

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JOSEPH HESS, SOPHIE AVINGAQ, MELISSA HESS, NUQLU HESS,  
FREDERICK HESS by his next friend, JOSEPH HESS, and  
JACOB HESS by his next friend, JOSEPH HESS

Plaintiffs

- and -

TOWN OF IQALUIT and ROCH LESSARD INCORPORATED

Defendants

- and -

NUNASTAR PROPERTIES INC. and 902776 N.W.T. LIMITED

Third Parties

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Action for damages arising from a motor vehicle accident.

Trial held at Iqaluit, NU on May 25 - 27, 2010

Reasons filed: July 21, 2010

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E.  
RICHARD

Counsel for the Plaintiff: Hugh Latimer

Counsel for the Defendants: Sheila MacPherson

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REASONS FOR JUDGMENT

INTRODUCTION:

[1] On a dark, rainy evening in August 1995 the plaintiff, Joseph Hess left a bar where he had been drinking and drove his truck along Ring Road, at that time one of the main roads in Iqaluit. In August 1995, the municipality was in the course of replacing a water line which crossed beneath Ring Road, and for this purpose had dug a deep trench across Ring Road. The plaintiff did not see the open trench until the last moment and unfortunately drove his truck into the trench. His vehicle was damaged and the plaintiff suffered injuries. In due course he commenced this lawsuit against the Town of Iqaluit and its contractor Roch Lessard Incorporated. There was inordinate delay on the part of the plaintiff in advancing this litigation;

however the matter finally came on for trial in May 2010. The quality of the trial evidence was less than satisfactory. The Court adjudicates as best it can, with the available evidence.

[2] Although at one point in this lawsuit the defendants filed a Third Party Notice against other proposed litigants, that third party claim was subsequently discontinued. Also, the defendant Town in its Statement of Defence plead a “statutory limitation period” defence; however, that defence was withdrawn at the outset of the trial. Further, whereas the defendant Town's pleading alleges it was the responsibility of the other defendant (Lessard) to place warning signs and ensure public safety at the site, at trial counsel (who represented both defendants) conceded that if there is a finding of liability against the defendants, it is joint and several liability.

[3] On the plaintiffs' part, whereas the Statement of Claim names six plaintiffs each of whom alleges loss and claims damages at trial it is only the plaintiff Joseph Hess who advances a claim.

#### DUTY OF CARE OF DEFENDANTS:

[4] The defendant Town acknowledges that in August 1995 it owed a duty of care to members of the public using the Ring Road. It had a duty to keep and maintain the road, including the placement of signs warning of any hazards, in such a state or condition “that those requiring to use it may, exercising ordinary care, travel upon it with safety”. *Houser v. Nikolaisen* 2002 SCC 33.

[5] The Town concedes that, in the context of an excavation dug across the entire width of a municipal road, the town had a duty to effect a closure of the relevant segment of that road, and to inform the public of the road closure and of the inherent danger at the excavation site. The defendant Town submits that it met the standard of care in this regard.

[6] On the evidence presented, I am satisfied that the Town's contractor Lessard indeed carried out a safety plan in connection with the subject excavation on Ring Road in summer 1995, as required by its contract with the town and in meetings with municipal authorities. There were public announcements on the local radio regarding the excavation project and the road closure. Wooden barricades were

placed across the width of the road, on both sides of the excavation. Signs indicating “Road Closed” and/or “Detour” were placed at the closest intersecting streets to this segment of Ring Road.

[7] The defendants' witness Gaston Lachance was foreman for Lessard in August 1995 and was the supervisor of the excavation project. He testified that he was at the work site every day. He stated that the barricades, “Road Closed” signs and “Detour” signs were in place every day during the duration of the project. Regular working hours at this job site in August 1995 were from 7:00 a.m. to 6:00 p.m., a one-hour break from 6:00 p.m. to 7:00 p.m., and work continued from 7:00 p.m. to 9:00 p.m. He stated that it was one of his responsibilities, when leaving the job site every day, to ensure that everything was in order and in place.

[8] Mr. Lachance testified, however, that on August 7, 1995, he and his co-workers did not return to the job-site at 7:00 p.m. following the supper hour, but rather ceased work that day at 6:00 p.m. The reason, he stated, was that there was unusual inclement weather, in particular heavy rain and thunder, and it was dark and cloudy. He stated it was not typical Iqaluit summer weather.

