. Head and Kyle Armagon, for the Plaintiff

Barry G. Marta, for the Defendant, the Corporation of the Municipality of Clarington

John A. Campion and Annie M.K. Finn, for the Defendants, VIA Rail Canada Inc. and Canadian National Railway

James M. Regan and Lianne B. Furlong, for the Defendants, Timothy Garnham, Apache Specialized Equipment Inc. and Apache Transportation Services Inc.

Donald H.R. Rogers and Brian Sunohara, for the Defendant, The BLM Group Inc.

Brian J.E. Brock, Q.C. and Roseanna R. Vaughan, for the Defendant, Blue Circle Canada Inc.

Joseph Agostino, for the Defendant, Hydro One Networks Inc.

Barry G. Marta, for the Third Party, the Corporation of the Municipality of Clarington

REASONS FOR JUDGMENT

J.E. FERGUSON J.

Overview

1 There are two actions:

(a) the class action brought in the name of Bonnie Davies claiming damages for negligence, breach of occupier's duties and breach of contract, arising from personal injuries allegedly suffered by passengers on the VIA train, and,

(b) the recovery action brought by CN and VIA seeking recovery of property damage to the CN train and infrastructure and the VIA train.

2 The defendants brought numerous cross-claims in the class action, as well as third party claims, cross-claims, and counter-claims in the recovery action. All parties, other than Blue Circle, have entered into a settlement agreement in each action ("the settling parties"). The parties to that agreement have agreed that it should not be disclosed to the court. All parties have agreed that B.L.M. has no liability and as such it has not been considered in this judgment. The settling parties' submission is that liability will be apportioned globally, on the agreed upon terms, amongst the settling parties.

3 The issue before the court is whether or not liability attaches to Blue Circle so that it contributes an apportioned amount. The subject railway corridor is comprised of the land owned by CN, the railway tracks, the rail bed, and the railway crossing upon that land. Blue Circle is the owner of land on the south side of the railway corridor and had a deeded right-of-way to use the farm crossing which CN was obligated to maintain. The crossing was in fact created for a prior owner of the land south of the railway corridor. The settling parties assert that Blue Circle shares in their liability and therefore must pay an apportioned share of the settlement agreement in each action. The settling parties submit that if I find Blue Circle liable, I only need to determine its share of fault and that I need not determine the degree of fault of each of the other defendants.

4 Blue Circle submits that if I find liability against it I must assess the degree to which Blue Circle contributed to the accident and that I must do this on a comparative basis. It further submits that doing so necessarily involves an assessment and consideration of the degree of fault (if any) of all other defendants.

Background Facts

5 On November 23, 1999 a westbound CN freight train traveling on the north track of the railway corridor struck a 65-foot tractor-trailer ("the rig") stopped on the track. The collision pushed the rig along the tracks. A Via passenger train traveling eastbound on the south track subsequently struck the remnants of the rig. Both trains derailed after impact.

(a) Apache and Mr. Garnham

6 Apache is a corporation in the business of owning large vehicles, employing drivers and transporting goods. Timothy Garnham was an employee/driver of Apache. He was making a pick-up for, and delivery to, Blue Circle on November 23, 1999. He was to pick up two boom lifts in Concord, Ontario at Nationwide and deliver them to Blue Circle. John Rennie Equipment Rentals, a company in the business of equipment rentals, owned the lifts. Mr. Garnham was driving the rig involved in the accident.

7 Apache did not provide Mr. Garnham with a road or route map that he could use to plan a route to, or arrival at, a destination. Mr. Garnham did have his own map with him that day. Despite Apache's standard practice to have its dispatcher provide directions, none were provided that day because the dispatcher was too busy when contacted by Mr. Garnham.

8 Mr. Garnham received directions to get to Blue Circle from Jarrett Roberts who met Mr. Garnham at Nationwide when he picked up the lifts. Mr. Roberts testified that he told Mr. Garnham to "... take the 400 south to the 401. ... 401 east to Waverly Road. ... And I told him if he went past Waverly Road or if he went - past Liberty, he went too far. ... That I told him when he got off at Waverly, to go south over the bridge and take your first right into Blue Circle Cement". Although Mr. Garnham recalls receiving directions from someone, he was unable to identify that individual. His memory of the directions provided differed from that of Mr. Roberts. Mr. Garnham testified that his "...

instructions were to take 401 east to the Bowmanville exit, turn right, and the plant was right there". I accept Mr. Roberts' recollection of the directions that were provided to Mr. Garnham and note that neither Mr. Roberts, nor his company, is a party to this litigation.

9 When Mr. Garnham exited at the Waverly Road exit, he turned right and drove along the South Service Road. When he realized that he had turned the wrong way, he turned around at the intersection of South Service Road and Holt Road. He still was not aware of the names of the roads, as he was not looking for, or at, signs. Mr. Garnham was now reversing his route, traveling easterly along the South Service Road. He could see the well-lit Blue Circle plant on his right as he traveled east along the service road. He turned right onto Symons Road and drove towards the plant. Mr. Garnham did not notice that the sign said "Symons Road" because he was not looking for signs. He did notice "The Area May Flood" sign as he traveled down Symons Road. At the south end of Symons Road, Mr. Garnham turned right onto the east-west portion of the road located on land owned by Hydro. He realized that he was on a road that did not lead to Blue Circle. He decided to turn around by executing a 3-point turn. In order to complete that turn, he moved his rig onto the railway corridor.

10 The rig became stuck in some manner on the railway corridor. Mr. Garnham unsuccessfully attempted to extricate the rig.

11 Although Apache had provided Mr. Garnham with reflective triangles to use if stopped in a place of danger, Mr. Garnham did not place the triangles on the railway corridor.

