

# The Ordinary Driver

*FORDHAM, CHIOCCHIO, SAFRANYOS AND OTHERS*

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# Point 1: Municipalities Sometimes Win!!!

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- *Fordham* – a win! 😊
- *Chiocchio* – a win! 😊
- But: *Sanfranyos* - 😞
- Note that in EACH CASE the municipality lost at trial - 😞

## Point 2: Even Without a Perfect Case!!!

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- Of course, municipalities ought to win every case in which the road signage and road markings meet the applicable standards or are otherwise reasonable in the circumstances.
- However, some problem at the location of the accident is always alleged.

# Point 3: It's Still Hard to Predict

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Cases are decided based on a  
legal fiction.

# Sources of Confusion

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The (fictional) Ordinary Driver

Vs.

The Actual Drivers

Vs.

Causation

# Statutory Duty

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- The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is **reasonable in the circumstances**, including the character and location of the highway or bridge – MA, 2001, s. 44(1)
- The duty is non-delegable – council cannot pass a by-law making some other person or entity responsible, or cannot pass a by-law that the law doesn't apply.
- It applies to roads and sidewalks
- It covers not only things like snow and ice and trip ledges, but also – signage, road and lane markings
- The issue is what is “reasonable” or “unreasonable” “in the circumstances”
- This statutory duty of care is the starting point of the analysis. If it is not breached, the analysis should be over. Even if it is, there are other ways to win.



*Municipalities are required to prevent or remedy conditions on its roads that create an unreasonable risk of harm for **ordinary drivers exercising reasonable care**. However, the duty does not extend to remedying conditions that post a risk of harm **only because of** “acts of folly” , i.e. negligent and reckless driving.*

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*Duty to the Ordinary  
Driver*

A municipality is expected to provide extra cautionary measures “***only where the conditions of the road and the surrounding circumstances do not signal to the driver the prospect that a hazard is present.***”

- Justice L. Bastarache in *Housen*

*Fordham (Litigation guardian of) v Dutton-Dunwich (Municipality)*, [2014]

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*Duty to the Ordinary  
Driver*

*“A municipality has **no duty** to keep its roads safe for those who drive negligently.”*

- Justice Laskin in *Fordham*

# That Sounds Straightforward, Right?

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- Standard of care depends on ordinary drivers driving without negligence – *Fordham*, para. 29
- A municipality’s duty of reasonable repair does not extend to making its roads safer to negligent drivers, *Fordham*, para. 29
- No need to remedy conditions that pose a risk of harm only because of “acts of folly”
- Only need to remedy conditions that create an unreasonable risk of harm for ordinary drivers exercising reasonable care
- BUT DOES **NOT** MEAN that no liability of municipalities for actions of negligent drivers

# Let's Talk About:

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Fictional, Ordinary Drivers

Actual, Negligent Drivers

What is an Act of Folly

Causation

# “Ordinary Driver” is a Legal Fiction

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The “ordinary driver” is like the “reasonable person” a legal fiction, belonging to a tradition of defining a legal standard by reference to a hypothetical person.

What the “ordinary driver” would or would not do cannot be proved by calling ordinary drivers as witnesses and asking them what they would do. It is purely a legal construct.

In essence, when we are in the position of fighting over whether a roadway was in a reasonable state of repair in all the circumstances, we are fighting over whether a fictional character, the ordinary driver could negotiate it safely.

This ultimately depends on what we think about this fictional, “ordinary driver”.

*The Ordinary  
Reasonable Driver*

- The ordinary driver is one who is “often faced with inherently dangerous driving conditions” that are hidden such as “icy or wet conditions, country roads that are not well lit, snow ridges and potholes.”
- Based on these obstacles, “common sense dictates that motorists will exercise a degree of caution when faced with dangerous driving conditions.”

-Justice L. Bastarache in *Housen*

*The Ordinary  
Reasonable Driver*

*“The ordinary driver must have room for those who are inexperienced, elderly, or have only average perception, reflexes and reaction time. They are all licensed to drive, and they may make mistakes of perception and/or reaction and/or judgment in relation to unexpected road-based changes, and they may, without some guidance, miss a subtle cue of potential change in road conditions, amid all the information unfolding as that motorist is driving. **The standard of care of road authorities rests on the notion of the ordinary motorist driving without negligence,** including those encountering the road for the first time, and the duty of care does not end at dusk each day.”*

– Justice Howden in *Deering*

# Can Science Tell Us?

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Human Factors experts are often called, most frequently by plaintiffs, to try to explain how such a hypothetical person would behave in a given circumstance, with such opinions purporting to be scientifically derived.

