UNDERSTANDING MUNICIPAL LIABILITY

I have yet to see any problem, however complicated, which when you looked at it the right way, did not become still more complicated:

Paul Anderson

Despite the hopelessly ambitious title (imposed on me by Alan Preyra) bearing in mind the vast array of potential actions against municipalities, this modest paper deals for the most part with slip and falls and trip and falls on roads and sidewalks and personal injury accidents on other municipally-owned property.

For a more detailed analysis of just about every aspect of municipal liability I refer you to *The Law of Municipal Liability in Canada* by David Boghosian and Murray Davison.

I also direct your attention to an excellent recent article by Alan Preyra, OTLA "Member at Large", entitled "*Bright Lights, Big City, The Hitchhiker's Guide to Municipal Highway Liability*".

SLIPPING and TRIPPING ON ROADS AND SIDEWALKS

I have it from a knowledgeable source that the late J.J. Robinette, when retained to provide an opinion, as a first step always carefully reviewed the applicable legislation again, no matter how many times he had done so previously.

As a grizzled defence lawyer with more than 40 years in practice and more than 20 years defending actions against municipalities, my first word of advice is to familiarize yourself with the relevant portions of the *Municipal Act*.

I am not suggesting that you read the entire Act, but with respect to slip and falls and trip and falls on the "highway", at the very least you should be familiar with the provisions of Section 44, which is reproduced in its entirety in the Appendix.

IT'S THE MUNICIPAL ACT, DUMMY!

Over the years I have seen more Statements of Claim than I care to count in road and sidewalk cases which have not even mentioned the *Municipal Act* and have pleaded the case on the basis that the *Occupiers' Liability Act* applied and sometimes, remarkably, on the basis of the law

as it existed prior to the passage of the *Occupiers' Liability Act* some twenty-five years ago (e.g. that the plaintiff was an "invitee" and referring to "hidden dangers and traps").

I also sometimes see a Statement of Claim using the threshold wording, as if the case was a motor vehicle accident and the injuries sustained had to meet the threshold.

Even if the case involves a car accident on an alleged slippery road the threshold is irrelevant because the municipality is not a Protected Defendant.

Not that it is of any major concern, but it is surprising how many lawyers are not aware that you cannot have a jury in an action against a municipality: *Courts of Justice Act,* s. 108, (2) .12.

Note also that the proper legal name is "*City of Toronto*", not *"The City of Toronto",* nor *"The Corporation of the City of Toronto".*

STATUTORY PROVISIONS

The term 'highway' is somewhat unhelpfully defined in S. 1 of the *Municipal Act,* to mean:

> "...a common and public highway and includes any bridge, trestle or other viaduct or other structure forming part of the highway, and, except as otherwise provided includes a portion of a highway."

Obviously municipal roads and sidewalks fall within the definition.

Issues can arise with respect to accidents which occur within the municipal road allowance, but between the sidewalk and private property.

I will not deal with these issues, which you will probably encounter rarely, if at all, other than to alert the reader to the *Municipal Act* provisions beginning at S. 24, but particularly, S. 31 regarding establishing a highway by by-law or assuming a highway by public use, without which the S.44 duty does not apply.

Also see S. 44(8) relating to accidents on 'untravelled portions of highway'.

Section 44 (1) imposes the statutory **duty** on a municipality to keep its highways in a state of repair that is reasonable under all the circumstances.

Sub-section 9 establishes that the municipality is not liable in a case of injury caused by snow or ice on a sidewalk absent gross negligence.

Sub-section 10 contains the important requirement that notice be given to the municipality within ten days after the accident; failure to give notice, however, is not a bar to the action if the injured person died [sub-section 11] and failure to give notice or insufficiency of the notice is not a bar to the action if a judge finds that there is reasonable excuse for the want or the insufficiency of the notice and that the municipality is not prejudiced in its defence: Sub-section 12.

NON-HIGHWAY ACCIDENTS

For accidents that did not occur on the highway, but on City-owned property such as a park or in a recreational centre owned by the City (on for example a ski hill or on a skating rink, or a parking lot) the provisions of the *Occupiers' Liability Act* apply.

Accordingly you also need to be familiar with the provisions of the *Occupiers' Liability Act*, which is short enough to be read in its entirety.

Under S. 3 the municipal occupier has a statutory duty to take such care as in all the circumstances of the case is reasonable to see that persons on the premises are reasonably safe.

Section 4 states that the S.3 duty of care does not apply in respect of risks willingly assumed by the person on the premises; in that case the duty is to not create a danger with the deliberate intent of doing harm or damage and to not act with reckless disregard of that person.

Sections 4(3) and 4(4) detail the circumstances under which a person is deemed to have willingly assumed all risks.

