

CITATION: Johnson v. County of Simcoe et al, 2026 ONSC 3836

COURT FILE NO.: CV-17-00001705-0000

DATE: 20260630

AMENDED: 20260703

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AMY JOHNSON

Plaintiff

– and –

THE CORPORATION OF THE COUNTY
OF SIMCOE, INNPOWER
CORPORATION, EDWARD
BOARDMAN, KYRA NICOLE
BOARDMAN, DANIELLA CELESTE
TORRES, REON HUSSAIN and SOUTH
SIMCOE POLICE SERVICE

Defendants

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)
) Sherilyn Pickering, Mark Elkin and Zaid
) Shams, Counsel for the Plaintiff
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) Andrea LeDrew and Frank Csathy, Counsel
) for the Defendant, County of Simcoe
)
)

) Alan Mark and Dan Block, Counsel for the
) Defendant, InnPower Corporation
)
)

) Patricia M. Hill, Counsel for Defendants,
) Daniella Celeste Torres and Reon Hussain
)
)

) **HEARD:** September 26, 29 and October 1,
) 3, 6, 8 and 10, 2025

AMENDED REASONS FOR DECISION

EDWARDS, RSJ.

OVERVIEW

- [1] The parties have bifurcated issues of liability and damages. These reasons address the liability portion of the plaintiff’s claim which arises out of a motor vehicle accident which occurred on February 20, 2016, at approximately 11:30 p.m. (“the accident”). The defendant, Torres, was driving westbound on 7th Line and the plaintiff was driving northbound on 20th Sideroad, in the County of Simcoe. The intersection of 20th Sideroad and 7th Line (“The Intersection”) was controlled by traffic lights which had no power at the time of the accident. The power had been turned off by the defendant, InnPower, to allow for the replacement of a hydro pole on a nearby intersection on the 7th Line east of the 20th Sideroad.

- [2] These reasons explain the responsibility of the various parties for this motor vehicle accident. These reasons also address the issue of late served expert reports, an issue which the court addressed the day before the commencement of the trial.

Chronology Regarding Expert Reports and Ruling on Late Served Reports

- [3] The plaintiff commenced this action on November 16, 2017. The claim was amended on January 11, 2018 and again on February 13, 2018.
- [4] The defendant, InnPower, delivered a statement defence and cross-claim on January 24, 2018. The defendants, Torres and Hussain, collectively delivered a statement defence and cross-claim on March 16, 2018.
- [5] The defendant, the County of Simcoe, delivered its statement defence and cross-claim on August 15, 2018.
- [6] The pleadings portion of this action was complete by the summer of 2018. Examinations for discovery were completed on July 3, 2019.
- [7] On February 9, 2021, the defendant, Torres, served an engineering assessment report authored by Nicholas Young and Mark Fabbioni of 30–Forensic Engineering (“30-FE”). Almost two years later, on May 24, 2023, the plaintiff served a road safety report prepared by Walters Forensic Engineering.
- [8] Between February 9, 2021, when Torres served its expert report and May 24, 2023, when the plaintiff served its expert report, there then ensued numerous attempts by the plaintiff to obtain pretrial dates. Ultimately, on September 20, 2022, the parties attended a case conference with Boswell J. where the sole issue was the scheduling of a pretrial conference. In his endorsement, Boswell J. indicated that plaintiff’s counsel confirmed that the case was ready for pretrial. Clearly, the case was not ready for pretrial given the fact that the plaintiff had not served any expert reports.
- [9] A judicial pretrial was held on July 10, 2023, before Healey J. The Walters report, which had been served on May 24, 2023, was non-compliant with the 90-day deadline for the service of expert reports prior to a pretrial.
- [10] On August 10, 2023, the County of Simcoe served a responding road safety report by CIMA+ Canada.
- [11] A second judicial pretrial was held on September 15, 2023.
- [12] On October 5, 2023, the defendant, InnPower, served a collision reconstruction report by CEP Forensic. The CEP Forensic report responded to the reconstruction report prepared on behalf of the defendant, Torres, that had been served in February 2021.
- [13] On October 13, 2023, the defendant, Torres, served a road safety assessment report by 30-FE. On October 17, 2023, the defendant, InnPower, served a report by Rene Gatien, which dealt with standard practices in the electrical distribution industry.

- [14] On October 20, 2023, the County of Simcoe attended an examination for discovery to answer questions arising out of answers to undertakings.
- [15] On November 7, 2023, the plaintiff served a rebuttal report from Walters Forensic Engineering. One week later, on November 13, 2023, the plaintiff served a second rebuttal report of Walters Forensic Engineering.
- [16] The parties attended a private mediation on November 14, 2023, that was unsuccessful.
- [17] On November 17, 2023, I conducted a trial management conference. At that time, Mr. Kahler appeared on behalf of the plaintiff. The trial was adjourned to the May 2024 sittings for a liability trial only. Of significance, I endorsed as follows,
3. All expert reports have been served. No further expert reports to be served.
- [18] This matter was before me in triage court on February 25, 2025. Mr. Kahler again appeared on behalf of the plaintiff. Given the history of this matter, I endorsed that the trial was to proceed during the last two weeks of the September 2025 sittings and “listed as priority”.
- [19] On September 19, 2025, *i.e.*, essentially on the eve of trial, the plaintiff served a new engineering report from Jeremy Erndt of J.S. Held.
- [20] On the Friday prior to trial, *i.e.*, September 26, 2025, I dealt with the various motions addressing the late service of the various expert reports referenced in the chronology above. In total, nine expert reports had been served by the various parties. Only one of those expert reports met the time requirements for service set forth in Rule 53.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (“the *Rules*”). I provided counsel with my bottom-line decision which provided that all experts by whom reports had been prepared and served, with the exception of the September 19, 2025, report of J.S. Held, would be allowed to testify. The report of J.S. Held, having been served on September 19, 2025, was excluded. These reasons will explain to the parties the court’s reasoning behind the bottom-line decision provided by the court prior to trial.

Late Served Expert Reports – Analysis

- [21] Rule 53.03, as it existed prior to the end of March 2022, required a party who intended to call an expert witness at trial to serve the expert’s report no less than 90 days before the pre-trial conference. Any responding report had to be served no less than 60 days before the pre-trial conference. The first pre-trial in this matter took place on August 10, 2023. A second pre-trial took place on September 15, 2023. In anticipation of a trial date in the May 2024 sittings, I conducted a trial management conference on November 17, 2023, at which time I endorsed that “all expert reports have been served – no further expert reports to be served.” The vast majority of the expert reports served prior to November 17, 2023, did not comply with Rule 53.03 as they were served after the pre-trials conducted by Healey J.
- [22] Rule 53.03, as it was drafted prior to March 2022, provided the same deadlines for the service of expert reports as exist today. Rule 53.08, prior to March 2022, provided for what

some might describe as an escape clause for anyone who was in non-compliance with Rule 53.03(1) and (2). Specifically, Rule 53.08, as it was drafted prior to March 2022, provided:

If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), ***leave shall be granted*** on such terms as are just and with an adjournment if necessary unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.
(Emphasis added)

- [23] The new provisions of Rule 53.03 became effective on March 31, 2022. O. Reg. 18/22, amended various rules of the *Rules of Civil Procedure* (“the Rules”). Rule 53.08(1) now reads:

53.08 (1) If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave **may be granted** if the party responsible for the applicable failure satisfies the judge that, (emphasis added)

- (a) there is a reasonable explanation for the failure; and
- (b) granting the leave would not,
 - (i) cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or
 - (ii) cause undue delay in the conduct of the trial.

- [24] The question of whether the court should grant leave to allow an expert to testify where the expert’s report is in non-compliance with the Rule, has been the subject matter of numerous decisions of this court. In *Agha v. Munroe*, 2022 ONSC 2508, 23 C.C.L.I. (6th) 118., (which I am told was the first decision interpreting the new Rule), I excluded a late-served expert report and suggested the new Rule was intended to address a long-standing problem of the court routinely granting extensions of time for late-served expert reports.

- [25] Since *Agha*, the Court has emphasized that a party seeking the Court’s indulgence must provide evidence of a reasonable explanation for why an expert’s report was not served in accordance with the timelines of Rule 53 and must also establish that the opposite party will not suffer prejudice that cannot be addressed either by way of costs or an adjournment. The most recent decision to address the implications of Rule 53.08 is a decision of Mathai J. in *Pelrine et al. v. Chung et al.*, 2026 ONSC 1601 (CanLII). I refer to *Pelrine* as it is currently the subject of an appeal to the Divisional Court, the appeal having been allowed with reasons to follow in early June 2026 – see *.Pelrine v Chung*, 2026 ONSC 3373 (CanLII).

- [26] As it relates to the specific facts of this case, it is worth observing that when this trial commenced, there were nine expert reports served by the parties addressing the issue of

liability. Of those nine reports, only the expert report served by the County of Simcoe was in compliance with Rule 53.

- [27] The last pre-trial in this matter was held in September 2023. Many of the late-served reports were served not long after the pre-trial. The reality of this trial is that nearly two years elapsed between the last pre-trial and the trial. The bulk of the late-served reports have therefore been in the hands of all counsel for a considerable period of time. Prejudice, while not conceded, was not seriously argued. With almost every party in non-compliance, in my view, it was important that this court apply the provisions of Rule 1.04 to ensure that a trial on liability would be conducted in a manner that was fair to the parties and at the same time allow for a hearing that would be cost-effective and as timely as possible, thus securing a determination on the merits.
- [28] While this court allowed almost all of the late served expert reports, one report stood out from all of the rest. The report of Jeremy Held was served on September 19, 2025. The trial began on September 26. As previously noted, I had ordered at a trial management conference on November 17, 2023, that no more expert reports were to be served. All parties complied with that order except the plaintiff.
- [29] When the matter was before me in Triage court on February 25, 2025, I endorsed this matter would proceed during the September 2025 sittings “with priority”. Despite my order of November 17, 2023, and with the full knowledge that the trial of this matter would proceed in the September 2025 sittings, counsel for the plaintiff waited until what can only be described as the eve of trial to serve the report of Mr. Held. On the evidence before me, not only was the plaintiff in clear violation of my order, but there was also no adequate explanation for the delay in the service of the report from Mr. Held. Applying the conjunctive test of Rule 53.08, this court refused its discretion to allow for the late service of the report of Mr. Held.
- [30] Fewer and fewer civil cases are proceeding to trial. Often, there is a significant gap in the time between a pre-trial and trial. Counsel, intent on taking a civil matter to trial, have an obligation to ensure compliance with Rule 53. The time to be thinking of whether a case will need expert evidence is not after a pre-trial. The time to be thinking of the need for expert evidence begins at the start of an action. It continues through the production phase and through discovery. Counsel has an obligation to their clients to make sure that the timelines set forth in Rule 53 are adhered to. Gone are the days that the court will grant what used to be a routine indulgence when an expert’s report was served after a pre trial.