[9] As noted earlier, the subject excavation was dug across the entire width of the road at a particular location on Ring Road. The closest intersection on one side of the excavation, i.e., in a south -east direction, is the intersection of Ring Road and the road leading to the Frobisher Inn. It was known at the time as “the four-way stop”. The excavation site was approximately 150-200 yards to the northwest of the four-way stop. When the plaintiff, Joseph Hess left the Frobisher Inn at 10:00 or 10:30 p.m. on the evening in question, he turned left at the four-way stop and drove in a north-westerly direction along Ring Road before encountering the excavation.

[10] One William MacKenzie (now deceased) was in August 1995 a long-time resident of Iqaluit. At 7:30 p.m. on August 7, 1995 he drove near the four-way stop. He noticed that the barrier which had been previously in place at that intersection to block traffic from continuing on Ring Road was not in place. Concerned, he attempted for two days to telephone the town's offices to advise of his observations. Being unsuccessful in his telephone attempts, on August 9, he wrote a letter of concern to the Town, stating “that I observed that the barrier that was supposed to block the Ring Road at the four-way stop across from the hospital

was not in place, nor did it seem to be blown down but set aside ...”. (This letter was ruled admissible at trial for reasons stated at 2010 NWTSC 45).

[11] Immediately after the accident at approximately 10:30 p.m. that evening, the plaintiff Hess, who had suffered injuries, was taken to hospital. At 9:00 a.m. the next morning, a friend Barry Cornthwaite visited Hess in the hospital and learned of the accident. Mr. Cornthwaite contacted a local lawyer and the two of them went to the accident scene and took photos at approximately 10:00 a.m. One of the photos was entered as trial exhibit #2 and depicts the four-way stop. It shows:

- a) three wooden “saw-horse” type of barricades, two of them erect, the third lying on its side;
- b) a hand-made detour sign, erect, approximately 6-8 feet in height, with the word “DETOUR” written in large bright red/orange letters, and a large arrow in similar color;
- c) an orange traffic cone, lying on its side;
- d) one of the erect barricades is on the left side of the road (not on the travelled portion);
- e) the other two barricades, the detour sign, and the orange traffic cone are on the right side of the road (i.e. facing north-west) and not in the centre of the travelled portion of the road.

This photo of course, depicts the state of affairs as at that time, i.e. 10:00 a.m. the following day. In the meantime, of course, police vehicles had attended the accident scene, as had other vehicles.

[12] Gaston Lachance, the Lessard foreman, stated that he did not have any workers present at the worksite other than during actual working hours to monitor the worksite, the barricades, etc. He stated there was no vandalism reported to him during the duration of this project. No special steps were taken by the Town or Lessard to monitor the worksite on the occasion of the unusual storm on the evening of August 7.

[13] Mr. Lachance was at the excavation site at 5:30 a.m. on August 8, and saw the truck in the excavation trench. He was told that the driver of the truck was in the hospital. He made arrangements for a crane to remove the truck from the trench. He says that when he saw the barricades at the four-way stop in the early

morning of August 8, the barricades were in place in their proper position across the road. He says he arranged for these barricades to be moved aside in order to take the Plaintiff's truck out.

[14] The plaintiff Hess gave evidence about driving his vehicle that evening 15 years ago, from the Frobisher Inn to the four-way stop. He stopped there and let out a passenger. He then turned left and continued along Ring Road. He says he was in second gear, traveling perhaps 30 kph, and had gone approximately 200 yards from the four-way stop when at the last second, he saw the hole when he was only about 10 feet from the hole, and then his vehicle plunged into the hole in the road. He says there was nothing in front of the hole blocking access to the hole. He says there were no barricades or signs at the four-way stop intersection. When shown the photo exhibit #2, he says he did not see those barricades, detour sign or cone at that intersection, whether at the side of the road or otherwise.

[15] In consideration of the whole of the trial evidence, I find that although the Town and its contractor took steps to warn the public of the danger inherent in the road excavation and to erect barricades and warning signs in appropriate locations adjacent to the subject excavation, those barricades and warning signs were not fully in place at the time of the Hess accident at approximately 10:30 p.m. on August 7, 1995. I find that the safety measures previously in place at the location of the four-way stop had been partially removed or set aside, possibly by vandalism, possibly by wind, possibly by a motorist, or causes unknown. I find that the municipality and its contractor breached their duty to the motoring public, including the plaintiff Hess, in its failure to monitor the road excavation site "after hours" on any regular or irregular basis, and in particular in the circumstances of the unusual dark and stormy weather and poor visibility present on the evening of August 7, 1995.