12 Apache provided Mr. Garnham with a cellular telephone that had limited use. Mr. Garnham believed the telephone only permitted calls to his dispatcher. Apache did not provide proper instructions regarding the use of the cellular phone. Mr. Garnham did not know that it allowed calls to 911 and he did not attempt to telephone 911. He did not call his dispatcher, which call he certainly could have placed.

13 The inter-train and network communications of the rail authorities would have been mobilized had a warning been given. If the rail authorities had received such a warning, the train operators would have been notified of an obstruction on the corridor and had an opportunity to respond.

14 Mr. Garnham testified he was not intending to traverse the railway corridor. He was using it as a turnaround point and would have done so whether signs were present or not. The grade and slope of the corridor approach were not an impediment to him. He misjudged his turn in a way not expected of a professional truck driver. The posting of an emergency rail authority number would have made no difference, as he did not attempt to call his dispatcher or 911. He could not have dialed an emergency number even if one had been posted because his cellular telephone did not allow such out-going calls. Planking and site lines and other physical aspects of the corridor had nothing to do with Mr. Garnham's actions or the movement of his rig. He knew the railway corridor was in front of him and it was never his plan to drive across it.

15 While attempting to free the rig, Mr. Garnham saw a CN freight train approaching from the east. About seven minutes had elapsed since the rig became stuck on the corridor. The CN train collided with the rig and pushed it westward along the tracks. An eastbound VIA passenger train then collided with the remnants of the rig. Both trains derailed. Mr. Garnham testified that on impact the rig's engine was running and all the lights were on.

(b) The Creation of the Railway Corridor

(i) History

16 The railway corridor was created by way of a conveyance in 1902 and, I assume in the absence of evidence to the contrary, in accordance with the provisions of the applicable railway legislation of that time.

17 Pursuant to that conveyance, Grand Trunk (CN's predecessor), purchased land from the Mason family for a railway corridor to be built through lots 16 and 17 on a concession in the Township of Darlington (now Clarington). Grand Trunk paid Mason $6,350 on December 12, 1902, plus the further consideration set out in the conveyance and recorded as follows:

> "... [A]nd of the construction and maintenance at all times as required by the Railway Act of a suitable farm crossing to be located at a point approximately but not less than 20 rods from the westerly boundary of said lot number seventeen."

18 The purpose of including that provision in the conveyance was to permit access between the land to the north and south of the railway corridor by a right-of-way. According to the conveyance, the railway agreed to construct and maintain the crossing commencing in 1902. There are two, parallel, tracks on the railway corridor.

19 Also on December 12, 1902, Mason conveyed to Erastus Burke the balance of lots 16 and 17, i.e. the land that remained after excluding the railway corridor owned by Grand Trunk. In 1949, the Burke family deeded the land to Garnet Symons (Frank Symons' father). The Symons family lived in a house located on the land south of the corridor, farmed the lands to the south and north and used the crossing to access and farm the lands on both sides.

20 On July 20, 1966, Garnet Symons sold the land to St. Mary's Cement (Blue Circle's predecessor), excepting the railway corridor. St. Mary's and Blue Circle have operated a cement plant since they purchased the property. St. Mary's leased a portion of the land to Garnet Symons for farming, in exchange for payment of the property taxes plus $1.00 as the annual rent. The Symons family continued to live on the land south of the corridor, farm the land to the south and north and used the crossing as their only access to the lands on both sides. Frank Symons subsequently took over the farm operation from his father and became Blue Circle's tenant.

21 In 1978 most of the land north of the corridor on lots 16 and 17 was expropriated by Ontario Hydro, now Hydro One Networks Inc., who thereafter licensed the land north of the corridor to Mr. Symons for farming use.

22 From 1966 to 1978 Mr. Symons' arrangement to farm was by way of a lease with St. Mary's Cement and included the land north and south of the railway corridor. After Hydro's expropriation in 1978, Mr. Symons agreement to farm on the south side of the corridor was with St. Mary's Cement and on the north side, with Hydro. Mr. Symons continued to farm the north and south sides of the railway corridor until 1999.

23 In February of 1999, Blue Circle notified Mr. Symons that his tenancy would be terminated as of the end of October 1999. The Symons continued to live on the property south of the corridor until they vacated the premises in mid to late October. Mr. Symons auctioned his farm equipment in May of 1999.

(ii) Ingress and Egress to Blue Circle Land

24 Blue Circle had two ways to enter onto its land south of the corridor. The main entrance used by Blue Circle, its suppliers and employees, was on Waverly Road, a municipal north-south road on which was located a large sign, floodlit at night, which indicated the entrance to its property. Visitors and delivery persons were directed to use the Waverly Road main entrance. The second means of access was that used by the Symons and their predecessors.

There was a gate located in a fence that ran north-south between Blue Circle and the farmland. The gate was located on the south side of the corridor and was locked at times.

25 The Symons exit from the farm, beginning on the south side of the corridor, was achieved by traveling north across the corridor, along an east-west road to Symons Road and north to the main roads. Entry to the farm was obtained by a simple reversal of that route. On a few occasions, Blue Circle allowed the Symons to use its internal road, accessed from Waverly Road and by way of the gate.

26 Blue Circle knew in early 1999 that Mr. Symons would be leaving the farm as of the end of October 1999. Blue Circle did not inform CN or Hydro that the crossing was no longer required by the tenant.

27 Shortly after the accident, concrete blocks were placed at or near the corridor to place it off limits. Mr. John Shakell, CN's track supervisor, made the arrangements for the blocks. Blue Circle had expressed an interest in keeping its right-of-way open until advised by CN that it could only do so if it assumed the responsibility for, and maintenance of, the crossing. Blue Circle did not wish to assume that responsibility.