The Evidence of the Plaintiff

- [31] February 20, 2016, Ms. Johnson was returning from a party with Lisa Van Wieringen, (“Lisa”). Ms. Johnson testified that she was not familiar with the 20th Sideroad. She described the road conditions as dry. She was not worried about any snow or rain. It was pitch black with no moon. She was travelling at 80 km/h. The speed limit on the 20th Sideroad in the area of the collision was 80 km/h.

- [32] Ms. Johnson testified that there was no signage as she was approaching the Intersection. She stated that she had on her GPS, which she had checked and observed on the GOS screen that she was approaching what she described as a “cross”. She testified that she understood that she was approaching an intersection and that she began to slow to assess the situation. She then continued to proceed at approximately 80 km/h.
- [33] In cross-examination, Ms. Johnson confirmed that because she saw a “cross” on her GPS screen that she knew she was approaching an intersection. She was therefore expecting either some traffic lights or a stop sign. In cross-examination, Ms. Johnson confirmed having seen the “cross” on the GPS, that it would have provided her with sufficient time to make a turn at The Intersection had she chosen to do so.
- [34] Ms. Johnson was asked about her knowledge of how to deal with an uncontrolled intersection. She confirmed that she knew it should be treated as a four-way stop. She also confirmed that she understood that the MTO guidelines suggest that a driver approaching an intersection on an unlit road should be reducing her speed. She confirmed that she did not reduce her speed as she approached The Intersection.
- [35] Ms. Johnson testified in cross-examination that, as she approached The Intersection, she was not using her high beams and that there were trees that would have obstructed her view to the right approaching The Intersection.
- [36] As Ms. Johnson was approaching The Intersection, she did not observe that there was a left-turn lane which the evidence establishes begins approximately 230 metres from The Intersection. Ms. Johnson testified that she remained in her lane but made no observations of the left turn lane.
- [37] In cross-examination, Ms. Johnson testified that she had a conversation with Lisa immediately prior to the collision. The conversation related to the fact that they were approaching an intersection. Ms. Johnson testified that throughout the time leading up to the accident, she was looking straight forward. She did not look up and observe the traffic lights, which were out.

The Call Taker’s Evidence Regarding Lights Out

- [38] Various witnesses from the South Simcoe Police Service were called to assist the court in the relation to the timing of when calls were received at the emergency call centre regarding the power outage at both The Intersection and the accident which had occurred earlier in the day. In that regard, the evidence confirms that the first emergency call to the South Simcoe Emergency Services occurred at around 11:35 p.m. There is no evidence reflected in the documentation that would confirm that an earlier call had been made around 11:00 p.m.
- [39] Patricia Milligan was the communications supervisor for the South Simcoe Police at the time of the accident. In cross-examination, she was shown a copy of a Bell Telus bill that purportedly relates to telephone calls made by employees of InnPower. The Telus bill reflects a telephone call made at 11:02 p.m. to a telephone number associated with the South Simcoe Police Service. Ms. Milligan testified that this telephone call, if it was made,

does not appear to have been logged in in any written records. Ms. Milligan testified that telephone calls into the general number for the South Simcoe Police Service are recorded, but that the retention policy for those records may not be the same as for the other call records that were entered into evidence in this trial.

The Evidence of Scott Walters

[40] Mr. Walters is a well-known expert in accident reconstruction who has testified approximately 99 times as an expert. Plaintiff's counsel sought to qualify Mr. Walters as an expert in the following areas:

- Accident reconstruction.
- Lighting in intersections.
- Design, visibility, and sightlines at an intersection.
- Minimum Maintenance Standards and other standards at intersections; and
- Human factors.

[41] Counsel for the defendants conceded that Mr. Walters had the necessary qualifications to testify as an expert in the area of accident reconstruction and human factors. He was qualified to testify in those areas. After a *voir dire*, I ruled that Mr. Walters did not have the requisite education, training or experience to offer opinion evidence concerning the standards of care that would apply to the design of the subject intersection which includes the standard of care as it relates to the traffic lighting system and the use of what has been described as UPS at the subject intersection. I also ruled that Mr. Walters did not have the education, training, or experience to testify about the standard of care applicable to a hydro-electric provider like InnPower, as it relates to how a downed hydro pole should be repaired and what a utility provider like InnPower should or should not have done as part of that repair process.

[42] As part of the process for providing his opinion evidence, Mr. Walters attended at the subject intersection on April 6, 2023, at approximately 8:30 p.m. Mr. Walters approached The Intersection proceeding northbound on 20th Sideroad and observed that there were no signs warning of an intersection approaching. He testified that on the occasion when he visited The Intersection, the traffic lights were working.

[43] As it relates to the traffic signals, Mr. Walters testified that the minimum maintenance standards requires that roads are to be safe for those using the roads and that if traffic signals are out, the standards require "immediate attention". In cross-examination, Mr. Walters conceded that, in fact, the minimum maintenance standards require the authority responsible for traffic signals to deploy resources as soon as practicable once notified that traffic signals are out. Mr. Walters conceded that the minimum maintenance standards required the County of Simcoe to respond "as soon as practicable." Once notified that the lights were not working, Mr. Walters testified that the response should be

“immediate”. When pressed on this point, Mr. Walters conceded that the minimum maintenance standards, in fact, requires a reasonable reaction as opposed to an immediate reaction.

- [44] Mr. Walters conceded in cross-examination that if the County of Simcoe in fact did not have any notice of the traffic signals being out until midnight, it would have been impossible for the County of Simcoe to have done anything that would have impacted the accident involving the plaintiff, as the accident had already occurred at 11:35 p.m., *i.e.*, prior to when the County of Simcoe received notification of the lights being out.
- [45] Mr. Walters offered opinion evidence that because the location where the hydro pole had fallen, it fell within the responsibility of the Township of Innisfil, the County of Simcoe should have known about the hydro pole being down. Mr. Walters was of the view that there should have been a protocol amongst the various townships and County regarding all affected people as it relates to the traffic lights being out and/or a hydro pole being down. Mr. Walters suggested that “common sense” dictated that two municipalities should be talking to each other if there was a power outage. While he conceded that there was no written protocol supporting this opinion, nonetheless it was his view that common sense should have resulted in dialogue between the Township of Innisfil and the County of Simcoe.
- [46] In cross-examination, Mr. Walters was asked about the sightlines at the subject intersection. While he testified that neither Ms. Torres nor Ms. Johnson would have been able to actually see each other as they approached The Intersection, he was nonetheless of the view that the headlights of the vehicles would have been visible.
- [47] It was Mr. Walters’ overriding opinion that the accident was preventable if the traffic lights had been working.

The Evidence of Jason Van Wieringen

- [48] Mr. Van Wieringen (“Jason”) received a phone call from his wife, Lisa, that she had been involved in an accident at The Intersection. He lived approximately five minutes from The Intersection and arrived shortly after 11:30 p.m. He stated that upon his arrival at The Intersection, there were first responders in attendance. Jason took various pictures that demonstrate that the traffic lights at The Intersection were out.
- [49] Jason was informed that there had been an earlier accident on the 7th Line. Jason jogged down the road and made observations and took photographs of the hydro truck that was repairing the downed hydro pole.

The Evidence of Mathew Crowe

- [50] Mr. Crowe was an eyewitness to the accident. Mr. Crowe lives in the general area of where the accident occurred and was very familiar with The Intersection, having travelled through it on numerous occasions.

- [51] Mr. Crowe was travelling southbound on the 20th Sideroad. He observed a vehicle northbound approaching him. This would have been the plaintiff. Mr. Crowe also observed the Torres vehicle as it approached The Intersection. Mr. Crowe believed that both vehicles were travelling at the speed limit.
- [52] Mr. Crowe noticed that the traffic lights at The Intersection were out. He stated that he could see the left turn lanes.
- [53] Of significance, Mr. Crowe testified that because of trees at the southeast corner of The Intersection, it was his view, that neither the plaintiff nor Torres would have been able to see each other prior to entering The Intersection.

The Evidence of the County of Simcoe

Brian Mallone

- [54] Mr. Brian Mallone was qualified as an expert to give opinion evidence in the areas of road design, traffic control, and highway maintenance. Mr. Mallone is a civil engineer and has extensive experience in road design, which includes traffic signals and road traffic sign markings. Mr. Mallone has consulted extensively with respect to safety operations and the design of signalized intersections.
- [55] Mr. Mallone was retained by counsel for the County of Simcoe and did a site visit to the subject intersection in 2023. At that time, Mr. Mallone observed the traffic signals operating at The Intersection and noted that there was a “traffic signal ahead” sign south of The Intersection and one east of The Intersection. As it relates to whether those signs were there in 2016, Mr. Mallone testified that he sought out historic images and indicated that there was one at the 20th Sideroad both before and after the accident and that there was strong evidence to suggest that there was one on the 7th Line, but that he was not certain.
- [56] Mr. Mallone was questioned extensively with respect to the necessity for a UPS system with a light traffic signal and particularly the traffic signals at The Intersection. He was also questioned with respect to the sightlines or what was referred to as the “sight triangle” at the subject intersection. As it relates to the sightlines, Mr. Mallone testified that sightlines were a desirable element in the design of an intersection but that they were not mandatory where traffic signals were going to be used. He indicated that removing trees and buildings at an intersection to provide sightlines would have been highly unusual.
- [57] As it relates to the use of UPS, Mr. Mallone referenced the 2012 edition of the Ontario Traffic Manual (the “OTM”), which makes no mention of a requirement to have UPS at an intersection governed by traffic lights. This is in contrast to what is found in the 2007 edition of the OTM which does in fact reference the use of UPS and the types of considerations that ought to be taken into account in the installation of traffic signals at an intersection. Those considerations include the location of an intersection and whether it is a high-speed intersection.