LIMITATION PERIOD

The limitation period for claims against the municipality, whether on or off the highway, is now, by virtue of the *Limitations Act* which came into effect January 1st, 2004, two years from the date that the cause of action is "discovered".

Hopefully you will not find yourself in a situation where more than two years have gone by since the accident, but if you do, you should carefully review S. 5 of *The Limitations Act.*

It states that a claim is "discovered" on the earlier of:

(a) the day on which the person first knew,

(I) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the injury, loss or damage was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in the clause (a).

Under S. 5(2) a person with a claim shall be presumed to have known of the matters referred to in clause 1(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

While the two year window of opportunity is surely a welcome relief to plaintiffs' solicitors faced with the previous stringent three month limitation period with respect to the accidents on the "highway", the ten day notice requirement notice cannot be overlooked.

The cases establish that the notice must contain sufficient particulars to enable the municipality to investigate.

One of the most frustrating matters from a municipality's point of view and in particular the adjuster or City employee assigned to investigate, is a notice which does not sufficiently identify where the accident occurred.

I am not suggesting that the accident area must be exactly identified, but time and time again I have seen notices which simply refer to an intersection without identifying which corner, or a street without identifying any municipal address.

Despite the generous two year limitation period, at the first interview with your client you should sufficiently identify the accident area to enable the municipality to investigate and to enable you to immediately provide the municipality with notice.

If you do not identify the accident area with some precision, although there are some conflicting cases, you may run the risk of having the action dismissed on the basis of insufficiency of notice.

A helpful case for plaintiffs' solicitors on this issue is *Myshrall v. Toronto*, (2001), 51 O.R. (3rd) 686 (C.A.) where the Court of Appeal found that a notice that did not set out the date or location nevertheless was not defective.

In *Glazman v. Toronto,* [2002] O.J. 1881 Justice Lane commented in obiter that "in many, perhaps most, cases failure to specify the exact location coupled with performance of work that altered the site would prejudice the City ...".

Photographs of the accident scene taken as soon as possible after the accident are important, if not essential, particularly in the case of ice and snow on a sidewalk.

With respect to a trip and fall, it is surprising how many times I have encountered cases where neither the plaintiff nor anyone on his or her behalf has ever measured the difference in elevation that caused the "trip".

If there is no measurement then if the City employee investigating the claim takes a measurement (which is not always the case) the plaintiff runs the danger of the Court accepting that measurement.

If there is substantial passage of time between the date of the accident and the first time a measurement is taken, the City can always argue passage of time, particularly if there was intervening freezing weather, could well have caused the difference of elevation to increase.

The early investigation should also focus on obtaining statements from any witnesses to the accident or in the case of a slip and fall on ice on a

sidewalk, from adjoining homeowners or business owners who can testify as to the condition within a few days before the accident.

Usually in my experience while there may be persons who assisted the plaintiff immediately after the accident rarely is that person's name obtained and accordingly the investigation will be directed to persons living or working in the area.

When your potential client comes in to see you and outlines the facts of the accident and tells you about all the snow and ice on the road or sidewalk, you are, of course, only getting one side of the story and in my opinion at this stage it is impossible to decide whether this is a case in which you will eventually succeed in extracting some money from the municipality.

Just because there is ice on a sidewalk, crosswalk or road does not necessarily mean there is liability.

You are going to need to obtain details of the City's system of maintenance and inspection and what the actual and predicted

weather conditions were like in an ice and snow case, and in all probability you will not know the full details until after discovery.

All relevant documents relating to inspection and maintenance should be included in the municipality's Affidavit of Documents, but in my experience usually the discovery process unearths other documents and almost always there are undertakings to make further inquiries and supply further documents.

Although our firm has been defending Toronto since the creation of the MegaCity on January 1st, 1999 we are still being surprised by learning of documents which we did not previously know existed.

The issue at discovery in all these cases will be whether the City had a reasonable system of inspection and maintenance.

Monitoring weather forecasts will also be an issue in ice and snow cases.

Often the City's records are incomplete and what records are produced have not been filled in with sufficient detail.

That may not ensure success by the plaintiff: In *Ondrade v Toronto,* [2006] O.J. No. 1769 Madam Justice Low declined to infer that if an action was not described in the log book it had not taken place and that if a patroller did not make a note that he was at a particular location he was never there.

After discovery has been completed and you have all relevant City documents and answers to undertakings you should have a good idea as to whether or not to carry on.

Either there will be a settlement offer or not; if not, you have to decide whether to take the case to pre-trial.

You of course will have analysed your case and looked for decisions in similar cases, but each case depends on its own facts.

In my experience usually municipalities are prepared to go out without costs after discoveries have been held and sometimes even after pre-trial.

