

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

**Citation: Margeson v. Halifax (Regional Municipality), 2009 NSSM 14**

**Date:** 20090526  
**Claim:** SCCH 307257  
**Registry:** Halifax

**Between:**

Donald Margeson

Claimant

v.

Halifax Regional Municipality

Defendant

**Adjudicator:** W. Augustus Richardson, QC

**Heard:** May 12, 2009 in Halifax, Nova Scotia.

**Appearances:** Kevin MacDonald for the Claimant  
Sarah Knight for the Defendant

**By the Court:**

[1] Shortly after noon on a sunny January 7<sup>th</sup> in 2008 the Claimant's car dropped into a pothole in the northbound lane of Mic Mac Boulevard in Dartmouth, in the Regional Municipality of Halifax. The car, a BMW 528, sustained damage in the amount of \$2,259.04. The claimant was also forced to rent a replacement—an SUV—at a cost of \$1,141.40 for the week that his car was being repaired. Mr Margeson now claims the total of those two amounts—\$3,400.44—plus general damages in the amount of \$100.00 and costs against the defendant Regional Municipality of Halifax (“HRM”) by reason of what he says was its negligence in either or both:

- a. permitting the pothole to develop without repairing it, and
- b. failing to warn the traveling public of the pothole.

[2] I heard the evidence of Mr Margeson on his behalf. On behalf of the HRM I heard the evidence of Robert Connor, a street inspector for the HRM, and Dan Yeomans, a gas line construction inspector for the HRM. I also received into evidence several documents and service records. There was really no conflict in this evidence, and I accordingly set forth the facts as I find them to be without attributing the evidence to any particular witness.

## The Background

[3] Heritage Gas supplies natural gas to various commercial, industrial and residential users in the HRM. To do so it must lay underground pipes, and to do that it and its contractors must from time to time excavate under the city's streets and sidewalks. All such work requires a city permit. City inspectors, such as Mr Yeomans, inspect the work that is done. They also ensure that the contractor returns the street or sidewalk to its pre-excavation state. As Mr Yeomans noted, his job was to "make sure they [Heritage Gas and its contractors] comply with requirements in the permit and ensure that the restoration is up to scratch."

[4] At some point in late 2007 Heritage Gas obtained a permit to permit it to install a gas lateral from its gas pipeline under Mic Mac Boulevard into the Kent's Building Supplies box store in the Mic Mac Mall. The work entailed cutting into the asphalt surface of the northbound lane of Mic Mac Boulevard (which runs parallel to the back of the Mic Mac Mall), and then running a lateral pipe down to the Kent building. Once the pipe installation was completed Heritage Gas was required under the terms of its permit to return the road surface to its "natural" condition.

[5] The work was completed on Thursday, January 3<sup>rd</sup>, 2008. However, the contractor had to use "cold patch" rather than "hot mix" to create a temporary road surface. "Cold patch" is a rougher, coarser form of road asphalt that is used to effect temporary repairs to road surfaces. It is not intended to be a permanent "fix" because the nature of its composition is such that it quickly degrades, particularly during cold or inclement weather. In this case the contractor had to use "cold patch" because the supplier of "hot mix" (that is, the normal asphalt mix used for road surfaces) had shut down until the end of the month.

[6] On January 3<sup>rd</sup> Mr Yeomans visited the site and noted that cold patch had been used. He called the contractor to point out that hot mix was required. He was told that the asphalt plant had shut down until January 28<sup>th</sup>, and that once it re-opened the contractor would apply hot mix.

[7] The morning of January 7<sup>th</sup> Mr Yeomans re-attended the site. He noted that there was "a pothole forming" in the cold-patched surface of the construction cut in the road surface. He did not consider it a hazard to users of the road *at that point*, but it was nevertheless something that "you would want to look at." He called Heritage Gas's contractor and told him "to correct it." He did not see any warning sign or construction cones. Nor did he leave any at the site before leaving. He acknowledged that in his experience such patches could deteriorate with traffic or adverse weather conditions, and that such deterioration can lead to the development of road hazards. Indeed, that was one of the reasons he went out to the site that morning, to check on its condition.

[8] At some point in the late morning of January 7<sup>th</sup>, and sometime after Mr Yeoman's visit to the site, Mr Matheson drove to the Mic Mac Mall. He drove in through the front entrance of the mall. He left the mall around 12:30 p.m. He left via the "back" entrance, which fronts onto Mic Mac Boulevard. He turned right onto Mic Mac Boulevard. He was traveling about 30-40

kph. He did not see the temporary road surface formed by the cold patch. The surface at the cut was to his eye gravel and it formed a bit of a hump, not unlike a speed bump. His car road up over the bump. There was a hole in the centre of the bump. The right front wheel dropped into the hole and when it did the right front end of his car dropped with it. Because of the car's low clearance this meant that the body of the car actually struck the road surface, causing the damage that forms the basis of this claim.

[9] Mr Margeson then called the HRM road department to report the problem. His complaint was the only call or complaint recorded by the department with respect to the site.