- [58] Mr. Mallone was cross-examined with respect to the actual design of The Intersection which dates back to a time prior to when the collision occurred. In interim drawings prepared by an engineer on behalf of the County of Simcoe, there is reference to the installation of a UPS system. The County of Simcoe ultimately decided not to install a UPS. Mr. Mallone does not know what the process was that led to the County of Simcoe removing the UPS system originally contemplated in the sight drawings. As to the cost of a UPS, Mr. Mallone testified that a UPS system costs approximately \$25,000 out of the total cost of the traffic lights themselves being \$200,000. Mr. Mallone testified that he would not have removed the UPS from the design drawings as it is a viable device.
- [59] Mr. Mallone was cross-examined with respect to the role of a contractor like InnPower. He was taken to book 7 of the OTM and specifically paragraph 4.1 (pages 63-64), which suggests that any contractor dealing with the supply of power to an intersection would have been obliged to notify the police and the county prior to turning out the lights. Mr. Mallone testified that if the lights had been working, an accident at The Intersection would have been highly unlikely.
- [60] Mr. Mallone was cross-examined by counsel for InnPower as it relates to a comment made in the Walters Report at page 16 that InnPower was bound by the MMS. Mr. Mallone testified that the MMS do not apply to InnPower. Nonetheless, Mr. Mallone did testify that it would have been better if InnPower had provided more proactive notification as it relates to the power outage that ultimately resulted in the traffic lights being turned off.

Christian Meilie

- [61] Christian Meilie is a professional engineer and the Director of Engineering and Transportation for the County of Simcoe. Mr. Meilie provided context to the size of the County of Simcoe and the number of roads and intersections with traffic lights. The County of Simcoe has a population of approximately 500,000 people and 2,000 lane kilometres of roads. It had 58 traffic intersections dating back to 2016. He testified that the 20th Sideroad was a Class 3 road under the jurisdiction of the County of Simcoe. The 7th Line was under the jurisdiction of the Town of Innisfil.
- [62] Mr. Meilie testified that in 2013 when The Intersection was under construction, the County of Simcoe did not require the use of UPS when installing a new traffic light system at an intersection. He confirmed that the cost of the traffic lights was in the order of \$200,000 of which \$10,000 to \$15,000 would have related to the installation of a UPS system.
- [63] Mr. Meilie was asked as to why the UPS system contemplated in the initial design drawings was removed and he testified that he did not know.
- [64] As it relates to sight triangles, Mr. Meilie testified that while sight triangles would be considered in the construction of a new signalized intersection, they were not as important given the fact that The Intersection was controlled by traffic signals.
- [65] The patrol logs for the County of Simcoe on the day in question were reviewed by Mr. Meilie. These logs establish that an employee of the County of Simcoe had been at The Intersection at 1:44 p.m. on the day of the accident. The call logs reflect that the first

notification of the outage at The Intersection was at approximately 12 midnight. The patrol logs also establish that the patrol person for the County of Simcoe was at The Intersection at approximately 1:00 a.m. to deal with the outage.

- [66] As it relates to the installation of UPS systems since the accident, Mr. Mielie testified that for any intersections that are new builds, a UPS system is installed and that one of the reasons for that can be related back to this accident.
- [67] Mr. Mielie testified with respect to the line markings on the roadway at the time of the accident and was taken to various pictures entered into evidence. He testified that the condition of the paint was good to fair, and that the road markings had been last painted in the summer of 2015. He testified that the lines were visible and that they had reflective beads.
- [68] In cross-examination, Mr. Mielie was taken to the maintenance logs as they relate to the traffic lights at The Intersection. Those logs reflect that in the period November 2014 through May 14, 2015, there were 10 instances where there were issues with respect to the power supply to the traffic lights. The issues with respect to the lights, however, were not related to the absence of a supply of power but rather the voltage. Those issues were ultimately resolved.

Police Investigation

- [69] Police Constable Fawcett (“PC Fawcett”) was one of the officers from South Simcoe Police Service who attended at the scene of the accident. PC Fawcett was quite familiar with The Intersection, having lived in the area for some time prior to the accident.
- [70] PC Fawcett testified that he was one of four officers in the Innisfil division of the South Simcoe Police Service who were on shift on the evening of the accident. He testified that all of the officers assigned to the Innisfil division would have been available to respond to any call for the traffic lights at The Intersection being out. PC Fawcett testified that if The Intersection had been deemed unsafe, police officers would have been assigned to control the traffic.
- [71] PC Fawcett testified that he had been to the scene of literally hundreds of motor vehicle accidents and this particular accident stood out for him because he lived in the area and it was “incomprehensible” that work on the electrical power supply would be done at that time of night.
- [72] PC Fawcett testified that, in his view, the subject motor vehicle accident was preventable if the traffic lights had been on.

The Evidence of InnPower

- [73] Mr. Danny Persad was the Chief Operating Officer for InnPower beginning in 2018. Mr. Persad described InnPower as a small largely rural utility company; one of 57 in the Province of Ontario. As it relates to a down hydro pole such as the one which required fixing on the day of the accident, Mr. Persad testified that the repair needed to be done right

away as it had the potential to create another hazard and harm bystanders and or InnPower workers. He described this as emergency work – not a planned outage.

- [74] Mr. Persad was shown the hydro distribution map (Case Centre F1263) that was available to the InnPower work crew dispatched to repair the downed hydro pole on the day of the accident. He testified that this map would not show which customers would be affected by a power outage. Mr. Persad agreed that with a planned outage InnPower had a program available to it that would notify customers of a planned hydro outage; in acknowledging this ability, Mr. Persad was quick to emphasize the difference between a planned outage and an emergency repair.
- [75] As it relates specifically to the lights at the intersection going dark when Mr. Letouf turned off the hydro, Mr. Persad testified that the practice in the industry was to continue with an emergency repair and disregard the fact that the traffic lights had gone dark. It was Mr. Persad's evidence that employees engaged with an emergency hydro pole repair are not trained to deal with the consequences of turning off the hydro. Mr. Persad went so far as to testify in cross examination that even if he had been working the night of the accident and was informed that the traffic lights had gone dark, he would have done nothing differently. His evidence, simply put, is that InnPower had no obligation to notify a customer of a pending hydro outage when it might occur during an emergency repair.
- [76] Mr. Chris Letouf was the InnPower repairman who was on scene the day of the accident and was the person who isolated the hydro switch that ultimately caused the traffic lights at the intersection to go dark. Mr. Letouf testified that in his experience he had never notified a customer of a pending hydro outage occurring in the context of an emergency repair such as happened in this case.
- [77] Mr. Letouf testified that the switch which caused the hydro outage at the intersection was approximately one or two hydro poles from the intersection; it was close enough that he could see the traffic lights. He testified he was surprised when he saw the lights go out. He believed, based on the map he was using, that the lights would stay on. When the lights did go out he immediately called the local police main phone number and told the person answering his call that the traffic lights were out which had created what was, in his mind, a hazardous situation.
- [78] Mr. Rene Gatien was qualified as an expert to give opinion evidence in the area of the operations and practices of electrical distribution utilities including the repair of distribution facilities and equipment.
- [79] In Mr. Gatien's evidence in chief he made it clear that a hydro crew dispatched to effect an emergency repair to a downed hydro pole have one focus and that is the repair. The hydro repair crew would not have been able to assess which customers might be affected when the hydro was cut to allow for the repair to be done in safety. He acknowledged that once the hydro was turned off the hydro crew doing the repair work might notify the local police but that their focus remained the repair.

- [80] In cross examination, Mr. Gatien acknowledged that a rural intersection with no traffic lights would present as a dangerous situation, particularly if a motorist could not see the colour of the lights. He agreed that a hydro repair worker who became aware of an intersection going dark because the hydro had been turned off should contact the local police to notify the police of a hazardous situation.
- [81] Mr. Mark Fabbroni was qualified to give expert opinion evidence in the field of accident reconstruction. Mr. Fabbroni testified that the Plaintiff and Ms. Torres should have treated the intersection as a four way stop when the traffic lights were not functioning. When cross examined about drivers travelling on an unlit road of which the drivers had little familiarity, Mr. Fabbroni made a remarkable observation about the Ontario Driver's Handbook. He testified that, while the Handbook might set forth how drivers should respond, the Handbook "says a lot of things that are not vetted by science and that you have to take the advice in the handbook with a grain of salt." He also testified that he did not agree with the advice given in the Handbook about not overdriving one's headlights.
- [82] While Mr. Fabbroni may be an engineer with professional experience as an accident reconstructionist I did not find his evidence helpful.