#### NEGLIGENCE OF THE PLAINTIFF HESS:

[16] One of the trial witnesses, Sgt. Dan Nowlan , was an RCMP constable at the Iqaluit detachment in August 1995 and was working the evening shift when he received a call about a single vehicle accident on Ring Road. He attended the scene with other police officers. He observed a vehicle in the excavation ditch which extended across the road. No person or persons were located within the vehicle or immediately beside it. He then noticed a person unsteady on his feet,

walking back and forth, within a small creek some distance off the road, between Ring Road and the high school. He recognized the person as Joseph Hess who was known to Cst. Nowlan. Mr. Hess appeared to be intoxicated. Cst. Nowlan asked Hess if he had been drinking and Hess stated he had been drinking at the Frobisher Inn bar. Hess told Cst. Nowlan that his friend "Glen" had been driving the vehicle. The keys to the vehicle were located in the pocket of Hess' jacket which he was wearing. Other officers arrested Hess and took him to the hospital. Cst. Nowlan at one point completed the *pro forma* "motor vehicle accident report" as part of his duties. Under "weather" he entered "raining". Under "lighting conditions" he entered "darkness". Under "street lighting" he entered "present and on".

[17] Sgt. Nowlan stated that he was asked to do a follow-up investigation regarding this motor vehicle accident, in particular to determine who was the driver of the vehicle. Two months after the accident he met with Mr. Hess. Mr. Hess refused to give any statement regarding who was driving the vehicle at the time. Hess never did acknowledge to Cst. Nowlan that he himself was the driver. No charges were laid against Hess.

[18] The plaintiff Hess testified that he went to the Frobisher Inn bar at 9:30 p.m. and that he left just before 10:00 p.m. He says while there he had "one beer and one shot of Bailey's Irish Cream". I find that Mr. Hess' evidence regarding the amount of alcohol he consumed that evening to be less than credible. Similarly, I find that the evidence of the plaintiff's witnesses Ian Dart and Bill Strickland regarding the same topic to be less than credible. All three appeared defensive and evasive when answering questions about the length of time Hess was in the Frobisher Inn bar, and the amount of alcohol he consumed.

[19] The witness Ian Dart testified that he recalls being in the Frobisher Inn on August 7, 1995 for an hour or an hour and a half. He says he left about 9:30 p.m. He says he saw Hess there, and he had a drink or two with Hess and Hess' wife. He says Hess' condition was ok, i.e., not intoxicated. This witness appeared defensive when questioned about the amount of alcohol consumed.

[20] The witness Bill Strickland was bar manager at the Frobisher Inn bar on the evening of August 7, 1995. He testified at trial that Joseph Hess was there for an hour and a half or two hours. He stated that Hess' condition was normal. He says

he served him one beer and one Bailey's. How does a bartender remember that after 15 years?

[21] On cross-examination, Mr. Strickland was shown a copy of a statement he gave to an insurance adjuster in 1997 regarding the 1995 accident. In the 1997 statement he had stated that Hess came into the bar at 5:00 p.m. and left at 10:00 p.m., and that Hess had drank four to five beer. The witness did not satisfactorily explain this discrepancy.

[22] On his trial testimony the plaintiff Hess states that he does not recall speaking to Cst. Nowlan at the accident scene. He does recall meeting with Cst. Nowlan some time after the accident. He was evasive in answering questions on cross-examination regarding his interview with Cst. Nowlan. He says he never told Cst. Nowlan that someone else was driving the vehicle. He says he never denied that he was the driver.

[23] In his direct examination at trial, when questioned about his prior knowledge of the municipal construction project in the summer of 1995, he stated that he had never previously driven near the hospital area or Ring Road nor had he seen the excavation there. Yet on cross-examination he acknowledged that he indeed had, in the days previous to August 7, driven by that specific location and had indeed seen the actual excavation, and the workmen working at that site.