(c) CN

(i) The Maintenance and Condition of the Railway Corridor

28 Significant evidence was called with respect to CN's negligence concerning the maintenance of the railway corridor. That evidence included the following:

(i) gates should have been placed at the crossing;

(ii) the crossing should have been more clearly marked, with appropriate signage;

(iii) an emergency telephone number should have been posted at the corridor;

(iv) the physical structure of the railway corridor, i.e. the sloping and grading of the crossing and its approaches including its planking, was not constructed to appropriate standards.

29 The absence of a gate and additional signage near the corridor are not germane to the factual matrix of this case. Mr. Garnham was not intending to traverse the corridor and any gate placed by Blue Circle would, conceivably, be located on its land south of the corridor and therefore of no benefit. Mr. Garnham did not enter onto Blue Circle property at any time. He was, additionally, fully aware of the presence of the corridor and unable to make outgoing telephone calls to a CN emergency number. Additional signage would not have assisted Mr. Garnham.

30 The conditions of the corridor, road, and topography of the pertinent lands, are not relevant to this decision. As a trained and professional rig operator, Mr. Garnham had the knowledge and ability to operate his rig safely but failed to do so. The topography of the railway corridor and Symons Road were no impediment to him. He had no intention of crossing the corridor because he was only seeking a turnaround point. The lay of the land was there to be seen by Mr. Garnham and he saw the corridor. Mr. Garnham's failure to operate his rig safely was not caused by the topography or its condition.

(ii) Train Operation

31 The two CN train operators, Gordon Birt and Robert Hoffman, testified that they saw something either on the track or adjacent to the track when they were about 6,000 feet away. Each thought that what he saw was some ribbon-like material.

32 Mr. Birt testified that he saw a reflection at the side and across the track at 6,000 feet even though the train's headlight illuminated only 800 feet in front of the train. They were not able to identify what it was they saw until about 2,000 feet away from it. At that point Mr. Birt knew that it was a rig blocking their path.

33 Mr. Hoffman's evidence was that he "... first saw what is described as reflectorized material coming out of the curve, about 6,000 feet ... I can see ... there's something else ahead of me. Something reflective shining back at me up in the distance. I'm looking at this and I don't know what it is, but it does have my attention. You know, it looks to me that it is off to the side". He recognized that it was a rig across the track when he was between 2,000 and 4,000 feet away.

34 Mr. Hoffman testified that the emergency brakes were applied when the train was approximately 2,000 feet from the crossing. Mr. Birt also testified that the brakes were applied at that point. Both testified that they did not slow down the train when they first saw the object on the track at about 6,000 feet and in fact maintained the throttle in position eight, which is to say, wide open.

35 Although Mr. Birt and Mr. Hoffman testified that the train was put into an emergency stop at about 2,000 feet from the rig, the train event recorder did not support that evidence. The recorder confirmed that the brakes were applied at about 897 feet from the site of impact (Exhibit 131 - the updated event recorder analysis).

36 Robert LeBlanc, a senior transportation engineer employed by CN, testified that at full speed (about 60 m.p.h.) and upon the application of the emergency brakes, the total stopping distance of the train was 2,752 feet. The stopping distance would have been 1,911 feet if the train had been going 50 miles per hour at application of the emergency brakes and 1,223 feet at 40 miles per hour.

37 The evidence established that had Mr. Birt and Mr. Hoffman slowed the train before the application of the emergency brakes, or had they applied the emergency brakes earlier such as when they first saw the rig across the tracks at about 2,000 feet (possibly 4,000 feet according to Mr. Hoffman's evidence), there would have been a real opportunity either to avoid the collision or dramatically minimize its impact. No explanations were provided as to why they did not slow the train down before the application of the emergency brakes or apply the emergency brakes earlier when they first saw the rig across the track.

38 I agree with Blue Circle that it is reasonable to infer that if the train had collided with the rig at a greatly reduced speed, the train would not have pushed the rig down the track another 1,742 feet, as established by the event recorder (or at least not as far down the track), which would likely have led to minimal or no impact with the Via train.

(d) Symons Road

(i) Overview

39 Symons Road originally ran from Baseline Road, north of the current Highway 401. During the 1950's when Highway 401 was constructed, the municipality built the South Service Road to service those roads south of Highway 401, which included Symons Road.

40 Symons Road is about 1,000 meters long. The first 300 meters run from the South Service Road to the westerly bend, referred to at trial as the first leg'. A portion of this leg is paved and two residential properties are located on it. The next 700 meters run in an east-west direction parallel to the corridor. The road then makes a southerly bend, turns toward and ends at the corridor. This portion of the road was referred to at trial as the second leg'. For a number of decades Symons Road was primarily used by horses and horse-drawn carriages. Since that time the road has been used by various motorized vehicles.

(ii) The Use of the Road

41 Frank Symons described the use of the road and railway corridor during his tenure as follows:

(i) when engaged in dairy farming from the 1950's to the mid-1980's, the dairy truck came down the road every other day;

(ii) his father drove the school bus down the road for 30 to 35 years;

(iii) his farm equipment traveled the road and included a tractor, thrashing machine, cultivator, seed drill, haying equipment, and inseminator. He used the crossing to access the land he farmed on the north side;

(iv) strangers including people who wanted to go to the lake/marsh and hunters, drove down the road rarely;

(v) CN vehicles, at times, parked by the tracks on the south side of the corridor;

(vi) Hydro security vehicles two or three times a day checking the switch at the corridor;

(vii) on two occasions over the course of about 40 years, trucks came to his door looking for St. Mary's Cement.