Apportionment of Liability as Argued by the Parties

- [83] In argument, none of the parties through their counsel accepted that their clients had any responsibility for the accident. At the completion of the evidence and during the course of argument, counsel were asked by the court how they would apportion liability if the court was to find their client had some liability. The responses from counsel are worth recording as part of these reasons before this court begins its own analysis of the evidence and the applicable legal principles.
- [84] Counsel for the plaintiff, as her primary position, is there is no liability on the plaintiff for the accident. In the alternative, if there is liability, counsel for the plaintiff would allocate 75% against InnPower; 10% against Torres; 10% against the County of Simcoe; and 5% contributory negligence against the plaintiff.
- [85] Counsel for the County of Simcoe asserts, as his primary position, that the County has no liability for the accident. If liability is found against the County, then counsel would apportion 25% against Torres; 25% against the plaintiff and 50% against InnPower and the County, which I would take to mean 25% against InnPower and 25% against the County. In short, I took the submission of Mr. Csathy to mean that if there is a finding of liability against the County, then liability should be apportioned equally amongst the parties.
- [86] Counsel for InnPower, like all counsel, asserts there can be no finding of liability against InnPower. In the event there is a finding of liability, then counsel for InnPower suggests liability should be apportioned 60% against the drivers (which I took to mean 30% against the plaintiff and 30% against Torres); 20% against the County of Simcoe and no more than 20% against InnPower.
- [87] Finally, counsel for Torres asserts there is no liability against her client. She argues liability should be apportioned 60% against InnPower; 25% against the County of Simcoe and 15%

against the plaintiff. Under no circumstances does counsel for Torres see anything in the evidence that could attract liability against her client.

Position of the Plaintiff

- [88] As noted above, counsel for the plaintiff sees InnPower as being primarily responsible for the accident. Everyone agrees that if the hydro had not been shut down, the traffic lights would have been working, and the accident would never have happened. It thus follows that InnPower, having cut the power, must shoulder the lion's share of responsibility for the accident.
- [89] Ms. Pickering argues that InnPower had ample time to notify the road authority and/or the police before deciding to shut the power off. She argues that InnPower provides a service to the public and thus owed a duty of care to the public – in this case, the users of the roadway where the accident happened. Ms. Pickering argues that as provider of a service to the public, InnPower's first responsibility should have been protecting the public, not dealing with the repair of the downed hydro pole.
- [90] It is argued that the actions of InnPower included an overt act to turn off the hydro which resulted in foreseeable harm once the traffic lights went dark. Ms. Pickering argues that the outage was a planned outage as opposed to an emergency outage. It is argued that Mr. Letouf, and thus InnPower, should have notified the County of Simcoe and sought permission to turn off the hydro to the traffic lights.
- [91] As it relates to the liability of the County of Simcoe, Ms. Pickering argues that the County should have in place some mechanism that would have immediately notified the County of a power outage to the traffic lights. It is also argued that, if the County had installed the UPS system that was initially contemplated in the drawings for the new intersection, there would have been a battery backup once the hydro to the traffic lights was cut off. The cost to install a UPS backup (\$25,000) was a relatively small percentage of the total cost of the traffic signals (\$200,000).
- [92] Ms. Pickering acknowledged that, if this court finds that Mr. Letouf did notify the police immediately after he shut down the power causing the traffic lights to go off, the police authority could bear some legal responsibility for the accident. The difficulty with this position is that if the court did find Mr. Letouf made the call, and if the court found the police had some legal liability, the police are no longer a party to the action. The South Simcoe Police Service were initially named in this action as a defendant. A statement of defence was filed by the South Simcoe Police on June 7, 2018. When this matter was before the court on February 25, 2025, Mr. Kirk Boggs was shown as counsel of record for the South Simcoe Police Service. No one attended the trial to defend the South Simcoe Police. The court can only assume the South Simcoe Police were released from this action presumably on consent of all parties, including the plaintiff.

Position of the Defendant Torres

- [93] Counsel for Ms. Torres argues her client cannot be held responsible for the accident. Torres arrived at the intersection when it was in total darkness. She had no way of knowing she was entering a controlled intersection.
- [94] While counsel for Ms. Torres accepts that an intersection controlled by non-functioning traffic lights is to be treated as a four-way stop, for this to happen, drivers approaching the intersection first had to appreciate the intersection was controlled by traffic lights that were not working. If the court accepts Ms. Torres' evidence, she never adverted to the fact she was approaching a controlled intersection and, as such, she could not treat it as a four-way stop.
- [95] Counsel for Ms. Torres suggests that the plaintiff was in a different situation. The plaintiff was using GPS which showed she was approaching something she described as a cross on her screen. The plaintiff should have known what she was looking at on her screen was an intersection. Despite this knowledge, the plaintiff did nothing; she didn't apply her brakes. The plaintiff had an opportunity, that counsel for Ms. Torres argues, was not available to her client. As such, it is argued the plaintiff is not without fault.
- [96] Counsel for Ms. Torres argues that the County of Simcoe should have installed a UPS system which was in the original design drawings for the construction of the intersection back in 2016. For whatever reason, the County chose to make a decision that resulted in no backup for the traffic lights when there was a power outage, as occurred on the night of the accident. Noteworthy, counsel argues the County led no evidence as to why the County did not adhere to the original construction plans that called for the installation of a UPS system.
- [97] As for InnPower, counsel argues that, from the moment workers from InnPower arrived at the scene, they knew that the power would have to be turned off to allow them to safely repair the downed hydro pole. Knowing the hydro would have to be cut off, it is argued that InnPower should have notified the police and/or the County of the pending hydro outage.
- [98] It is argued that a dangerous situation became reality and was recognized by Mr. Letouf when he cut the power and recognized the traffic lights had gone out. Counsel for Ms. Torres argues Mr. Letouf knew he had created a dangerous situation, which is reflected in his own evidence that he tried to then immediately contact the police. It is argued, however, that Mr. Letouf did not actually speak to the police, even though his cell phone bill would appear to suggest otherwise.

Position of the Defendant County of Simcoe

- [99] It is conceded by Mr. Csathy that the lights were out at the intersection at the time of the accident and that the absence of functioning traffic lights was a cause of the accident. That said, it is argued that the County cannot be liable in any way for the accident as the County had no knowledge that the lights were out. In the absence of any knowledge the lights were out, there was nothing that the County could have done to avoid what happened between

Ms. Torres and the plaintiff. The County did not find out about the lights being out until about 30 minutes after the accident had occurred.

- [100] While Mr. Walters testified that the County should have had a system that would have warned the County of an outage, there was no evidence adduced by the plaintiff to suggest that it was the standard across other similar sized county jurisdictions to have a modem that would have alerted the County of Simcoe to the outage at the intersection.
- [101] As for the installation of a UPS system and the original design drawings, Mr. Csathy argues the original design drawings which contemplated the installation of a UPS system at the intersection is nothing more than a “red herring”. The fact that the drawings contemplated a UPS system does not lead to the conclusion that a UPS system was required. Mr. Csathy argues the absence of a UPS does not constitute a state of non-repair. Mr. Csathy relies on the opinion of Mr. Mallone that there was no requirement to install a UPS system when the intersection was built. Furthermore, Mr. Csathy points to the evidence that some municipalities may have UPS systems at their intersections while others do not.
- [102] As it relates to the opinion evidence of Mr. Karim, Mr. Csathy argues no weight should be given to his opinion as Mr. Karim’s evidence about the requirement for a UPS system as reflected in the Traffic Handbook was simply wrong. Furthermore, Mr. Csathy argues that no weight should be given to the opinion evidence of Mr. Karim as he was nothing more than an advocate for the party who had retained him and called him as a witness.
- [103] As it relates to who was responsible for the accident, Mr. Csathy argues that both the plaintiff and Ms. Torres were negligent as they were approaching the intersection. Mr. Csathy points to the evidence of the plaintiff who acknowledged she had seen a “cross” on her GPS which she took to be an intersection that she was approaching. While she adverted to the existence of an intersection ahead, she could not see it, but nonetheless, continued at the same speed. Mr. Csathy also refers to the other indicia of an approaching intersection that should have alerted the plaintiff to have slowed down – these indicia included the ‘traffic lights ahead’ sign; the widening of the road for a left turn lane; the reflective street sign and the stop line immediately before the intersection.
- [104] As it relates to Ms. Torres, it is argued by Mr. Csathy that she clearly was not paying attention to the road conditions as reflected in her evidence, that she has no recollection of driving through that part of the road where the repairs to the hydro pole were taking place. The evidence establishes this part of the roadway was well delineated by warning lights and signs, none of which Ms. Torres ever saw. Like the plaintiff, she has no recollection of the reconfiguration of the road to include a left-turn lane as she approached the intersection. Mr. Csathy points to Ms. Torres’ own evidence in cross-examination that if she had seen the various cues to an approaching intersection, she would have slowed her speed down.

Position of the Defendant InnPower

- [105] **Mr. Mark**, on behalf of InnPower, rejects the suggestion of the plaintiff that InnPower chose to create a risk when it turned off the hydro that powered the traffic lights. Rather, it

is argued the outage was in fact caused by the single vehicle accident that had knocked down a hydro pole many hours prior to the accident involving the plaintiff and Ms. Torres. InnPower was contractually bound to repair the downed hydro pole which is precisely what its repair people did. **Mr. Mark** argues that the accident was caused because two drivers chose not to follow the rules of road, by treating the intersection as a four-way stop.

- [106] As it relates to the suggestion that InnPower had an obligation to warn its customers, and by implication others, of a pending power outage, it is argued that the law does not impose any such duty on a company like InnPower. InnPower is not an insurer obligated to provide hydro to its customers. Furthermore, **Mr. Mark** points to the complete absence of any evidence that the standard of care in the hydro industry required InnPower to provide any warning of a power outage associated with its repair of the downed hydro pole.
- [107] **Mr. Mark** also argues that if this court determined that InnPower did have a duty of care to warn customers of a power outage, then that duty was discharged when Mr. Letouf made his phone call to the local police telephone number and alerted the person taking the call for the police department that the lights at the intersection were not functioning.
- [108] It is also argued that the plaintiff's argument about InnPower's duty to warn cannot succeed as it had no involvement in the construction of the intersection and the installation of the traffic signals. The responsibility for road safety was not InnPower's but rather, the responsibility of the Province and the County.
- [109] As for the suggestion that this court should find some kind of novel duty applicable to InnPower, **Mr. Mark** argues that an accident like the one involving the plaintiff and Ms. Torres was not reasonably foreseeable. InnPower had no way of knowing that when the hydro was cut off, it would shut down the traffic lights. InnPower could not foresee that drivers either could not or would not comply with the rules of the road by treating the intersection as a four-way stop. Fundamentally, it is argued that InnPower was entitled to rely on the expectation that both the County of Simcoe and other drivers would comply with the duty of care imposed on them under the prevailing circumstances.
- [110] As it relates to the proximity between the parties, it is argued that InnPower was a public entity providing a service to the County. There was no nexus between the plaintiff and InnPower that would suggest any duty of care was owed to the plaintiff.
- [111] In the alternative, it is argued that if there was any duty of care to warn of a pending outage, **Mr. Mark** again refers to the evidence of Mr. Letouf that he did try to warn of the outage by calling the local police. Any duty of care also has to be looked at in the context of the outage not being a planned outage but rather, was a response to an emergency situation caused by a collision earlier in the day with a hydro pole that had to be replaced.
- [112] As it relates to who is liable for the accident, **Mr. Mark**, like Mr. Csathy, refers to the actions and lack of attention of both the plaintiff and Ms. Torres. Both drivers were not paying attention and should have seen indicia of an approaching intersection. If they had been paying attention to those indicia, they should have slowed down. If they had slowed down, the accident would not have happened.