Such reports generally aim to prove that the roadway was hazardous to the ordinary driver (duty of care), and exculpating their client (contributory negligence).

Some Human Factors conclusions may be scientifically founded, such as how much time someone requires to perceive and react to a hazard, how far a person can see, and so on. Other conclusions are arguably pseudo-science.

# Law

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The *Highway Traffic Act* is something the ordinary driver is generally presumed to know and follow.

# Actual Driver May Be Negligent (Likely Is....)

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It is probably fair to say that any condition that poses a challenge for an ordinary driver poses a greater challenge for a negligent driver.

In most cases the condition that is alleged to be negligent has existed for years without any significant accident history.

The alleged problem is uncovered only when the condition is attempted to be negotiated by a negligent driver. To defendants, this fact is telling.

We'll see in *Deering*, that the courts will not necessarily put a lot of weight in a clear accident history when assessing whether a condition is safe for the ordinary driver. Again, this is because the ordinary driver is fundamentally a legal construct.

# The Negligent Driver

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There are too many negligent driver actions to list. Most are also breaches of the *Highway Traffic Act* or are simply careless. The top ones:

Speeding/Driving too fast for conditions

Following to close

Distraction/Inattention

Drinking leading to a decrease in reaction/perception times

Not keeping a proper lookout

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# Negligent Driver Summary

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Even if the actual driver(s) involved in the actual accident are negligent, this does not change the duty of care analysis which is based on the fictional ordinary driver.

# Act of Folly

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Municipalities are not liable for “acts of folly” by a driver.

*Kennerley v. Norfolk (County) (2005): “reckless conduct.”*

This may be because: 1) there is no duty to design around them because the ordinary driver does not commit acts of folly; or 2) contributory negligence = 100%.

# CASE ANALYSIS #1

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*Fordham (Litigation guardian of) v Dutton-Dunwich (Municipality), [2014] OJ No 5938*

**Act of Folly** : The driver drove at or near 80 km/hour into an intersection without first stopping at the visible stop sign.

*“A municipality has no duty to keep its roads safe for those who drive negligently.”*

*Facts*

- The road curved to his right just after the intersection (“the offset”).
- Fordham saw the curve too late and in trying to navigate it, lost control of his car and crashed into a concrete bridge abutting the road.
- He sued the municipality under Section 44 of the *Municipal Act* alleging that it failed to post a checkerboard sign warning of the change in the road's alignment.
- The argument was: if there had been a reflective checkerboard sign, he would not have driven into the intersection against the stop sign

## *Procedural History*

### TRIAL :

- Apportioned the municipality's liability at 50% for non-repair of the road and Fordham's at 50% for going through the stop sign.
- Held that the offset was a "*hidden hazard*"

## *Appeal*

*Four step test for analyzing the statutory cause of action against the municipality :*

- 1.Non-repair: The plaintiff must prove on a balance of probabilities that the municipality failed to keep the road in question in a reasonable state of repair.
- 2.Causation: The plaintiff must prove the "non-repair" caused the accident.

*Appeal*

3. Statutory Defences: Proof of "non-repair" and causation establish a *prima facie* case of liability against a municipality. The municipality then has the onus of establishing that at least one of the three defences in s. 44(3) applies.

4. Contributory Negligence: A municipality that cannot establish any of the three defences in s. 44(3) will be found liable. The municipality can, however, show the plaintiff's driving caused or contributed to the plaintiff's injuries.

*Fordham (Litigation guardian of) v Dutton-Dunwich (Municipality)*, [2014] OJ No 5938

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*Issue on Appeal*

Was the road in a state of non-repair because the municipality failed to put up a sign warning of the offset?

*Fordham (Litigation guardian of) v Dutton-Dunwich (Municipality) (2014)*

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***Holding on Appeal***

- The Ontario Court of Appeal held that the road was in a state of repair.