[10] Based on the evidence and the above-noted facts I am also satisfied that:

- a. the work in question was performed by Heritage Gas or its contractor, not by the HRM;
- b. that Heritage Gas and its contractor were not agents, servants or contractors of the HRM;
- c. that HRM did have a surveillance and compliance system in place to ensure that third parties like Heritage Gas who damaged city streets as a result of necessary construction work returned the street to its "normal" state;
- d. that HRM became aware on January 3<sup>rd</sup> that the contractor had not repaired the road to its "normal" state, in that it had used a "cold patch" rather than hot mix to close the cut in the road surface;
- e. that as of this date HRM's knowledge and belief was that the reason the contractor had used "cold patch" was because the plant that normally produced hot mix was shut down until the end of the month, and that the contractor would effect permanent repair of the road surface with hot mix once the plant re-opened;
- f. that when Mr Yeomans visited the site on the morning of January 7<sup>th</sup> it was not then a "hazard," although by its nature it could become one sometime in the future, depending upon road and weather conditions; and
- g. neither the contractor nor the HRM placed any warning signs or cones at the site to alert the traveling public to the existence of the temporary patch in the road surface.

## **The Issues**

[11] On these facts the claimant submits that the HRM was negligent:

- a. in permitting the road work to be done, or

- b. in permitting a pothole to develop, or
- c. in failing to require the posting—either by the contractor or its own inspectors—of the temporary road patch or the developing pothole.

[12] The HRM acknowledges that it owes a duty of care to users of its roads. However, it submits that the standard of care is one of reasonableness, not strict liability. Here it had a system of oversight in place. Nor was there any actual hazard at the time of Mr Yeomans's visit to the site on January 7<sup>th</sup>. Hence it submits it discharged its duty of care to Mr Margeson.

### **Analysis**

[13] I was not satisfied on the facts before me that there was any negligence on the part of the HRM.

[14] First, the work in question was not performed by the HRM or any entity for which it might be vicariously liable. Heritage Gas and its contractor cut the road surface for their own purposes, not for the HRM's. Neither was under contract with the HRM. Hence any negligence on the part of Heritage Gas and its contractor (assuming there was any) cannot be passed onto HRM, unless HRM was independently negligent in its own right.

[15] Second, the HRM did have a system of surveillance in place to ensure that third parties who damaged the surfaces of its roads repaired such damage. It issued permits that required the streets to be repaired or returned to their "normal" condition according to certain specifications. It had inspectors, such as Mr Yeomans, to ensure that the required work was carried out according to those specifications.

[16] Third, the inspector in this case did carry out his duties and took reasonable steps to ensure that the road was returned to its normal state as quickly as possible. He inspected the work after it was completed, and upon discovering that the road had only been temporarily repaired immediately discussed the matter with the contractor. I am satisfied that given the contractor's explanation that the hot mix plant was closed until the end of the month it was reasonable for Mr Yeomans to acquiesce to the contractor's temporary use of cold patch, particularly given that he returned to the site a few days later to make sure that the patch was still in place and that it had not deteriorated to such an extent as to constitute a hazard.

[17] This brings us to the final point, which is whether Mr Yeomans should have posted or signed the patch in some way on the morning of January 7<sup>th</sup>.

[18] There are two points that are pertinent to this question.

[19] The first is that it is clear to even the most casual traveler that the streets and roads of Halifax are in a shabby state. The surfaces of the streets are frequently patched or rough or cracked. Potholes of various shapes and sizes and depths litter the streets. Some holes can be navigated with no more than a slight vibration of the car; others threaten to swallow a car's

wheel up to its axle. Potholes sometimes develop and enlarge slowly over time; others seem to open up virtually overnight.

[20] The existence of such an infrastructure surely means that a city cannot be expected to post or flag or sign *every* questionable road surface, no matter how small or large the crack or hole, and no matter what potential it has to develop from a minor blemish to a gaping hole in the street surface. The HRM's duty to warn at best can extend, *if at all*, only to those potholes that represent a clear and significant threat of personal injury or property damage to the traveling public.

[21] Second, on the facts of this case the HRM (in the guise of Mr Yeomans) was not faced with such a hazard. He knew only that the temporary patch *might* at some point in the future, depending on road and weather conditions, become a hazard. Mr Yeomans was an experienced road inspector. He looked at the patch and was satisfied that it did not then represent a hazard at that time. He took steps to ensure that it did not become a hazard by calling the contractor to return to repair the temporary patch. And in doing so he in my opinion discharged whatever duty to the public was created by his observation of the patch's condition that morning.

[22] I accordingly dismiss the claim.

## **Damages**

[23] Had I found the HRM liable I would have allowed Mr Margeson's claim for the repair costs to his vehicle. There was nothing to indicate that the cost of the repair was anything other than reasonable; or that it related to anything other than the damage caused by the car coming into contact with the road surface.

[24] I would not however have allowed the entire rental amount. The rent claim was as high as it was because Mr Margeson chose to rent a large SUV rather than a normal sized replacement vehicle. He did so because it had "heated seats and I was used to heated seats in the BMW." There was no other reason (such as towing heavy loads or carrying lots of passengers) offered by him to justify incurring such a bloated rental charge. Claimants are required to mitigate their loss reasonably, and in this case Mr Margeson needed transportation. That need could have been met by renting a less expensive replacement. His desire to secure heated seats as well as transportation was not in my opinion reasonable mitigation.

[25] In the absence of any evidence on the point I would have allowed \$30.00 a day for the week he needed a replacement vehicle.

[26] Mr Margeson also claimed \$100.00 in general damages, but there was nothing in the evidence that suggested anything other than the usual minor inconveniences associated with such cases. I would not have allowed that claim either.

Dated at Halifax, this 26th day of May, 2009

Original: Court File )  
Copy: Claimant )  
Copy: Defendants )

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W. Augustus Richardson, QC  
ADJUDICATOR