DRIVERS' NEGLIGENCE

- [113] The facts of this case give rise to a number of commonsense assumptions. The first and perhaps the most obvious is that traffic lights provide a very important safety function. They are used around the world, and they provide a universal signal as to whether a driver has the right-of-way or whether the driver must stop. Green means go; red means stop; and yellow means slow down and be ready to stop. If drivers obey these signals, then traffic can safely enter and exit a controlled intersection. When drivers do not obey the signals and the rules of the road, accidents happen.
- [114] But what happens when traffic lights go out – as they will do on occasion? In those circumstances, the Driver's Handbook published by the Ontario Ministry of Transportation (the "Handbook"), dictates that drivers are to treat such an intersection as a four-way stop. On the night of February 20, 2016, the traffic lights were all out and, as such, the intersection should have been treated as a four-way stop. In order to appreciate the need to treat the intersection as a four-way stop, the plaintiff and Ms. Torres each had to realize that they were approaching an intersection and that the intersection was supposed to be controlled by traffic signals. Neither made that determination and, as such, they both entered the intersection at essentially highway speed. The legal issue is, should they have appreciated that they were approaching an intersection where the traffic lights were out?
- [115] The plaintiff confirmed in her evidence she was not familiar with the road she was travelling on. She was using a GPS system. The screen on her GPS screen showed she was approaching what she described as a "cross". At the very least, knowing her GPS was describing what could only be an intersection of two roads ahead, a prudent driver would have exercised some caution – caution that at the very least would have involved a reduction in speed. The plaintiff was driving at 80 km/h (the posted speed limit) and for all intents and purposes, she maintained this speed into the intersection.
- [116] As the plaintiff was approaching the intersection, she made no observation of the "traffic signal ahead" sign which was 350 metres from the intersection. The plaintiff also made no observation of the left-turn lane which tapered about 230 metres from the intersection with a solid line and left-turn arrows near the intersection. The plaintiff did not see the reflective street signs at the intersection.
- [117] Despite the darkness and her unfamiliarity with the road, the plaintiff was travelling at the posted speed limit and did not have her high beams engaged.
- [118] The plaintiff was entirely candid when she admitted in cross-examination that if she had seen the "traffic signal ahead" sign, she would have slowed down. She was equally candid that when she saw the "cross" on her GPS she would have had enough time to slow down to make a left turn had she wanted to.
- [119] Both Mr. Porter and Mr. Walters, who were qualified as accident reconstruction experts, agreed that if either of the drivers had slowed to a speed of 60 km/h, the collision would have been avoided. A prudent driver, having been alerted to a "traffic signal ahead" sign, would make visual enquiries about what the signals were portraying, *i.e.* red, green or

yellow. Not seeing any visual cue, the prudent driver would be alerted to slow down. Seeing an intersection or “cross” on one’s GPS would alert one to an intersection ahead. Not being able to visually see the intersection despite the cue from the GPS would alert a prudent driver to slow down. The plaintiff did nothing other than take her foot off the accelerator for a brief moment – only to resume highway speed.

- [120] While in all likelihood the accident would never have happened if the traffic lights were working, the fact remains that there were a number of visual cues that the plaintiff either failed to observe, or cues she did observe but failed to heed. The plaintiff is not without fault for what befell her the evening of February 20, 2016.
- [121] Ms. Torres was confronted with an intersection that had no traffic lights working. Was this something she should have been able to see and then treat the intersection as a four-way stop? The answer to this question lies in part from the complete lack of any appreciation about her surroundings. Approximately 500 metres from the intersection, Ms. Torres drove through the worksite that InnPower had set up on the roadway to repair the hydro pole that needed replacing. The work site included a large Radial Boom Derrick with its boom attached to a broken hydro pole; amber lights; flood lights; multiple warning signs and pilons. Most significantly, the road was down to one lane. Yet, despite all of these warning signs, Ms. Torres had no recollection of seeing these clear warning signs.
- [122] Ms. Torres also had no recollection of a “traffic signal ahead” sign located about 300 metres from the intersection. Ms. Torres had no recollection of seeing the left lane markings on the roadway as she approached the intersection and, like the plaintiff, did not see the reflective street signs at the intersection. Like the plaintiff, Ms. Torres was quite candid when she admitted that had she seen any of the visual cues reviewed above, that she would have slowed down to better survey the roadway ahead. Ms. Torres bears some responsibility for the collision with the plaintiff as she was not keeping a proper lookout. If she had been keeping a proper lookout, she would have been prompted to slow her speed and appreciate she needed to stop for an intersection whose lights were out.

The Claim against the County of Simcoe

- [123] Counsel for Simcoe concedes that the traffic lights were out at the intersection and that the lack of traffic lights controlling the intersection was one cause of the accident. Mr. Csathy argues that Simcoe could not have known that the traffic lights were out as the evidence establishes that Simcoe did not know until approximately midnight that the traffic lights had gone out.
- [124] Before addressing the specific liability issues in this case, it is important to set out the general statutory scheme and corresponding analytical framework applicable to assessing the liability of the County of Simcoe.
- [125] Section 44 of the *Municipal Act* has codified the common law and imposes a duty of care and provides for a remedy as follows:

44. (1) 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.

(2) A municipality that defaults in complying with subsection (1) is subject to the Negligence Act, liable for all damages any person sustains because of the default.

[126] In addition, subsections 44 (3), (4) and (5) are also relevant to the analysis:

(3) Despite subsection (2), a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if,

(a) it did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge;

(b) it took reasonable steps to prevent the default from arising; or

(c) at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway or bridge and to the alleged default and those standards have been met.

(4) The Minister of Transportation may make regulations establishing minimum standards of repair for highways and bridges or any class of them.

(5) The minimum standards may be general or specific in their application.

[127] The Court of Appeal in *Fordham v. Dutton-Dunwich (Municipality)*, 2014 ONCA 891 (CanLII) at para. 26, laid out a four-step test for analysing a cause of action against a municipality for non-repair:

(a) 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.

(b) Causation: the plaintiff must prove the “non-repair” caused the accident.

(c) 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.

(d) 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 [another defendant]’s driving caused or contributed to the plaintiff’s injuries.

[128] In this case, the plaintiff has the onus to prove, on a balance of probabilities, that the intersection was in a state of disrepair at the time of an accident, and that a specific non-repair was the cause of the accident.

- [129] In this case, if the plaintiff can establish a case of prima facie liability, the onus then shifts to the municipality – in this case, the County of Simcoe – to establish, on a balance of probabilities, that liability for the state of disrepair and resulting accident is negated by application of one or more of the statutory defences outlined in s.44(3) of the *Municipal Act*, 2001.
- [130] There are three defences available to the County of Simcoe which are set out under ss. 44(1) and 44(2) of the *Municipal Act*, 2001, supra, which reads in part as follows:
- Despite subsection (2), a municipality is not liable for failing to keep a highway ... in a reasonable state of repair if,
- (a) it did not know and could not reasonably have been expected to have known about the state of repair of the highway...;
 - (b) it took reasonable steps to prevent the default from arising; or
 - (c) at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway ... and to the alleged default and those standards have been met.
- [131] The three subparagraphs of s.44(3) are disjunctive, such that a municipality will not be liable if any one of the three defences applies.
- [132] There is no evidence that either the road travelled by the plaintiff or the road travelled by the defendant, Torres, was itself in a state of non-repair. The road is, however, not just the concrete and asphalt on which cars travel. The road includes many other things such as signage. In this particular case, the road also includes the traffic signals. Traffic signals are an integral part of any roadway. Without proper functioning traffic signals, vehicular traffic simply could not proceed in safety.
- [133] The traffic signals were not working when the accident happened. The County was not responsible for the absence of the hydro needed to power the traffic signals. Power outages are however not uncommon, whether in the County of Simcoe or anywhere else in this Province. Outages happen, and when an outage happens, it may result in traffic signals going out. It is precisely for this reason that the Ontario Driver's Handbook provides drivers with guidance on what to do when approaching an intersection with malfunctioning traffic lights; drivers are to treat such an intersection as a four-way stop.
- [134] In a city where there is ambient light, drivers may have little difficulty at night recognizing the hazard presented when traffic lights are not working. In a rural setting, where there is no ambient lighting, drivers may have great difficulty even advertent to the fact they are approaching an intersection, let alone an intersection where there are traffic lights that are not functioning. In a rural setting like the one where this accident happened, it may not be enough to rely on the direction of the Ontario Driver's Handbook to ensure that drivers can enter and exit an intersection where the traffic lights are not working. An intersection in rural Ontario with non-functioning traffic lights is an intersection not in a good state of repair.