*“It is not the law in Canada that the duty of road authorities goes beyond the duty to keep their roads in reasonable repair for the ordinary driver exercising reasonable care, to include drivers who, for instance, do not pay attention, drive at excessive speeds, drive too close to the vehicle in front and who are otherwise negligent.”*

-Justice Laskin *in Fordham*

*Misapplication of the test  
for assessing a  
municipality's duty of  
repair*

***Duty to erect signs:***

- A municipality's general duty of repair includes erecting and maintaining proper signs.
- The mere presence of a hazard does not require a municipality to put up a warning sign.

*Misapplication of the test  
for assessing a  
municipality's duty of  
repair*

***Duty to erect signs:***

- Where hazards are hidden or “*not readily apparent to users of the road*,” a municipality may have a duty to install warning signs, if without them, an ordinary driver exercising reasonable care would be exposed to an unreasonable risk of harm.
- But generally, there is no duty to warn of obvious hazards, or hazards that would be apparent to the ordinary driver

*Fordham (Litigation guardian of) v Dutton-Dunwich (Municipality)*, [2014] OJ No 5938

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*Non-application of the reasonable  
driver standard*

**In *Fordham*:**

- The ordinary reasonable driver who stopped at the stop sign would have had adequate time to perceive the offset and navigate it safely.

# *Fordham* Take Away

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If the fictional “ordinary driver” can negotiate the roadway in safety then the roadway is in a reasonable state of repair.

Question is: “what would the ordinary driver do?”

In *Fordham* the answer was obvious: Stop.

But it’s nice to have a great contrast with the actual driver. For example, a 16-year-old, race-car driving, beer-drinking, G2 driver, driving at almost 80 km per hour, at night, through a clearly visible stop sign, on an unfamiliar road. 100% Contributory negligence might equally have explained the result.

That said, *Dutton-Dunwich* lost at trial. ☹️

# *The Steps in the Analysis*

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1. The condition in question is reviewed by reference to whether the fictional “ordinary driver” could negotiate it in safety;
2. The analysis of how the “ordinary driver” would negotiate the condition could be decided by reference to the law (HTA, for example), inferences, and possibly expert evidence;
3. If the judge determines that a condition creates a situation of danger for the “ordinary driver” then negligence of the actual driver does not exculpate the municipality, it just goes to the liability split to the extent that each act of negligence caused or contributed to the damages; and,
4. Causation remains a necessary part of the negligence analysis.
5. Don’t forget about the s. 44(3) defences – in particular with respect to idiosyncratic findings by Human Factors experts, did the municipality know or could it reasonably have been expected to know about such things or respond to them? At some point another fictional character might be called upon: the similarly situated reasonable municipality.

# Deering

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# *Deering: What Happened?*

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*Whether it was due to the unidentified vehicle driving slightly over centre, or the **Deering** vehicle being .5 metre over centre just before any braking occurred, or an illusion caused by the deflected road alignment on that particular hill, Shannon **Deering** saw the approaching vehicle as coming directly at her, its lights blinding her.*

*To avoid an apprehended collision, she steered right to avoid the oncoming vehicle, lost control and panicked, over-steered left trying to stay on the road, tried momentarily to brake but hit the accelerator very briefly, veered into the ditch still at a tragically high speed, rolled twice, collided with the rock culvert, and stopped west of the 1360 Coates Rd. driveway of Mr. Agnew (para. 72).*

Basically, she veered off the road because she thought another car was coming towards her even though it probably wasn't going to hit her car.

# Deering was Negligent

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In *Deering* it was after 10 between 10:34 and 10:42 p.m. The driver and passengers were on their way to a movie that started at 11:00 p.m.

- The driver was inexperienced, she was a G2 driver and had her car for about 6 weeks;
- It was dark;
- She was driving on an unlit, rural road with which she was unfamiliar to save time;
- She was speeding;
- The road was hilly, which must have been obvious to the driver, and she was on the third hill at the time of the accident;
- The road did not have centre lines which must have been obvious to the driver.

# Problem Was Assessed for the Ordinary Driver

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In my conclusions, I do not accept that an ordinary driver, exercising reasonable care and unfamiliar with this road, would be expected to drive above the speed limit, let alone at 90 to 95 km./hr. at night.

In finding that the conditions on the accident hill represent an unexpected hazard, I am assuming that an ordinary driver would be proceeding under the speed limit on this unlit road with two hills prior to this one and knowing that there is the possibility of vehicles coming in the opposite direction.