42 Beverly Hart, a neighbour on the north side of the corridor, described the road's use as follows:

(i) kids used the road as a lover's lane and as a place to drink and party;

(ii) Hydro trucks used the road every two to three hours, some going across the corridor;

(iii) the farmer with his tractor;

(iv) once or twice a year a truck driver became lost on Symons Road.

43 Peggy James, Frank Symons' daughter, traveled the road to visit family during the 1990's and described the users of the road as follows:

(i) guests of her grandmother's eight-unit lakeside resort until the resort closed in 1964;

(ii) the Symons family, many times a day;

(iii) Hydro trucks frequently accessing the south side of the corridor;

(iv) the following farm vehicles: milk truck, veterinarian's vehicles, feed trucks and fuel trucks.

44 Jim Schell, an employee of Blue Circle, testified that he used the road to cross the corridor once during a labour dispute.

(iii)<b/> The Municipality of Clarington's Relationship to the Road

45 The municipal road authority installed signs along Symons Road. Signs in place at the time of the accident included a yellow "No Exit" sign on the east corner facing north, a "Symons Road" sign above the "No Exit" sign, and a "Caution Area May Flood" sign on the west side traveling south down the first leg about 250 meters south of the service road. On the south side of the corridor was a St. Mary's Cement sign that read, "No Trespassing St. Mary's Cement Company".

46 Mr. Baker, a municipal employee, testified that Clarington included the first 300 feet of Symons Road in its road inventory for a 1994 road needs study. The first 300 feet is the paved portion of Symons Road, near the residential homes. That inventory was prepared by Clarington to obtain a road subsidy from the provincial government. The road was designated as a rural roadway and was included in the municipality's road patrol routes. The municipality plowed, graded and inspected the road, cut grass and performed weed control along side the road. The municipality had also erected, in addition to those signs identified in the preceding paragraph, a checkerboard "Dead End" sign that faced east. That sign was located about 1,000 meters from the Symons Road and South Service Road intersection and was adjacent to the corridor. Mr. Baker testified that he saw that sign in 1993 and perhaps 1994. He did not see any indication of the sign or its posthole when he attended the accident site about a week after the accident.

47 Clarington did not limit its maintenance of Symons Road to the first 300 feet. It treated the whole of Symons Road to the north side of the railway corridor the same in regards to maintenance and the associated expense as with all other public roads. Mr. Baker's understanding was that Clarington was required to keep Symons Road open for the owner or farmer of the land located south of the railway corridor. Mr. Symons testified that this municipal treatment of the road had prevailed for decades.

48 I find that Symons Road, for the portion that begins at the Symons Road and South Service Road intersection and ends at the north boundary of the railway corridor, constitutes a public road pursuant to the applicable *Municipal Act,* R.S.O. 1990, c. M.45. A municipality generally passes a by-law providing for the assumption of a road for public use. If so, the maintenance of the road becomes a municipal responsibility and expense under the applicable municipal act. However, a municipality may assume responsibility for a road without passing a by-law: A dedication by a landowner that the road be a public road, along with an act of assumption by the municipality for the public use of the road, may give rise to the same municipal responsibility (see *Municipal Act,* R.S.O. 1990, c. M.45, ss. 261 and 284; *Green v. North York (City)*, *[1996] O.J. No. 1450* (Gen. Div.) aff'd *[2001] O.J. No. 3351* (C.A.); *Schraeder v. Township of Gratton*, *[1945] O.R. 657* (H.C.J.)).

49 I find that Clarington, as a result of work performed by it, assumed Symons Road for public use. The case of *Scott et al. v. City of North Bay (1977), 18 O.R. (2d) 365* (C.A.) deals with municipal assumption in the absence of a by-law and the test that applies. Assumption may be inferred from either municipal work performed on, or public money spent by the municipality for the maintenance and/or improvement of, the road. The applicable test, to be met, requires that Clarington be found to have clearly and unequivocally performed the work, which in turn clearly and unequivocally demonstrated its intention to assume the road for public use. Clarington regularly maintained and improved Symons Road using public funds as far south as the railway corridor, in the same fashion it did other roads. The public used Symons Road. It is clear and unequivocal that Clarington intended to assume the whole of Symons Road, from its beginning at the South Service Road to its end just north of the railway corridor.

The Position of the Parties

(i) The Settling Parties

50 The settling parties assert that Blue Circle's liability arises as a result of the application of the *Occupiers Liability Act*, *R.S.O. 1990, c. O.2* ("the Act") because it was an occupier of the premises at the time of the accident. Blue Circle "had control over the railway crossing through its contractual and statutory right of way over the crossing". Therefore it, as well as CN, Hydro and the municipality, were all occupiers under the Act.

51 The settling parties assert that as an occupier, Blue Circle had an affirmative "... duty to ensure that persons using the rail crossing and the Blue Circle land to the south were reasonably safe". Specifically, they submit that Blue Circle had a positive obligation to close the crossing once it was no longer required for farming purposes. They allege that Blue Circle's failure to take steps to close the crossing resulted in a breach of the required standard of care under the circumstances. Therefore, they say, Blue Circle is liable for its portion of the damages caused by the accident.

52 In the alternative or in addition, the settling parties assert that Blue Circle owed a common law duty "to take reasonable steps to ensure that the many vehicles attending at its plant for various reasons would have adequate directions by signage". It is submitted that signage was required because Blue Circle knew:

(i) that people would be making deliveries to it;

(ii) the 401-Waverly Road exit ramp was confusing as it did not lead directly to Waverly Road;

(iii) Symons Road appeared to be an entrance to the plant and;

(iv) the railway crossing was for farm traffic only and not rigs.

As a result, the settling parties submit that a duty attached to Blue Circle that required it to place signs that would warn people that the Symons Road was not an entrance to the plant and/or that Waverly Road required a left turn at the first stop sign on the 401 exit ramp. Blue Circle breached that duty by not posting the necessary sign(s).