- [135] The evidence establishes that Simcoe relied on being notified of any power outages from information supplied by either the public or the police, or alternatively, from employees of Simcoe who were out patrolling the highways. Other than the evidence of Mr. Walters who suggested that Simcoe should have had a system in place with InnPower whereby InnPower would have been obliged to notify Simcoe of potential power outages, there was no evidence that any other municipality in the Province of Ontario had a similar system in place. Other than the evidence of Mr. Walters who suggested Simcoe's reliance on the public and police and its employees, there was no expert evidence that would suggest that Simcoe should have had in place some kind of modem that would have allowed Simcoe to have been notified of a power outage.
- [136] There was considerable evidence at trial with respect to the installation of what is described as a UPS system or what might be more commonly known to the public as a battery backup system that would automatically kick in if the hydro for the traffic lights was cut off. The evidence establishes that at the time that Simcoe was planning to install the traffic lights at the subject intersection, it had considered the installation of a UPS system. This is clear from the original plans that contemplated the installation of a UPS battery backup. The overall cost of the installation of the traffic lights at the intersection was approximately \$200,000. The cost to install a UPS battery system would have been approximately \$25,000.
- [137] The design of an intersection governed by traffic lights may seem like a relatively simple process to a lay person. In point of fact, there are lengthy and detailed instructions set forth in Book 12 of the *Ontario Traffic Manual* that relates to traffic signals. The relevant book was edited in March 2012. Of significance, a review of Book 12 reveals no guideline or suggestion that a UPS battery backup system should be installed with the installation of traffic lights, whether they be at an intersection like the one at issue or any other intersection.
- [138] The foreword to the *Ontario Traffic Manual* is, however, important because it makes clear that while the OTM provides recommendations and guidelines which may assist in determining the specific design and operational effectiveness of traffic control systems, the authors of the manual go on to state,

No manual can cover all contingencies or all cases encountered in the field. Therefore, field experience and knowledge of application are essential in deciding what to do in the absence of specific direction from the manual itself and in overriding any recommendations in this manual.

- [139] The authors of the manual go on to state,

The traffic practitioner's fundamental responsibility is to exercise engineering judgment and experience on technical matters in the best interests of the public and workers. Guidelines are provided in the OTM to assist in making those judgments, but the guidelines should not be used as a substitute for judgment.

- [140] The consulting engineers for the County of Simcoe prepared what I would describe as a detailed blueprint which is dated June 2012 and is specific to the intersection of County Road 37 and 7th Line. The blueprint specifically provides for a “pad mounted traffic controller and battery backup system.”
- [141] Brian Malone was qualified as an expert to give opinion evidence in the areas of road design, traffic control and highway maintenance. Mr. Malone had extensive experience in the design and engineering of traffic signals, signage and road safety. Mr. Malone confirmed that the 2012 *Ontario Traffic Manual* would have been the governing manual in relation to the design of the traffic lights at the subject intersection. He confirmed that there is no mention in the *Ontario Traffic Manual* Book 12 of a requirement for the installation of a UPS battery backup system. Mr. Malone disagreed with the expert opinion evidence of Mr. Karim, who suggested that, in fact, the 2012 edition does mention the need for a UPS system. In that regard, Mr. Malone suggested that Mr. Karim simply was wrong in his understanding of the requirement set forth in Book 12 of the *OTM*.
- [142] In his evidence, Mr. Malone was taken to the fact that the installation of the traffic signals had an overall budgeted cost in the range of \$150,000 – \$200,000, and that the UPS battery backup system would have cost approximately \$25,000. When questioned as to whether he would have removed the UPS from the design drawings, he suggested that he would not have done that because it is a “viable device”. In giving this evidence to the court, Mr. Malone noted that it was up to the County of Simcoe to decide whether it would follow the professional advice of its engineers.
- [143] Absent the installation of a UPS battery system, Mr. Malone confirmed that the obligation of the County, in the exercise of ensuring the safety of the traveling public and to be in compliance with the minimum maintenance standards, would require the County to respond to a situation where the traffic signals were out “as soon as practicable.” Mr. Malone noted that the County could only respond once it became aware that something was amiss with the traffic signals. The real issue for this court, however, is whether or not the County had an obligation to have in place a UPS battery system, especially in a situation where the original design drawings contemplated the installation of such a system.
- [144] While the Traffic Manual in existence at the time of the construction of the intersection did not mandate the need for a UPS system, the words of the author(s) of the foreword to the Manual are worth repeating:
- The traffic practitioner’s fundamental responsibility is to exercise engineering judgment and experience on technical matters in the best interests of the public and workers. Guidelines are provided in the OTM to assist in making those judgments, but the guidelines should not be used as a substitute for judgment.
- [145] In this case, the original blueprints of the Intersection prepared for the County included the provision for a UPS system. The professionals who prepared these blueprints saw the need for a UPS system. The Court can only surmise that these professionals were exercising their professional experience and judgment in recommending the need for a UPS system

when the original blueprint plans were prepared for the County's approval. The County chose not to heed the advice of its professionals and removed the requirement for a UPS system in the final blueprints.

- [146] I accept that the County was not required to have in place a monitoring system like a modem to alert it to malfunctioning traffic signals. I also accept the County could not have known that the traffic signals were malfunctioning until it was alerted to this situation. The alert did not come into the County until after the accident had already happened. I do not accept, however, that the County is without fault. The traffic lights were not functioning and thus the roadway was in a state of non-repair. While there was no specific requirement for a UPS system in the *Traffic Manual*, the County chose not to heed the advice of the professionals engaged to construct the intersection. If the County had followed the advice of the professionals engaged to prepare the blueprints for the construction of the Intersection, a UPS system would have provided temporary power to the traffic lights when the hydro was cut off approximately 30 minutes prior to the accident. The County could have taken reasonable steps by installing a UPS system. It chose to save \$20,000. That choice resulted in a darkened intersection at about 11:30 p.m. on the night of the accident and was a contributing cause to the accident.

The Claim against InnPower

Did InnPower Have a Duty of Care to the Plaintiff

- [147] There is no evidence that those responsible for fixing the downed hydro pole did anything negligent in the manner in which they carried out the actual repair. There is no evidence that the repairs themselves caused any direct harm to anyone. There is no dispute that, in order to carry out the repair, the hydro to the downed hydro pole had to be turned off.
- [148] There can be little dispute that if the traffic lights had been functioning the accident would never have happened. The absence of hydro power to the traffic lights was one reason the traffic lights were not working; the other reason was the absence of a UPS system. The question for the court to decide is whether InnPower had a duty to warn its customer – the County of Simcoe – or, for that matter, anyone that the hydro would be turned off.

DUTY OF CARE OVERVIEW

- [149] It is a well-established principle that a defendant is not liable in negligence unless it owed the plaintiff a duty of care – see *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para 45.
- [150] To establish negligence, the plaintiff must, in accordance with *Cooper v. Hobart*, 2001 SCC 79 at para 41, prove that her case falls within or is analogous to a previously recognized category of duty of care, or that a novel category of duty of care should be established under the *Anns/Cooper* test.
- [151] This test in accordance with the Supreme Court decision in *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41 at para 20. is as follows:

“(1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a prima facie duty of care; and

(2) If so, are there any residual policy considerations which ought to negate or limit that duty of care?”

RECOGNIZED CATEGORIES OF DUTY OF CARE

[152] In *Cooper* at para 36, the Supreme Court makes clear that the first requirement to establish a duty of care is foreseeability. In addition to foreseeability, there must be proximity. There must be some relationship which is sufficiently “close and direct”. The court will look for factors such as expectations, representations, reliance and property or other interests. The court listed the recognized categories and relationships, concluding that “[w]hen a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a prima facie duty of care may be posited.” The recognized categories the court listed include:

- (a) the defendant’s act foreseeably causes physical harm to the plaintiff or the plaintiff’s property, including nervous shock;
- (b) negligent misstatement;
- (c) misfeasance in public office;
- (d) duty to warn of the risk of danger;
- (e) a municipality owes a duty to prospective purchasers of real estate to inspect housing developments without negligence;
- (f) governmental authorities which have undertaken a policy of road maintenance owe a duty of care to execute that maintenance without negligence;
- (g) relational economic loss, related to the performance of a contract in situations such as where the claimant has a proprietary interest in property, the general averaging cases and joint venture cases.

[153] The *Anns/Cooper* duty of care framework, including the list of recognized duties, was recently endorsed by the Supreme Court in *Nelson (City) v. Marchi*, 2021 SCC 41 at para 16 as continuing to apply at common law. Counsel for InnPower argues that none of the duties recognized subsequent to *Cooper* are applicable to InnPower on the facts of this case. InnPower argues that to be considered a recognized category, beyond those listed above, the duty of care must be well established in the jurisprudence, with the weight of authority appearing to have settled the issue. If the duty is not well established, the *Anns/Cooper* test must be applied.

A. The Duty to Warn

- [154] There is no well settled duty established in the jurisprudence for utility companies to take affirmative action to warn the public of the risks of unexpected power outages. For the purposes of this analysis, the most plausible pre-existing category under which a court could find InnPower owed a duty of care is the duty to warn of the risk of danger. The duty to warn “can arise only on the basis of a special kind of underlying relationship together with other elements of “proximity”, including high degrees of predictability and foreseeability.”
- [155] The analysis trial judges must follow in the application of the *Anns/Cooper* analysis requires the court to answer four basic questions:
- (a) Does a sufficiently analogous precedent exist that definitely finds the existence or non existence of a duty of care in the circumstances presented by the facts of the case; if not;
 - (b) Was the harm suffered by the plaintiff reasonably foreseeable; if yes;
 - (c) Was there a relationship of sufficient proximity between the plaintiff and the defendant such that it would be just to impose a duty of care; if the answer is yes, then a prima facie duty arises which then requires the court to answer the fourth question;
 - (d) Are there any residual policy reasons for negating the prima facie duty of care established by the answer to question c), aside from policy considerations that arise naturally out of a consideration of proximity; if the answer to question d) is no, then a novel duty of care will be found to exist.

Does the Claim Against InnPower Fall Under a Recognized Duty of Care?