# *Deering*: Not Safe for an Ordinary Driver

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*“But even at 70 km./hr., which means 19.44 metres per second, with two vehicles approaching each other at a combined speed of 140 km./hr. depending on the speed of the approaching driver and (due to the deflection) pointing at each other at first, there is too little time to react appropriately. Of course, at night, to a first-time driver on Coates Rd. West, that driver would not see the sight-distance deficiency or the misleading deflection in the road until it is too late.”*

These conclusions were heavily reliant on the plaintiff’s Human Factors Evidence.

# Deering

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- The road had a unique feature, an “accident hill”, that presented an unusual and dangerous deflection of light that might lead even an ordinary, reasonable driver in the westbound lane to believe that eastbound traffic was in their lane as eastbound traffic crested the hill
- The road was unlit
- The speed limit was unposted and excessive such that even a driver going at or slightly under the speed limit would not have sufficient time to react to oncoming traffic;
- There was no centre line on the road; and
- The road was excessively narrow in light of the above factors.

# Causation: But For Test

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Even where there is a breach of a standard, or negligent driving, the court still has to determine the extent to which any breach or negligence caused or contributed to the accident, injuries and damages **in fact**.

This also requires the application of some amount of judgment and discretion. For example:

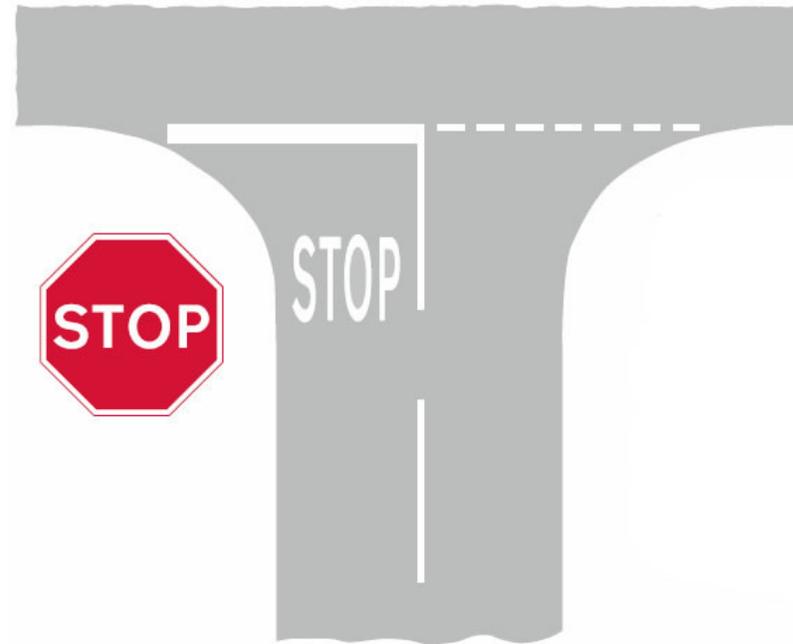
No centre line: 67% (note, other circumstances of the road were not tortious: it is not tortious for a rural road to be dark, or for a road to be hilly, and so on).

Speeding at night, on an unfamiliar road, knowing it did not have a centre line and was hilly and that other cars could suddenly appear, veering off the road, hitting the gas instead of the brake, losing control: 33%.

On appeal, the appeal court noted that this finding was entitled to deference.

# *Application in Stop Sign Cases: Chiocchio and Safranyos*

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## **CASE ANALYSIS # 2**

*Chiocchio v Ellis*, [2018] OJ No 4766

Contrary to the *Highway Traffic Act* and ‘common sense’, the driver failed to stop at a point close enough to an intersection to have adequate sightlines of oncoming traffic.

*Facts*

- Vehicular accident that occurred at an intersection governed by a stop sign.
- The stop sign governed the flow of westbound traffic.
- The defendant vehicle, proceeding westbound, accelerated away from the stop sign and T-boned the northbound vehicle in which the plaintiff, Chiocchio, was a passenger.
- Chiocchio was rendered a **quadriplegic**.
- The stop sign was behind a faded stop line.
- The plaintiff alleged that the municipality did not maintain the road in a state of repair in failing to repaint the stop line.

*Procedural History*

**TRIAL :**

- Held the City of Hamilton was negligent in failing to repaint and maintain the stop line.
- Apportioned the City's liability at 50%.
- Reasoned that without the stop line, drivers had to exercise their judgment as to where to stop, in order to have an adequate sightline of northbound traffic. The judge used zones to make this determination:
  - 8 meters before the stop sign= green zone of safety where sight lines were adequate;
  - 8.5 meters before the stops sign=red zone where sightlines were not adequate.