(ii) Blue Circle

53 Blue Circle submits that the allegations against it lack substance, are bereft of any evidentiary foundation, and are gratuitously speculative. Blue Circle was not an occupier of the railway corridor and associated rail crossing, or land on the north side of the corridor. The Grand Trunk right-of-way, or easement, runs with the land and is limited to a right of passage only. There were no cases submitted that held that the holder of a right of passage is an occupier. A right-of-way does not automatically result in a user obtaining control over another's land.

54 The "premises" in issue, as identified by the settling parties, are the railway corridor and the second leg of Symons Road. Blue Circle asserts that it was not an occupier because it had no responsibility for, and control of, the identified premises. It is the occupier of only the land south of the railway corridor.

55 Blue Circle submits that it had no obligation to post a sign at Symons Road and the South Service Road,

indicating that Symons Road was not an entrance to Blue Circle. The settling parties did not adduce any evidence that such a sign would be permitted or whether it was possible to obtain the necessary permission. There was no evidence that Mr. Garnham would have seen an additional sign at a particular location; indeed, he was clear about not seeing any signs because he was not looking for signs. The same applies to the settling parties' submission that Blue Circle should have placed a sign at the Waverly Road exit ramp.

56 The deeded conveyance to Grand Trunk imposed no obligation on an owner or occupier or user of the land to the south of the crossing to inform the railway owner of a change of use of the crossing.

The Issues

1. Is Blue Circle an occupier of adjacent land, specifically the railway corridor, under the *Occupiers' Liability Act*?
2. Did Blue Circle owe a common law duty of care, the standard of which was subsequently breached, that required it to place signs to warn people coming to its plant that it could not be reached by Symons Road, and that it could be reached by taking Waverly Road?

The Occupiers' Liability Act

57 References to the Act are as follows:

Definitions

1. In this Act,

"occupier" includes,

(a) a person who is in physical possession of premises, or

(b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises, despite the fact that there is more than one occupier of the same premises; ("occupant")

"premises" means lands and structures, or either of them, and includes,

(a) water,

(b) ships and vessels,

(c) trailers and portable structures designed or used for residence, business or shelter,

(d) trains, railway cars, vehicles and aircraft, except while in operation. ("lieux") *R.S.O. 1990, c. O.2, s. 1*.

Common law duty of care superseded

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

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 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*.

58 The purpose of the Act was to provide clarity and consistency in the application of occupiers' law and to do away with the former common law "class" system. The common law system established a duty and the applicable standard of care, based on the "class" of visitor to the premises. The Act replaced the "class" system with a general duty to all entrants based on the "neighbour" principle established in *Donoghue v. Stevenson*, [1932] A.C. 562, [1932] All E.R. 1 (H.L.); see *Waldick v. Malcolm*, *[1991] 2 S.C.R. 456*, aff'g *[1990] 70 O.R. (2d) 717*, cited to S.C.R. at para. 19; *Appleyard v. Essex Terminal Railway* 1997 CarswellOnt 3650 (Gen. Div.).

59 *Mann (Next Friend of) v. Calgary (City)*, *[1995] A.J. No. 206* (Q.B.) similarly considered whether the Alberta legislation had also subsumed the application of "unusual danger" or "special circumstances" that would have previously triggered the application of the common law and found that it had. The *Occupiers' Liability Act* eliminated the application of the common law's "unusual danger" and the proper question asked whether the occupier could "... reasonably have foreseen a risk to visitors who exercised ordinary diligence"; at para. 35. Section 2 of the Act expressly subsumes all of the common law related to occupiers' liability including "unusual danger" or "special circumstances". Those factors, however, may still be relevant in identifying the applicable standard of care that applies once a duty is found.

60 In order for the Act to apply, the individual must be found to be an "occupier" of the particular "premises", as defined in s. 1. The "premises" in this case is the railway corridor that included the crossing - the location of the accident. That land is owned by CN. The deed stated that CN was responsible for the construction and maintenance of the rail crossing.

61 However, there may be more than one occupier of the "premises". For the purposes of liability, an occupier's responsibility and/or control of the premises need not be exclusive. Each occupier may be found to be under a duty of care, which requires a standard of care that is reasonable under the circumstances and keeps visitors reasonably safe; *Wheat v. E. Lacon & Co.*, [1966] A.C. 552 at 578.

62 Pursuant to s. 1 of the Act, a person will be an occupier if he or she meets the threshold requirement and falls within one of the following categories:

a. the person has "physical possession of the premises";
b. the person has "responsibility for and control over the condition of the premises";
c. the person has "responsibility for and control over the activities carried on in the premises"; or
d. the person has "control over persons allowed to enter the premises".

63 There has been debate in the case law regarding whether or not the fourth category requires simply "control" or "responsibility for and control over" persons allowed to enter the premises. It seems settled in Ontario that "control" over persons allowed to enter the premises is all that is required; see *Moody v. Toronto (City)* *(1996), 31 O.R. (3d) 53* (Ont. Gen. Div.) and *Lemieux v. Porcupine Snowmobile Club of Timmins Inc.* *(1999), 120 O.A.C. 292*, 1999 CarswellOnt 1525 (C.A.) aff'g *[1997] O.J. No. 5823* (Gen. Div.).

64 On an ordinary reading of the Act, and in order for the Act to apply, there must be evidence that Blue Circle meets one of the four branches of the definition of occupier pursuant to s. 1 of the Act. The settling parties must establish, on a balance of probabilities, that Blue Circle is an occupier of the relevant premises under the Act; *Appleyard* at 12. Where the Act is found to apply, the occupier, where circumstances warrant, has an affirmative

duty to take steps to ensure the premises are reasonably safe; *Waldick, supra; Sandberg v. Steer Hldg. Ltd.*, [1987] 3 W.W.R. 732; *Carroll v. Metropolitan Toronto Condominium Corp. No. 560*, [1992] O.J. No. 649; *Reid v. Hatty*, [2005] N.B.J. No. 20.