[24] In consideration of all of the evidence, I find that the plaintiff Hess was intoxicated at the time of the accident, and in addition, that he did not exercise sufficient care in driving his vehicle in the conditions and circumstances in existence on the evening in question. By all accounts it was dark, raining, stormy, windy and poor visibility. Hess was aware of this prominent construction project, including the excavation trench, on the main road of his home community of Iqaluit. He says he stopped at the four-way stop and let his passenger out of the vehicle. Why did he not see the sign and barricades at that intersection? I find on the evidence that the sign and barricades were there, either in their proper place across the center of the road, or, more likely, beside the road as described in the Mackenzie letter or as depicted in photo exhibit #2. With prior knowledge of the excavation site, with the sign and barricades to alert or remind him of the construction project, with the presence of inclement weather and visibility issues, the reasonable motorist would have proceeded with caution along that segment of



Ring Road, if at all. A reasonable motorist continuing with caution in a northwest direction along that segment of Ring Road, with the aid of an illuminated street light adjacent to the excavation, would have seen the large pile of dirt at the excavation site and avoided plunging into the trench.

[25] I find that the conduct of Hess in turning left and proceeding through that intersection in those circumstances, and proceeding along that segment of Ring Road towards the excavation site as he did, is explained by his state of intoxication and his lack of due care and attention to the existing circumstances, Mr. Hess is not without fault. He was negligent. Indeed, I find that his intoxication and lack of ordinary care was the main cause of his driving of his vehicle into the excavation ditch.

[26] Under the *Contributory Negligence Act* RSNWT 1988, C-18, I apportion the degree of fault 75% to the plaintiff Hess and 25% to the defendants.

[27] A brief note about the lack of a seatbelt. Mr. Hess testified that at the time of the accident he was not wearing a seatbelt, as the vehicle was not equipped with a seat belt. The defendants cite case law in support of their submission that any damages ought to be reduced by 5% - 25% by reason of the plaintiff's failure to wear a seatbelt. I find that the submission is not applicable in the circumstances of this case, and I confirm that the 75% degree of fault which I apportion to the plaintiff Hess does not include anything on account of his failure to wear a seatbelt. The rationale for the case law cited by the defendants is that damages for injuries suffered by a plaintiff are reduced "whenever it has been demonstrated that the injuries would have been reduced if the belt had in fact been worn". *Galaske v. O'Donnell* [1994] 1 S.C.R. 670 at 682. In the present case, there is no evidence of how, precisely, the plaintiff suffered any injuries he did suffer in this accident, and so one is unable to say whether the presence of a seat belt would have changed anything.

#### PLAINTIFF'S INJURIES:

[28] Trial evidence regarding injuries suffered by the plaintiff Hess in the August 1995 accident is sparse. The plaintiff recalls getting stitches in his eye at the hospital. When asked if he had any injuries at the time, his answer was "I had lots of pain in my chest and my neck and my back". He was sent by the Iqaluit hospital

to a Montreal hospital for observation and evaluation. There is no medical evidence of any diagnosis, or treatment, at either the Iqaluit hospital or Montreal hospital.

[29] The plaintiff did testify about two surgical operations he underwent a few years after the 1995 accident. He says at a Montreal hospital in 1997 he had an operation on his neck when “they fused my neck”. He says he had another operation at an Ottawa hospital in either 1999 or 2000 when they “fused my lower vertebrae, in my lower back”. There is no medical or expert evidence indicating the reason for these two surgical operations. There is no evidence whether these operations may/may not be related to the August 1995 accident.

[30] (At this juncture I point out that during the trial the Court denied the plaintiff's request to present certain proposed medical evidence for reasons stated at 2010 NWTSC 46).

[31] Cross-examination of the plaintiff Hess by defendants' counsel revealed pertinent aspects of Hess' medical history prior to the August 1995 accident. These can be summarized as follows:

- (a) in 1980, at age 25 Hess saw a radiologist regarding back pain and an x-ray showed “early degenerative disc disease”;
- (b) in 1981, at age 26 Hess was involved in a motor vehicle accident in which he rolled a vehicle. Upon admission to hospital, he was noted to be uncooperative and intoxicated. He complained of severe pain in his neck, and pain in his thigh and hip;
- (c) in July 1982 he was admitted to hospital at his own request complaining of drinking heavily for the previous 3 months;
- (d) in September 1982 Hess was involved in an altercation in a local restaurant in which he was thrown across a table and onto the floor, injuring his back. This resulted in two admissions to hospital in the ensuing weeks, each of 4-5 days duration, because of significant back pain. On the second admission,