*Issue on Appeal*

In the absence of a stop line, did the intersection pose an unreasonable risk of harm for ordinary drivers exercising reasonable care who sometimes make mistakes?

***Holding on Appeal***

- The Ontario Court of Appeal allowed the appeal and dismissed the action against the City.
- Reasoned that :
  - The trial judge erred when applying the ordinary reasonable driver standard in not recognizing that:
    - a. The evidence did not fully address the sightlines for southbound traffic;
    - b. Defendant's failure to stop at a point close enough to the intersection to have adequate sightlines of traffic in both directions was an “*act of folly*” uncharacteristic of the ordinary reasonable driver;
    - c. The intersection did not pose an unreasonable risk of harm to ordinary reasonable drivers.

*The Ordinary  
Reasonable Driver*

What is the ordinary reasonable driver standard?

*“The ordinary reasonable driver standard is that of ordinary drivers exercising reasonable care who nevertheless sometimes make mistakes”*

*Act of Folly*

A driver stopped at the stop sign, where the defendant driver stopped, would have had a view of northbound traffic but the view of southbound traffic would be completely obscured by a house at the corner of the intersection. However, at the faded stop line, the southbound sightline was completely clear.

Given the evidence, the defendant's failure to stop at a point close enough to the intersection to have adequate sightlines of traffic in both directions was an “*act of folly*.”

*Act of Folly*

*“Ordinary reasonable drivers would not stop their cars in a location where their view of oncoming traffic from one direction would be completely obscured and then proceed into the intersection without stopping again. They would know to come closer to the intersection before stopping initially or before stopping again, in order to have a clear view of traffic from both directions.”*

*Act of Folly*

**ACTS OF FOLLY :**

- *Kennerley v. Norfolk (County)* (2005) : Killeen J. held that it was an "*act of folly*" for a driver to stop 11.4 meters before an intersection without a stop line and proceed into that intersection without looking again.
- *Chaschuk (Hurlbert) v. Lebel* (1981) : It was declared that it may be negligent to miss a visible traffic signal that has only momentarily changed.

*Act of Folly*

*Highway Traffic Act (HTA) :*

- Drivers who fail to comply with the *HTA* and who also act in a manner that is contrary to common sense cannot meet the ordinary reasonable driver standard.
- Under s.136 of the *HTA*, mandating that a driver stop *immediately* before entering an intersection, the duty of the ordinary driver was to stop at a point close enough to the intersection so they would at least have sightlines in both directions.

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## **Case Analysis # 3 :**

*Smith v Safranyos*, [2018] OJ No 4765

The driver failed to keep a proper lookout in that she failed to stop and look left again, immediately before entering an intersection, in order to maintain adequate traffic sight lines.

*Facts*

- Two car collision at a four way intersection.
- The servient driver, Ms. Safranyos (“Safranyos”), failed to yield the right-of way to the dominant driver, Mr. McHugh (“McHugh”), who was proceeding northbound on a through highway.
- Safranyos’ vehicle was T-boned by McHugh’s vehicle.

*Smith v. Safranyos*, [2018] OJ No. 4765

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- The stop sign was 10 metres back from the edge of the intersection
- There had been a stop line, which was removed in a “shave and pave” in 2004 and not replaced by 2007
- Steel guardrail obstructed view to the left
- Elevation changes obstructed view to the left
- Given the guardrail and the elevation changes, approximately 25 m from the intersection the headlights of oncoming northbound, compact vehicles travelling in the curb lane can disappear from view

*Procedural History*

**TRIAL**

- The trial judge apportioned liability as follows :
  - 25 % to the City of Hamilton,
  - 25 % to McHugh
  - 50 % to Safranyos

*Appeal Holding*

**The Ontario Court of Appeal analysed *Fordham* Steps 1 and 2:**

- **Non-Repair** : Dismissed the City of Hamilton's appeal from liability, finding that the trial judge was entitled, based on the evidence, to find that the intersection was in a state of non-repair.
- **Causation** : The trial judge committed palpable and overriding errors in finding McHugh liable. She failed to properly consider how Safranyos' negligent driving caused the accident.