As an aside, I am often surprised at how seldom the smaller claims are brought under the *Simplified Procedure*, for claims worth $50,000.00 or less.

An elderly lady who is not working who breaks her wrist or ankle is unlikely to have her damages assessed in excess of $50,000.00 and the costs penalty if the case went to trial could be severe.

Plaintiffs' lawyers in general don't seem to be worried about this and of course losing the examination for discovery puts all parties at a disadvantage.

If you go the *Simplified Procedure* route you are going to end up at a pre-trial conference and at that point if the pre-trial judge was so inclined he or she might push the municipality's lawyer to agree to go out without costs.

Most municipalities will not pay "nuisance value".

It is surprising and somewhat distressing to me to see how often an insurance company in my non-municipal cases will throw money at a

plaintiff even when there is clearly no liability on the insured, simply in order to close the file, preferring to pay the claimant rather than their own lawyer.

That is not the case with municipalities in my experience.

No municipality wants to get a reputation such that a plaintiff's solicitor could say to his client that even if there is no liability the City will throw some money at it to make it go away.

If you take a case against the City it may not be quite the equivalent of an action against a doctor defended by the Canadian Medical Professional Association (CMPA), but probably you will not receive a settlement offer (other than an offer to go out without costs) unless the municipality's lawyer or relevant claims personnel are of the view that there is a legitimate exposure in the case.

ONUS IN HIGHWAY CASES

The plaintiff has the onus of establishing that the highway is not in a state of repair "that is reasonable in the circumstances, including the character and location of the highway".

Once the plaintiff establishes that the area in question was not in a state of repair that was reasonable in the circumstances the onus shifts to the municipality to establish one of the defences set out in Sub-section 3 (3) of s. 44, namely that:

> (a) it did not know and could not reasonably have been expected to known about the state of repair of the highway or bridge;
>
> or
>
> (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 Sub-section (4) applied to the highway or bridge and to the alleged default and those standards have been met.

Section 44(4) indicates that the Minister of Transportation may make regulations establishing minimum standards of repair for highways and bridges.

At that threshold step of deciding whether there is non-repair, the statute requires consideration of the circumstances, including "the character and location of the highway".

One circumstance could be a sudden, severe winter storm.

Even if the municipality's roads and sidewalks became like a skating rink, it is submitted that would not necessarily amount to non-repair in that "circumstance".

In the *Ondrade* case the plaintiff fell on ice on a crosswalk on Victoria Park Avenue on Sunday, February 23rd, 2003.

There was a very bad winter storm that weekend, with snow, ice pellets, rain and freezing rain.

Justice Low held that the plaintiff had not established non-repair; in cases of treacherous winter road conditions there must be a situation of special danger or one of serious or imminent harm of which the municipality knew or ought to have known.

There was no evidence that this crosswalk posed a special danger.

It is submitted that at this threshold step of deciding whether the plaintiff has established non-repair another "circumstance" that can be considered is budgetary constraints, availability of equipment and manpower etc.

As set out in S. 44 (1), "location" must also be considered.

The municipality has a higher standard of repair with respect to its more major roads and its sidewalks in busy areas where heavy pedestrian traffic can be expected.

Assuming that you can establish non-repair, then the questions that arise are basically the nature and severity of the condition of non-repair, how long it has been in existence (going to the question of whether the City knew or ought to have known of it) and whether the municipality had a reasonable system of inspection and maintenance (to prevent the non-repair from arising).

Arguably if the accident location is in an area of high pedestrian use, or close to schools, hospitals, retirement homes, etc. the City should give those areas greater priority, similarly an area which was known to have a history of becoming icy (e.g a bridge) or open area adjacent to a park or area where there was ponding.

STANDARD OF REPAIR

The standard of repair is flexible, depending whether you are dealing with roads, crosswalks or sidewalks.

With respect to roads, generally the standard is to keep them safe for vehicular traffic, recognizing with respect to ice and snow on the roads that it is impossible to keep the roadway generally free from ice and snow in this climate.

There is no statutory obligation to make roads passable in all places, at all times and in all kinds of weather.

The courts do take into account the degree of pedestrian use anticipated.

See for example *Glazman v. Toronto, supra*, where a pedestrian succeeded against the City after tripping while crossing a street which was in poor condition, with many potholes.

The standard is of course higher for crosswalks.

In the *Ondrade* decision, however, Justice Low quoted from the observation of the Court of Appeal in *Morrison v. City of Hamilton*, [1939] O.R. 349 that conditions that prevail upon a roadway will inevitably prevail to some extent upon the crossing: cars will carry snow to the crossing, and if there is water on the road it will be on the crossing as well and may form ice.

Justice Low also points out that the municipality is entitled to a reasonable time to do whatever is necessary to safeguard pedestrians who walk upon the streets.