- [156] The court was not referred in argument to any jurisprudence in this province or, for that matter, anywhere in Canada where a hydro company like InnPower has been found liable where its failure to provide hydro has resulted in a finding of a duty care resulting in a finding of negligence. There is of course jurisprudence where the courts have evolved to find a duty of care where no duty of care had previously existed – see *Cooper v. Hobart*, 2001 SCC 79; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, *Emil Anderson Maintenance Co. Ltd. v. Taylor*, 2024 BCCA 156 (CanLII).
- [157] Having heard the submissions of counsel and in the absence of any authority to the contrary, I have no issue in determining that the answer to Question a) is that there is no analogous precedent that has definitively found the existence or non existence of a duty of care in circumstances similar to those before this court.

Was the Harm Suffered by the Plaintiff Reasonably Foreseeable

- [158] The determination of whether something is “reasonably foreseeable” is an objective test – see *(Rankin’s Garage & Sales) v. J.J.*, 2018 SCC 19. The question to be answered is whether someone in the position of the defendant (in this case InnPower) ought reasonably to have foreseen the harm. The focus of the enquiry and the answer to this question should be on whether foreseeability was present prior to the accident. The answer to the question should not be made with the benefit of 20/20 hindsight – see *Rankin* at para 53.
- [159] The question this court asks is whether it would have been reasonably foreseeable to those working for InnPower on the night of the collision that, by shutting off the hydro to the traffic lights, an accident might happen between two vehicles entering the intersection. The answer to this question is answered in part by the actions of Mr. Letouf. Mr. Letouf was the person working for InnPower who ultimately caused the traffic lights to go dark. He turned off the switch immediately adjacent to the intersection. When he turned off the switch the lights went off. I accept the evidence of Mr. Letouf that he did not know when he flipped this switch that the lights would go dark. What Mr. Letouf did immediately upon realizing he had caused the lights to go dark was to call the local police. Mr. Letouf did the right thing. He tried to alert the police to what he knew was a possible dangerous situation, *i.e.* an intersection in the middle of the country with no traffic signals. It was clearly foreseeable, as evidenced by the actions of Mr. Letouf that, when the hydro was turned off to the traffic lights, a dangerous situation had been created which could result in a collision between two vehicles not seeing the intersection. The actions of Mr. Letouf demonstrate that objectively InnPower knew or ought to have known that the harm to the plaintiff was reasonably foreseeable.

Was There a Relationship of Sufficient Proximity Between the Plaintiff and the Defendant Such That It Would Be Just To Impose a Duty Of Care.

- [160] Counsel for InnPower points to the Supreme Court decision in *Cooper* at para 29 where the Court emphasizes that “there must be reasonable foreseeability of the harm plus something more.” The “something more” deals with the issue of proximity and as noted in *Childs* at para 31, proximity is evaluated by looking to the nature of the relationship to determine whether there is a nexus between the parties.
- [161] There are three elements which may cause a court to determine that there is proximity between the parties. These elements are set out in *Childs* at para 35-37 as follows:
- (a) Where a defendant “intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls”;
 - (b) Where the relationship is a paternalistic one of “supervision and control”, such as that between a parent and child or teacher and student; and
 - (c) Where a defendant exercises a public function or engages in a “commercial enterprise that includes implied responsibilities to the public at large.”

- [162] It can safely be said that the first two categories referenced above do not apply to the facts of this case. Can it be said that InnPower’s business engaged in a commercial enterprise that includes implied responsibilities to the public at large? There can be no doubt that InnPower does engage in a commercial enterprise. In *Childs* at para 40 McLachlin C.J. stated that: “Finally, there is a reasonable expectation on the part of the public that a person providing public services, often under licence, will take reasonable precautions to reduce the risk of the activity, not merely to immediate clients, but to the general public.”
- [163] The court’s next step in the analysis mandated by the Supreme Court decision in *Cooper* requires a consideration of whether sufficient proximity existed between the plaintiff and InnPower such that it would be appropriate to impose a duty of care on InnPower. Without proximity there can be no duty of care. In *Cooper*, the Supreme Court of Canada made clear that reasonable foreseeability standing alone is insufficient to ground a *prima facie* duty of care. In addition to reasonable foreseeability, there must be proximity: *Cooper* at para. 42.
- [164] Our Court of Appeal recently dealt with the appropriate analysis of whether a municipal hydro company could be found liable to a pedestrian allegedly injured in part because the hydro company had not adequately maintained street lighting in the area where the pedestrian was struck by a motor vehicle. The motion judge in *Case v. Pattison*, 2023 ONCA 529 (leave to appeal to the Supreme Court denied *Milton Hydro Distribution Inc v. Corporation of the Town of Milton*, 2024 CanLII 30095 (SCC)) on a motion for summary judgement had dismissed the claim against the hydro company. The Court of Appeal reversed the decision of the motion judge and provides the following guidance in how to analyze potential negligence claims involving arguable issues involving a novel duty of care :

[10] A successful claim for negligence requires proof of a duty of care, breach of the standard of care, compensable damage, and causation: *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at paras. 30-39; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 96. This case concerns the motion judge’s treatment of the duty of care and causation elements of the negligence analysis.

[11] In considering the third-party claim, the motion judge was first required to determine whether Milton Hydro owed a duty of care to the plaintiff pedestrian. As part of this analysis, the motion judge should have considered whether the duty of care in issue was a novel duty of care as it would be unnecessary to conduct a full *duty of care* analysis if previous case law had established that the duty of care in issue or an analogous duty existed: *Rankin (Rankin’s Garage & Sales) v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587, at para. 18. If it were necessary to determine whether a novel duty exists, the motion judge was required to consider whether there was a relationship of proximity in which Milton Hydro’s failure to take reasonable care by removing the luminaire might foreseeably cause this type of loss or

harm to the plaintiff: *Rankin*, at para. 18; *Nelson (City) v. Marchi*, 2021 SCC 41, 463 D.L.R. (4th) 1, at para. 17. In assessing foreseeability, the emphasis should be on the “[f]oreseeability of harm to the victim, and not the specific interceding events surrounding that harm”: Allan M. Linden et al., *Canadian Tort Law*, 12th ed. (Toronto: LexisNexis Canada Inc., 2022), at s. 7.10.

[12] As part of the duty of care analysis, the motion judge had to consider whether, if she determined that a *prima facie* duty of care existed, Milton Hydro had established that there were any residual policy considerations that should negate the imposition of such a duty: *Rankin*, at para. 20. Consideration of these residual policy concerns is an essential step in recognizing a novel duty of care, though it will rarely be necessary when the claim falls within or is analogous to an established duty of care: *Nelson (City)*, at paras. 18-19; *Cooper*, at para. 39. Here, the motion judge did not reach this fact-driven step in the analysis because of her determination of the issues of foreseeability and proximity.

[13] If she were satisfied that Milton Hydro owed the plaintiff pedestrian a duty of care and breached the standard of care, the motion judge would also need to consider causation. In assessing causation, the motion judge had to consider whether Milton Hydro’s assumed removal of the luminaire was a factual cause of the harm the plaintiff pedestrian suffered from the accident as alleged by the plaintiff pedestrian. She also had to consider whether Milton Hydro’s assumed removal of the luminaire legally caused the damages suffered by the plaintiff pedestrian: see e.g., *Mustapha*, at para. 11; *Frazer v. Haukioja*, 2010 ONCA 249, 317 D.L.R. (4th) 688, at para. 39.

[14] In assessing whether Milton Hydro’s assumed removal of the luminaire was a factual cause the accident, the motion judge had to apply the well-established “but for” test, namely: would the harm the plaintiff pedestrian suffered from the accident have occurred but for Milton Hydro’s assumed removal of the luminaire: see e.g., *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 8.

[15] The legal causation analysis is rooted in assessing remoteness: *Nelson*, at para. 96; *Mustapha*, at paras. 12-13. The motion judge needed to assess whether the harm the plaintiff pedestrian suffered from the traffic injury was a reasonably foreseeable consequence of Milton Hydro’s assumed removal of the luminaire: *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 20. If the harm the plaintiff suffered was not “the reasonably foreseeable result of the defendant’s negligent conduct”, then the harm would be too remote for the defendant’s negligence to have legally caused it: *Nelson*, at para. 97. This remoteness inquiry can be distinguished from the foreseeability analysis within duty of care “because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury”: *Nelson*, at para. 97.”

- [165] What then is meant by proximity which is fundamental to the outcome of whether InnPower owed a duty of care to the Plaintiff. The principle of proximity was summarized by the British Columbia Court of Appeal in *Wu v. Vancouver (City)*, 2019 BCCA 23 at para 51 as follows:

“[51] The law has not defined “proximity” with precision. Indeed, as was said in *Cooper*, the word may amount to little more than a label identifying the type of relationship in which duties of care arise: *Cooper* at para. 31. Nonetheless, one can recognize the kind of considerations pertinent to analysing proximity. Such relationships are said to be “close and direct”: *Cooper* at para. 32. They may involve physical closeness, direct relationships or interactions, the assumption of responsibility; or turn on expectations, representations, reliance, or the nature of property or other interests involved: see, *Cooper* at paras. 32-34. In short, proximity recognizes those circumstances in which one individual comes under an obligation to have regard for the interests of another so as to be required to take care not to act in a manner that would cause injury to those interests. Proximity involves an analysis both of the nature of the relationship between the parties and the kind of harms carelessness might cause: see *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2013 BCCA 34. It involves having regard to all relevant factors arising from the relationship between the parties: *Deloitte* at para. 29.