65 The settling parties' position is that Blue Circle was an "occupier" of the railway corridor and therefore subject to the duty contained in s. 3(1) of the Act. The only possible basis for finding Blue Circle to be an occupier is if the evidence demonstrates that it, as an adjacent landowner, had "control over persons allowed to enter" the premises comprised of the railway corridor. This is because it is clear that responsibility for, and control over, the railway corridor belonged to CN, pursuant to the deed and the applicable railway legislation at that time. The railway corridor and crossing were owned, maintained and used by CN. There was no evidence that Blue Circle had assumed any responsibility for the care or maintenance of the railway corridor or the crossing. It is equally clear that Blue Circle was not in "physical possession" of the railway corridor. For example, Blue Circle could not control who used the corridor, interfere with the use of the corridor, or obstruct the corridor.

66 There were no cases submitted by any party that dealt with an adjacent occupier being governed by the Act other than *Moody*. That case turned on its own particular facts that are not relevant to this case. The distinguishing feature between *Moody* and this case is that Symons Road and the railway corridor were not exclusively used by Blue Circle or visitors to its premises or its tenant. I have found Symons Road to be a public road. Hydro and CN used the road. There were residential homes on Symons Road. Other members of the public, such as hunters and guests at the resort, had used the road. The same was true of the railway corridor. CN and Hydro frequently used the railway corridor, owned by CN. As in *Appleyard*, a finding that Blue Circle had "control" over the railway corridor would require a finding that Blue Circle exercised control over the public when they were on Symons Road and/or the corridor. Such a finding would be incongruent with the purpose underlying the Act.

67 In *Bogoroch v. Toronto (City)*, [1991] O.J. No. 1032 (Gen. Div.), 1991 CarswellOnt 1554 [cited to CarswellOnt], the court held that the defendant was an occupier under the Act of an adjacent sidewalk. The defendant in that case had obtained a permit from the city allowing its goods to be placed for sale on the adjacent public sidewalk. The court held that the permit conveyed a right to physical possession of the adjacent sidewalk (the "premises"), which the defendant exercised on a continuing basis. The defendant had, in addition, used more than the permitted space and it was found to be in physical possession of that portion as well; at para. 28.

68 *Bogoroch* turned on its own facts. In this case Blue Circle did not obtain physical possession of the corridor under a contract or by permit. It did not have express authority from Clarington or CN that allowed it to use the railway corridor for private business purposes.

69 In *Appleyard v. Essex Terminal Railway*, [1997] O.J. No. 3266 (Gen. Div.), 1997 CarswellOnt 3650 [cited to Carswell], the court found that the Act did not apply to an occupier adjacent to the railway corridor "premises". In that case employees had to walk across the corridor to enter the employer's parking lot. An employee had been injured while crossing the corridor. The defendant employer had brought a motion for summary judgment to dismiss the claim against it on the basis that the Act did not apply. The motion was granted because: the adjacent occupier-employer was not under any contractual obligation to maintain the property at the corridor; it was not in physical possession of the crossing and; there was no evidence that the employer had assumed any responsibility and control for the condition of the crossing. The only way that the court could have found that the Act applied was if it decided that the employer had control over employees when on a public sidewalk, which it was unwilling to do in the circumstances.

70 Similarly, I am not willing to find that Blue Circle exercised control over people who used the railway corridor. Blue Circle had no obligation, contractual or otherwise, to maintain the corridor. It had no responsibility and control over the condition of the corridor. The corridor was available for use by the public and Blue Circle could not, and did not, exercise any control over people who chose to enter the corridor.

71 In *Lemieux, supra*, the decision of the trial court that the defendant snowmobile club was not an occupier of the

railway corridor ("premises") was upheld on appeal; at para. 5:

> In our view, the trial judge was correct in holding that there was no occupier's duty of care owed to the plaintiff. "Occupier" is defined in s.1 of the *Act*, and provides that a person is an occupier if the person:
>
> * is in physical possession of the premises,
> * has responsibility for and control over the condition of the premises,
> * has responsibility for and control over the activities carried on on the premises, or
> * has control over persons allowed to enter the premises.
>
> For the purposes of this appeal, the railbed constitutes "the premises".
>
> Karam J. found, correctly in our view, that there was no evidence that established that the defendant met any of the four branches of the definition of occupier.

In that case the plaintiff's snowmobile became wedged on a part of an abandoned corridor when he attempted to drive across it. That resulted in the plaintiff, an experienced snowmobiler, being injured. The plaintiff had submitted that the defendant snowmobile club was governed by the Act because the corridor formed part of the club's snowmobile trails. At trial, the court held that the club had never assumed "responsibility" for the corridor; nor had it attempted or been able to control who entered or was excluded from it. "Control" required "... at least some power to regulate the condition of the rail bed, as well as some power to admit or exclude the entry of persons using it"; at para. 13. Thus the Act was found not to apply.

72 The settling parties submit that because Blue Circle had a contractual and statutory right-of-way to use the crossing, they became an occupier of the railway corridor, as defined under the Act. The Act is not so broad that it applies as a result of the mere use of the premises. A right-of-way does not inherently include responsibility and/or control over the premises upon which it is exercised. There was no evidence demonstrating that Blue Circle's right-of-way was anything more than a basic and deeded right to cross the railway corridor.