Hess told his doctor he was drinking up to 20 beers a day to alleviate the back pain. The back pain continued into the Fall of 1982 when he also saw a doctor in Yellowknife to address it;

- (e) in December 1991 Hess had a snowmobile accident after consuming rum, when he hit a snowdrift, fell off the snowmobile and landed on his back and went to the hospital complaining of back pain;
- (f) in January 1993 his family doctor referred him to a specialist as he was complaining of a 2 year history of recurring headaches. These headaches, he reported, at the time, always begin in the left side of his neck and radiate toward his left eye;
- (g) on an unspecified date he was assaulted by someone with a hammer, breaking a bone under his eye, causing headaches;
- (h) in September 1993 he saw a doctor, complaining of “long standing back pain”.

[32] During his trial testimony, in addition to limited evidence about his injuries sustained at the time of the August 1995 accident, Hess also gave some evidence of his current, ongoing complaints of pain and suffering. He says he still has quite a bit of pain today. He says sometimes he has difficulty sleeping. He says he is unable to stand in one position for very long. He says he has problems turning his neck, and his back. He says he can't ride a skidoo. He says he can't do physical labor any more.

[33] Mr. Hess also testified that his family doctor has, over the years, prescribed painkillers for him, and has also prescribed valium to help him sleep.

#### CAUSATION:

[34] Earlier in these reasons, apart from finding that the plaintiff's own negligence was the main cause of the accident, I did partially find in the plaintiff's favor inasmuch as I held that “but for” the defendants failure to put up more signs or barricades and failure to monitor the excavation/road closure site, that the accident would not have happened. However, on the evidence presented, I am unable to

make any causal link between the 1995 accident and the ongoing back pain, neck pain and suffering of which the plaintiff complains. There is simply insufficient evidence in this case to make any such causal link. Mr. Hess had a series of prior injuries which had already (pre-accident) caused him pain in neck and back. The most that the Court can do is to award nominal damages e.g. \$5,000.00, for the injuries he received in this accident, i.e., lacerations in the area of his eye requiring stitches, trauma, and pain suffered at the time of the accident and immediately thereafter. The Plaintiff has not established that any pain and suffering endured subsequent to August 1995 was caused by the Ring Road accident.

DAMAGES:

[35] I award \$5,000.00 damages for pain and suffering, for reasons stated.

[36] There is no merit in the Plaintiff's claim for damages for loss of earning capacity. The evidence indicates that the Plaintiff's sole source of income in the years preceding the 1995 accident was social assistance payments.

[37] The plaintiff seeks pre-judgment interest in accordance with the provisions of the *Judicature Act*. This remedy is discretionary. I deny this claim, on account of the inordinate delay in bringing this matter to trial, a finding which was made by this Court on December 2, 2009.

[38] With respect to special damages, the defendants accept the two specific items:

- a) damage to the plaintiff's vehicle, in the amount of \$6,000.00;
- b) the subrogated claim of the GNWT Department of Health and Social Services in the amount of \$12,235.15.

[39] No other special damages have been proven. In particular, expenditures for drug prescriptions, listed in exhibit # 10, were not paid by the plaintiff. Nor is there evidence that those expenditures for drugs are directly related to the 1995 injuries.

COSTS:

[40] The defendants shall provide written submissions on costs within 30 days of the date of filing of these reasons. The plaintiff Hess shall provide his submissions in response within 30 days of receipt of the defendants' submissions.

CONCLUSION:

[41] Both the plaintiff Hess and the defendants were negligent. I apportion liability as follows: 75% to the plaintiff Hess, 25% to the defendants, jointly and severally.

[42] I assess general damages at \$5,000.00; special damages at \$18,235.15. Accordingly, the plaintiff Hess shall have judgment in the amount of \$5,808.79.

[43] A decision on costs is reserved pending receipt of counsel's written submissions.

J.E. Richard,  
J.S.C.

Dated at Yellowknife, NT  
this 21<sup>st</sup> day of July 2010

Counsel for the Plaintiff: Hugh Latimer  
Counsel for the Defendants: Sheila MacPherson

S-1-CV 07218

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