- [166] InnPower argues it owed no duty of care to the Plaintiff as it had no way of knowing that the termination of the hydro on the night in question would extinguish the traffic lights. It is argued that InnPower’s only responsibility was to perform its contractual responsibility to repair the downed hydro pole. As I have already observed there is no suggestion the actual repair to the hydro pole was done improperly. But it is too simplistic to simply say InnPower had only one responsibility and that was to repair the downed hydro pole.
- [167] InnPower knew from the moment it arrived to repair the hydro pole that power to the pole would have to be cut off. This was essential so that the workers could safely repair the pole. The downed hydro pole was less than 500 metres away from the intersection which had functioning traffic lights. The incident which required the hydro pole to be replaced occurred approximately six hours before InnPower turned the hydro off. There was much debate amongst the experts and witnesses about whether the repair involved a planned outage or an emergency repair. In my view this debate is a “red herring”. The repair to the downed hydro pole was an emergency repair. That said InnPower had six hours to assess how best to safely conduct the repair. InnPower knew the hydro would have to be isolated and power cut off to the downed hydro pole. InnPower had a duty to ensure that, as a corporation supplying an essential service, it took in the words of McLachlin J “reasonable precautions to reduce the risk of the activity, not merely to immediate clients, but to the general public.”
- [168] There is no evidence that InnPower did anything to determine if the termination of the power to the hydro pole might affect members of the public in a way that could have negative consequences. The focus of the enquiries made by InnPower and the arguments

made by InnPower was on getting the repair done. For good reason, the focus was on the safety of InnPower's employees. But this court rejects InnPower's argument that the public could not have expected InnPower to have considered the safety of the public when it came time to isolate the power to the hydro pole. The safety of the public is a fundamental aspect of the proximity between InnPower and the plaintiff.

- [169] Mr. Letouf recognized the safety problem created when he "flipped the switch" that caused the traffic signals to go dark. He immediately called the police in an effort to have police officers sent to the intersection for traffic control. I accept the evidence of Mr. Letouf that he did in fact contact the police. I accept his evidence that he not only made the telephone call as evidenced by the cellphone bill entered into evidence but I also accept his evidence he spoke to someone at the police switchboard and told that person about the traffic lights being out at the Intersection. For unexplained reasons this information was not acted upon by the police.
- [170] InnPower argues that, if it had a duty to the public, that duty was fulfilled by Mr. Letouf when he called the police. I agree part of the duty of care was, in fact, fulfilled by Mr. Letouf. But it remains a fact that if InnPower had properly considered the impact of turning off the power to the downed hydro pole, it could and should have determined that the power to the traffic lights could have been impacted. At the very least this should have been a consideration given the proximity of the downed hydro pole to the intersection.
- [171] If the power to the traffic lights had not been turned off there can be little doubt that the collision between the Plaintiff and Ms. Torres would never have happened. It was clearly foreseeable, as evidenced by the phone call made by Mr. Letouf, that traffic lights that were not functioning could result in a collision. The actions of InnPower were at least in part the reason why the accident happened. There was proximity between the Plaintiff as a member of the public and InnPower.

Public Policy Reasons for Finding a Duty of Care

- [172] InnPower argues that imposing a novel duty on electrical utilities to warn and respond to harm created to the public during its repairs would greatly overburden the utility company's resources and funds. Specifically, recognizing such a duty would require the installation of complex and sophisticated tracking systems for each utility to pinpoint public areas or roadways whose electricity was affected by ongoing repairs. The resources that the utility company would then need to be able to warn a potentially wide range of electrical customers will distract from the ultimate task of performing a competent and timely repair of damaged electrical infrastructure.
- [173] InnPower argues that imposing a novel duty on electrical utilities to warn and respond to harm created to the public during its repairs would greatly overburden the utility company's resources and funds. Specifically, recognizing such a duty would require the installation of complex and sophisticated tracking systems for each utility to pinpoint public areas or roadways whose electricity was affected by ongoing repairs. The resources that the utility company would then need to be able to warn a potentially wide range of electrical

customers will distract from the ultimate task of performing a competent and timely repair of damaged electrical infrastructure.

- [174] InnPower goes on to argue that such a duty would be unworkable for small hydro suppliers like InnPower as it has no practical means of knowing whether any particular streetlights or traffic signals would be affected when conducting a repair to a downed hydro pole. It is argued this information was not available to either the line repair worker or the on-call supervisor. As such, it is argued that this court should not require utilities who carry on business in the generally accepted way – at great expense and with uncertain efficacy – to allow a duty to be created. In support of these arguments, InnPower refers to *Cooper* at para. 55 where the Supreme Court stated:

55 Finally, we must consider the impact of a duty of care on the taxpayers, who did not agree to assume the risk of private loss to persons in the situation of the investors. To impose a duty of care in these circumstances would be to effectively create an insurance scheme for investors at great cost to the taxpaying public. There is no indication that the Legislature intended that result.

- [175] Imposing a duty on a supplier of hydro to, at the very least, determine whether there are any significant negative outcomes in “flipping a switch” to allow for a repair to a downed hydro pole does not impose a duty on InnPower, or any other similar hydro company, that is unfair and onerous. Nor does it impose the type of additional cost or concerns alluded to by InnPower in argument.
- [176] InnPower is entirely correct that motorists should drive according to the road conditions. In this case neither the Plaintiff nor Torres drove with the appropriate attention required by the circumstances and facts established leading up to the collision. InnPower is also entirely correct that if the County of Simcoe had a back up battery supply, the traffic lights would have continued to function. But the absence of hydro caused by InnPower was also a cause of the accident which was entirely foreseeable on a county road in the middle of the night. There is no public policy reason why InnPower should not be found partially responsible for the accident.

Apportionment of Liability

- [177] Very little time was spent by the parties in either their written or oral argument as it relates to the apportionment of liability amongst the parties for the accident. This perhaps is not surprising as all parties suggested that they had no responsibility for the accident. The plaintiff’s primary position was she bears no responsibility for the accident but if she is found to be contributorily negligent she should attract no more than 5% liability. Ms. Torres sees no basis for a finding of contributory negligence. The County of Simcoe’s primary position is a finding of no liability but if there is a finding of liability the apportionment against the County should be no more than 25%. Like the County, InnPower’s primary position was a finding of no liability; if liability is found against InnPower, the assessment of liability should be no higher than 20%.

[178] The *Negligence Act*, R.S.O. 1990, c. N.1. Sections 1 and 3 of that Act read as follows:

1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

...

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

[179] The *Negligence Act* goes on in Section 4 to provide that:

“If it is not practicable to determine the respective degree of fault or negligence as between the parties to an action, such parties shall be deemed to be equally at fault or negligent.”

[180] In *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12 (CanLII), [2000] 1 SCR 298 Bastarache J. at para. 55 noted that “when there are two or more tortfeasors, and a plaintiff has also been found negligent, the proper approach to apportionment is to first reduce the extent of the recoverable damages in proportion with the plaintiff’s negligence, and then to apportion the remaining damages between the defendants, in accordance with their fault; see, for example, *Fitzgerald v. Lane*, [1988] 2 All E.R. 961 (H.L.); *Bow Valley v. Saint John Shipbuilding*, *supra*; *Colonial Coach Lines Ltd. v. Bennett*, 1967 CanLII 171 (ON CA), [1968] 1 O.R. 333.”

[181] The accident would never have happened if the traffic lights were working. At 11:00 p.m. on a dark country road both the plaintiff and the defendant Torres could be expected to have obeyed the traffic signals. If the light was red for one and green for the other they could have both passed through the intersection safely. The lights were not working and the law then presumes that both drivers would have been keeping a proper look out as they were driving along an unlit roadway. The evidence establishes that neither the plaintiff nor Torres were in fact keeping a proper lookout. While the Driver’s Handbook gives guidance to drivers when approaching an intersection where the traffic signals are not working, it goes without saying that, for drivers to treat that intersection as a four way stop, the drivers first have to appreciate that they are approaching an intersection and that the intersection has traffic lights that were not working. For the reasons reflected above, neither driver adverted to the fact they were approaching an intersection let alone that the intersection had traffic lights that were not working. Neither driver was therefore in a position to treat

the intersection as a four way stop. Both drivers are equally at fault for the accident as neither was keeping a proper lookout. Both drivers kept driving at the speed limit despite indicia that should have alerted them to the fact they were approaching an intersection.

- [182] I have observed on a number of occasions that the accident would never have happened if the traffic lights had been working. I have come to this conclusion as the law presumes the drivers approaching an intersection will obey the traffic signal facing them. The traffic lights went out when the power was cut to the lights. When the power was cut, if the lights had been equipped with a UPS system, there would have been a backup and the lights would have continued to function (so long as the battery lasted). In this case, the accident occurred within approximately 30 minutes of the power outage. It is safe to presume that a battery UPS system would have been functioning within that 30 minute timeframe.
- [183] I have explained my reasons for why InnPower is liable to the plaintiff. By cutting the power to the intersection it was immediately apparent to Mr. Letouf that a darkened intersection presented a problem that needed the local police to be notified and police officers assigned to conduct traffic duty while the lights remained out. If the power to the lights had never been cut, the traffic lights would have been operating.
- [184] What happened at the intersection was a confluence of events:
- (a) the hydro was cut and the lights went out;
 - (b) the traffic lights didn't have a UPS battery backup;
 - (c) both drivers were not paying attention to the roadway and indicia of an approaching intersection; both drivers continued to drive at the speed limit.
- [185] This is a case where it is appropriate to engage the provisions of S 4 of the *Negligence Act*. All of the parties to the action are equally at fault – the Plaintiff is 25% contributorily negligent; the defendant Torres is 25% negligent; the defendant County of Simcoe is 25% negligent and the defendant InnPower is also 25% negligent.
- [186] As these reasons only determine the liability issue between the parties, the issue of costs may have to await the outcome of the damages portion of this trial scheduled for September. If counsel disagree, I am prepared to discuss how best to determine the costs of the liability trial.



Edwards, RSJ

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COURT FILE NO.: CV-17-00001705-0000
DATE: 20260630
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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AMY JOHNSON

Plaintiff

– and –

THE CORPORATION OF THE COUNTY OF
SIMCOE, INNPOWER CORPORATION, EDWARD
BOARDMAN, KYRA NICOLE BOARDMAN,
DANIELLA CELESTE TORRES, REON HUSSAIN
and SOUTH SIMCOE POLICE SERVICE

Defendants

REASONS FOR DECISION

Edwards, RSJ

Released: June 30, 2026