73 Blue Circle's right-of-way did not provide it with any responsibility or control over the corridor. The conveyance, in fact, expressly kept responsibility for the corridor in the domain of the railway. There was no evidence that Blue Circle had assumed any responsibility or control over it. The conveyance did not convey a right to physical possession of the premises as in *Bogoroch*. Blue Circle was not provided with the ability or authority to control who entered onto the railway crossing by way of Symons Road. Liability does not arise simply because Symons Road ultimately leads to Blue Circle land.

74 The evidence showed that Symons Road was used by the public, CN, Blue Circle, the Symons family and Hydro at various times. Blue Circle did not have exclusive use of the railway corridor.

75 I find that Blue Circle does not meet any one of the four branches of the definition of occupier, under s. 1 of the Act. The Act does not apply, no duty of care arises, and no liability attaches to Blue Circle.

76 The settling parties raised many issues concerning the standard of care that would be required of Blue Circle as an occupier of adjacent premises. There were cases submitted in support of the affirmative duty that attaches to an occupier under the Act, and the onus on the occupier to show it took reasonable steps to ensure the premises were reasonably safe. However, I have already found that no duty of care arises.

77 Even if I found that a duty of care arose, I would find that the standard of care was not breached. Section 3(1) of the Act identifies that the applicable standard of care requires an occupier "... 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". The occupier is not an insurer and the applicable standard is reasonableness: *Waldick C.A.* at para. 19; see also *Anderson v. Canada Safeway Ltd.*, *[2004] A.J. No. 792* at para. 4. The reasonableness of the steps taken by the occupier involves a contextual

analysis of the factual matrix of the particular situation; "... [T]he factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation. ... One such circumstance is whether the nature of the premises is rural or urban. Another is local custom ..."; *Waldick SCC* at para. 33; see also *Przelski v. Ontario Casino Corp.,* [2001] O.J. No. 3012 (QL) [cited to QL] at para. 40. The standard is not one of perfection; *Przelski* at para. 41; *Duddle v. Vernon (City)*, [2004] B.C.J. No. 1430 (C.A.) at para. 22, leave to appeal ref'd [2004] S.C.C.A. 432.

78 The phrase "in all the circumstances", written in the present tense, indicates that the question is not to be applied in hindsight where consideration would be given to what the occupier could have done; *Duddle*, at para. 16. The Act does not require occupiers to do everything within their power that would have prevented the accident because that would impose a standard of perfection. The question is whether Blue Circle took reasonable care in all of the circumstances at the time of events to see that Mr. Garnham was reasonably safe on the premises.

79 The settling parties argued that the standard of care required Blue Circle to notify CN that the farm crossing was no longer required once Mr. Symons vacated the property. I find that Blue Circle met the standard of care in the absence of notifying CN. Blue Circle had no contractual or other legal obligation to inform CN that the crossing was not being used as a farm crossing. The right-of-way attached to the land and not a named farmer. Hydro and CN used the crossing regularly. Suppliers and visitors were directed to Blue Circle's main entrance, which was primarily used, well lit and identified.

80 The standard of care would require Blue Circle to take steps to avoid an event that was reasonably foreseeable. Blue Circle was not aware of maintenance or safety issues with Symons Road or the railway corridor, nor was it responsible for them. The crossing had been in existence and regularly used for over nine decades at the time of the accident. There was no evidence that another accident had occurred. It was not foreseeable that an experienced rig driver would deliberately disregard signs and directions, fail to telephone for additional instructions when having difficulty finding Waverly Road, and then choose to perform a 3-point turn by moving onto a railway corridor. It was also not foreseeable that an experienced rig driver would not call the dispatcher or 911 for assistance once in trouble. I find that the steps, or lack thereof as argued by the settling parties, taken by Blue Circle were sufficient to meet the applicable standard of care under the circumstances. To require Blue Circle to notify CN, on its own initiative and without any contractual obligation, about its status concerning a corridor regularly used by others would be imposing a standard of perfection.

81 Even if I found that duty of care existed and the standard of care was breached, the claim against Blue Circle would fail for lack of causation. The settling parties failed to show on a balance of probabilities that but for Blue Circle's failure to notify CN, Mr. Garnham would not have found himself making a 3-point turn using the railway corridor. The evidence that CN would have promptly closed the crossing was purely speculative and would have required the agreement of others or at least Hydro since the blocks would have to be placed on its land. That evidence was not tendered.

Did Blue Circle have a common law duty to warn?

82 In the alternative, or in addition, the settling parties submitted that Blue Circle had a common law duty of care to take reasonable steps to ensure that visitors to its facility would have "adequate directions by signage". It was argued that this obligation arose because of the confusing layout of the Waverly Road exit off the 401 highway; and because Symons Road is not an access road for Blue Circle. It was submitted that at least one sign, located at Symons Road and the South Service Road, would tell visitors to Blue Circle that entry could not be gained by Symons Road. Another sign, located at the exit ramp and South Service Road, would inform the public that access to Blue Circle was to the east. The settling parties further submitted that Blue Circle's failure to place such signs resulted in a breach of the applicable standard of care.