*Smith v Safranyos*, [2018] OJ No 6427

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*Appeal Holding*

The liability for the plaintiffs' damages was apportioned at two-thirds to Safranyos and one-third to Hamilton.

*Non-Repair*

- **Test** : Was the road at the material time sufficiently in repair that those users of the road, exercising ordinary and reasonable care, could use it safely ?

*Non-Repair*

Two issues, which combined, constituted non-repair :

1. An unpainted stop line which was removed in a “*shave and pave*” in 2004 and not repainted in due course;
2. A steel guardrail and elevation changes on the northbound road rendering sightlines for vehicles approaching the intersection inappropriate.

▪ Principle : “*As long as the road conditions would imperil ordinary drivers constitute a but for cause of the accident, a liability finding may be appropriate*”

-Justice Paciocco in *Safranyos*

*Evidence of Stop Line  
Non-Repair*

The trial judge used the following evidence to establish non-repair, to which the ONCA found she was entitled to in order to make her determination:

- **Ontario Traffic Manual Guidelines** : Stated that “*a stop line must be used.*” The Guidelines were not binding but used to inform the standard of care required by the municipality;
- **Expert Witnesses** : Testified that a stop line should have been used;
- **Adverse Inferences** : There were three stop line witnesses who were not called by the City. The trial judge determined that the evidence of these witnesses would not have been favourable to the City;
- Policy documents supported a need for a stop line at the intersection.

*Evidence of Sight  
Line Non-Repair*

**The trial judge found the following issues regarding sightline non-repair to which ONCA agreed :**

- Drivers who would stop before entering the intersection would have no problem seeing northbound traffic.
- There was a partially obstructed sightline due to the guardrail on the northbound road.
- A stop line is not always required but the aggregate of the elevation on the northbound road, the guardrail, and the lack of streetlights warranted a stop line.

*Causation: Safranyos*

### **ONCA's analysis :**

- Agreed with the trial judge that Safranyos was a negligent driver.
- She contravened s.136 (1) of the *Highway Traffic Act* in failing to stop immediately before the intersection and to yield the right-of-way to the dominant driver.

*Causation: Safranyos*

**Safranyos:**

- **Failed to keep a proper lookout** :Safranyos stated that when she looked left from the stop sign she saw lights coming. However, she failed to looked left again.
- **Followed too closely and sped** :Witness evidence purported that Safranyos' vehicle followed onto the highway "*right behind*" the car ahead of it, and that she "*stepped on the gas quite quick to get out into the intersection.*" The witness also stated "*it was almost like she was avoiding something she was going so fast.*"
- The above actions depicted a "*sudden, hurried, and aggressive entry*" of Safranyos' vehicle into McHugh's lane on the through highway.

**Isn't this an Act of Folly?**

# *Chiocchio and Safranyos*

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- Difficult to reconcile
- At best, there is a finding that ordinary drivers would have a problem in the *Safranyos* intersection because of a lack of visibility to the left when a driver has not advanced far enough forward, and that this problem is worse there than in the *Chiocchio* intersection
- But if it is an “act of folly” to enter an intersection before having a view of traffic in both directions in *Chiocchio*, then the same has to be said in *Safranyos*
- Unless the ordinary driver would enter this intersection without a view of traffic from both directions – that finding is not evident in this case
- The ordinary driver is a legal fiction, a legal construct – a question of mixed fact and law
- To the extent the ordinary driver is a legal construct, the principles should be the same case to case

# Duty of Care – Forward Looking

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1. Municipalities owe a statutory duty to see that the roadways are in a reasonable state of repair in light of all of the circumstances.
2. A roadway is in a reasonable state of repair in light of all the circumstances if it can be negotiated in safety by a fictional character, the ordinary driver who is not perfect but who is also not driving (too) negligently. This ordinary driver is a totally different person to actual driver(s) who may well be driving negligently.
3. As the “ordinary driver” is a legal fiction, the question of whether a given roadway can be negotiated in safety by an ordinary driver is something that a judge decides after the fact, after a claim, after a trial, and sometimes after an appeal. Clearly judges sometimes disagree with each other.
4. For municipalities trying to prevent accidents and injuries, use science, best practice and judgment and remember that the ordinary driver is not perfect. Err on the side of caution.

# Conclusion

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*“A municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety”. - Justice L. Bastarache in Housen*

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**QUESTIONS?**

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