<u>MINIMUM STANDARDS</u>

Section 44 (3) (c) of the *Municipal Act*, 2001 states that "a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if at the time the cause of action arose, minimum standards ... applied to the highway or bridge and to the alleged default and those standards have been met."

Although the *Municipal Act* was amended in 1996 to permit the MTO to establish such minimum maintenance standards of repair for municipalities, no standards were established until July 23rd, 2002, when Ontario Regulation 239/02 came into effect.

The regulation only relates to roads, and "only in respect of motor vehicles using the highways".

Regulation 612/06 came into effect on December 29th, 2006; it applies only to the City of Toronto; it is virtually the same as Regulation 239/02, which applies to all Ontario municipalities, but again is applicable only to cars on roads.

Accordingly some eleven years after the minimum standards sub-section came into effect the provincial government has not established any minimum standards with respect to maintenance of sidewalks.

A task force led by the Ontario Good Roads Association, formed to not only review the existing standards, but also look at adding standards relating to pedestrians on roads and sidewalks, held its first meeting March 7th and is scheduled to complete its review by year end.

One case involving minimum standards is *Jameus (sic - Jemeus) v. Town of Midland,* [2006] O.J. No. 1400, where the Court of Appeal reversed the motion judge, Justice Margaret Eberhard, who had granted the municipality's summary judgment motion.

The plaintiff was injured after she lost control of her car on a snow-covered street (see April 28th, 2006 *Lawyers' Weekly*).

Justice Eberhard granted summary judgment on two bases: there was no evidence showing that the road conditions caused the accident (causation)and the municipality had met its standard of care.

The Court of Appeal held that Justice Eberhard erred in granting summary judgment on either basis.

The court pointed out that the municipality had not put causation in issue; moreover, the town's engineer had written the plaintiff stating "I suspect that your vehicle slid on a glazed packed snow section".

As to the standard of care issue, it appeared that the condition of the road at the time of the accident was contrary to the town's own 'bare pavement' policy.

The court also noted affidavit evidence from the plaintiff's expert raised an issue as to whether the town met "reasonable" maintenance standards.

On the summary judgment motion in *Jemeus* the plaintiff's solicitor submitted that *Dickson (Litigation Guardian of) v. Vezina,* [2004] O.J. 4264 was authority that tort liability could be established even if minimum standards were met, but it is difficult to draw that ratio from the decision.

In *Dickson* plaintiff's solicitor conceded that the County of Perth "may" have met the statutory standard, but submitted Perth had not demonstrated that there was no breach of its common law duty.

Justice Haines simply said that he disagreed and that the inspection program and response to weather and road conditions were reasonable.

However, after referring to *Dickson*, Justice Eberhard stated:

> "I accept that tort liability is not impossible even where mandatory minimums have been met."

Presumably she only had in mind the circumstances in the case before her, where the town had adopted a policy with higher standards than the statutory minimum.

In reversing Justice Eberhard's decision, the Court of Appeal was silent on this issue, and made no reference to the statutory standards.

I submit that *Jemeus* stands for no more than the principle that if a municipality adopts standards that are higher than the minimum a court can then look to see if the municipality met those standards and if not, perhaps impose liability.

It is difficult to understand why this should be the law.

Surely a municipality which attempts to provide a better system than the minimum standards require should be encouraged to do so, not punished by then leaving itself open to potential liability it would not otherwise have had.

Since the statute clearly states that the municipality is not liable if it met the minimum standards, the legislature has decreed those standards to be "reasonable".

If a municipality met those standards, just because it did not meet a higher self-imposed standard should not make its system unreasonable.

Plaintiff's counsel in *Dickson* argued that Perth had to demonstrate it met the statutory standard and also demonstrate it met its "common law" duty.

Surely any common law duty was abrogated by the wording of S.44 (3) (c).

Hopefully another court will clarify this issue.

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