83 The first question to ask is whether Blue Circle owed a duty of care to the plaintiffs based on proximity; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (Q.L.) [cited to QL]. The question, as restated by Justice Wilson in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.) at page 10-11, and applied in *Coulter v. Canadian National Railway Co.*

(2000), 138 O.A.C. 309, 2000 CarswellOnt 4100 (C.A.) at para. 34 [cited to Carswell], rev'g *[1998] O.J. No. 2946*, *1998 CarswellOnt 2931* (Gen. Div.), asks:

> i. Is there a sufficiently close relationship between the parties (the [defendant] and the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,
>
> ii. Are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

84 *Coulter, supra*, concerned a plaintiff who was injured while traveling across a private railway crossing to reach a lodge. The plaintiff had been a guest at the defendant's lodge. At trial, the court held that the defendant was not an occupier of the railway corridor under the Act but did have a common law duty to warn the plaintiff of the "unusual nature of the crossing"; *Coulter* (Gen. Div.) at para. 49. That finding was overturned on appeal because no duty to warn arose under the common law. The court identified that the common law is reluctant "... to impose a duty on a person to take action to assist another who is facing a risk of harm that the person played no part in creating"; at para. 33. The court found that the threshold test of proximity was not met under the circumstances because the defendant had not created the risk the crossing presented; did not have any responsibility for or control over the crossing; the road was used by the public and; he was unaware of problems on the road. Therefore, and in regard to the risk posed by the crossing, it was not foreseeable that carelessness by the defendant might cause the plaintiff injury and no duty of care arose. The court also held that policy reasons at the second stage would eliminate any duty that might have arisen because of indeterminacy in regard to whom the duty is owed and how the duty would be discharged.

85 The directions provided to Mr. Garnham indicated that the entrance to Blue Circle was obtained by way of Waverly Road. Mr. Garnham, however, turned right after exiting the 401 and drove along the South Service Road. When he realized he had turned the wrong way, he turned around at the intersection of South Service Road and Holt Road. He still was not aware of the names of the roads as he was not looking for or at signs. He was heading towards the lit up plant, looking for its entrance. At the south end of Symons Road, Mr. Garnham turned right onto the east-west road located on Hydro's land and then realized that he was on a road that did not lead to Blue Circle. He decided to turn around by executing a 3-point turn. In order to complete that turn, he had to move his rig onto the railway corridor.

86 Mr. Garnham was an experienced rig driver. He had been given directions to Blue Circle that identified Waverly Road as the plant's entrance. He took a wrong turn on the South Service Road and decided to attempt to access Blue Circle based on its visual location even though he knew that it was Waverly Road and not Symons Road that he was looking for. Mr. Garnham testified that he was not paying attention to the signs. One of those signs, at the corner of the 401 exit ramp and the South Service Road, indicated that Waverly Road required drivers to make a left hand turn. Mr. Garnham testified that he did not read the signs because he was not looking at them. He testified that he saw no marked entryway into Blue Circle after he turned right onto the South Service Road, heading west. Mr. Garnham assumed that he was on Waverly Road and did not read the signs posted. He turned right onto Symons Road, without reading the signs, because it looked to be a road into Blue Circle based on his view of the plant. He testified that he saw the signs at the South Service Road and Symons Road intersection but did not read them. Mr. Garnham realized he could not gain entry to Blue Circle by way of Symons Road when the road turned in a westerly direction. He then decided to look for a spot on the road on which to turn around on and decided to perform a 3-point turn that involved placing his rig over the railway corridor he knew was there, despite any alleged lack of signage that indicated its presence.

87 Under the circumstances, the settling parties are arguing that the standard of care, in effect, required Blue Circle to control the decision-making process of a person. I find that Blue Circle had no obligation to warn of a danger it did not create. Blue Circle's standard of care would not have required that it warn Mr. Garnham of self-evident dangers such as performing a 3-point turn on a railway corridor. Blue Circle is not liable for Mr. Garnham's

disregard of such self-evident dangers or his poor decision-making. The plaintiffs' injuries arose as a result of Mr. Garnham choosing to perform a 3-point turn on the railway corridor and not from any lack of signage.

88 I agree with *Coulter* that imposing a duty to warn under the circumstances would give rise to policy concerns that would militate against such imposition. Permission to place signs on property owned by others may not be obtainable or granted. There are no specifications regarding the size, type, and location of the signs. This leads to questions such as how far away from the premises should the first sign be placed and how many are required. To whom would the duty attach? Conceivably everyone would be required to place signs indicating that visitors cannot get to a location from various other roads and streets.

89 In conclusion:

(i) the *Occupiers' Liability Act* does not apply to Blue Circle as an adjacent landowner to the premises comprised of the railway corridor. Blue Circle does not meet any one of the four branches that define an occupier' under s. 1. It was not in physical possession of the premises; it had no responsibility and control over the condition of the premises and activities thereon and; it could not control who was permitted to enter the railway corridor. Blue Circle had no obligation under the Act to notify CN that the crossing would no longer be required for its tenant.

(ii) if an occupiers' duty had attached, the standard of care would not have been breached. It was not foreseeable that an experienced and professional rig driver would operate his vehicle in the manner previously described. Similarly, it was not foreseeable that CN operators would choose not to slow down the train when they first saw a reflective material across the corridor or apply the brakes immediately upon knowing that the object was a rig. The steps, or lack thereof, taken by Blue Circle were reasonable under the circumstances and provided for the reasonable safety of entrants to the premises.

(iii) if the standard of care had been found to be breached, the claim would fail for lack of causation. The settling defendants failed to show, on a balance of probabilities, that, but for Blue Circle's failure to notify CN, Mr. Garnham would not have found himself making a 3-point turn using the railway corridor.

(iv) the claim that Blue Circle had a common law duty to warn also fails and no liability attaches. No duty arises because Blue Circle played no part in the creation of a risk of harm. Blue Circle had no responsibility or control over the corridor or the road leading up to it. No duty arises as a result of a lack of proximity. Moreover, policy considerations would militate against the finding of a duty under the circumstances. The duty to warn, that "you cannot get to my place from here", would apply to virtually everyone in the absence of standards that would identify how to fulfill that duty.

90 The actions are dismissed as against Blue Circle. It is not necessary for me to decide the respective liability of the other defendants as they have reached an agreement amongst themselves. I may be contacted with respect to costs if the parties cannot agree on same. Judgment accordingly.

J.E. FERGUSON J.