The general standard of repair for sidewalks is obviously higher than roads and crosswalks.

Keep in mind, however, the three defences available to the municipality under S. 44 (3).

Also keep in mind that with respect to standard of repair the Courts will take financial considerations into account.

In *Restoule v. Strong*, [1999] O.J. No. 2979 the Court of Appeal stated that it may be appropriate for the court to consider the financial resources of the municipality in determining whether it failed to keep the highway in repair.

In the *Just* case in the Supreme Court of Canada, [1989] 2 S.C.R. 1228, Cory, J. had this to say:

> "... the requisite standard of care to be applied to (the manner and quality of an inspection system) must assessed in light of all of the surrounding circumstances, including for example budgetary restraints and the availability of qualified personnel and equipment."

Note also the *Sutherland v. North York* case (1997), 35 O.R. 3rd 189 where the Court of Appeal reversed the trial judge's finding of gross negligence where the sidewalk had been plowed, but not sanded.

Per Rosenberg, J.A.:

> "It is unwise for the courts to become involved in rewriting policies on an *ad hoc* basis and dictating priorities to the City or its employees."

In addition, as mentioned, with respect to ice and snow on a sidewalk the municipality is not liable unless there was gross negligence.

GROSS NEGLIGENCE

The Courts have resisted a precise definition of gross negligence, other than to say that "it is very great negligence", or "a greater degree of neglect than simple negligence".

See *Campbell v. North York,* [1993] O.J. No. 1010 where Justice Haley found under the circumstances that there was not even ordinary negligence.

The case contains a good summary of what is required to demonstrate gross negligence.

You will be more cautious about taking an ice and snow on a sidewalk case to trial because there will be no liability without gross negligence.

In some sidewalk cases the municipality does not maintain the sidewalk and purports to pass the obligation to do so onto the adjoining property owner.

The Ontario Court of Appeal has stated in *Bongiardina* v. *York (Regional Municipality)* (2000), 49 O.R. (3d) 641, that this does not create an obligation on the adjoining property owner.

There are two situations where the adjoining property owner may become liable, namely (1) where he or she becomes an occupier and (2) where something comes from the property owner's land onto the sidewalk and exacerbates a condition on the sidewalk.

In an interesting decision, *Levy v. Brampton,* [2005] O.J. 2487 Spence J. decided that in order for the municipality to be liable in a case where by by-law it required a school board to clear snow and ice from the sidewalk in front of the school, there would have to be gross negligence on the part of the school board; he found there was not.

MINIMUM STANDARDS

In 1996 the *Municipal Act* was amended to permit the MTO to establish minimum maintenance standards of repair.

No standards came into effect until 2002; they only related to roads, and "only in respect of motor vehicles using the highways".

Ontario Regulation 239/02, which was made July 23rd, 2002 is reproduced in the appendix; you should consult it in the event you have a case involving a motor vehicle accident allegedly contributed to by road conditions.

On December 29th, 2006 Regulation 612/06 was made and filed; it applies only to the City of Toronto.

It is virtually the same as Regulation 239/02, which applies to all municipalities, but again **is applicable only to cars on the road**.

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

I am advised that sidewalks were intentionally left out of the standards in 2002 because consensus could not be reached by the committee involved.

The Ministry of Transportation has asked the Ontario Good Roads Association to lead the review of the existing standards, and has asked municipalities for input on how these standards have impacted levels of service and liability claims.

The OGRA is not only reviewing the existing standards, but also looking at adding standards relating to pedestrians on roads and sidewalks.

A task force has been formed and had its first meeting March 7th of this year.

This review is scheduled to be completed by the end of 2007.

A case involving minimum standards is *Jemeus v. Town of Midland,* [2006] O.J. No. 1400, where our Court of Appeal reversed the motion judge, who had granted the municipality's summary judgment motion.

The motion judge had given summary judgment on two bases: one was causation; the other was that the municipality had met its standard of care.

The Court of Appeal pointed out that the municipality had not put causation in issue and led no evidence thereon.

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

In addition, there was affidavit evidence from the plaintiff's expert that raised an issue as to whether the town met reasonable maintenance standards.

One prominent plaintiff's solicitor has suggested that this case is authority for the proposition that even if a municipality met minimum standards that would not necessarily be a complete defence.

I respectfully disagree, although I do concede that the municipality would have to show that the road was properly classified and that there was compliance with the applicable minimum standards.

In the *Jemeus* case the plaintiff's solicitor argued that *Dickson v. Vezina,* [2004] O.J. 4264 stood for the proposition that tort liability could be established even if minimum standards were met.

Justice Eberhard stated:

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

Perhaps this comment has in mind that in the *Jemeus* case the Town had adopted a policy imposing a higher standard than the minimum.

In the *Dickson* case 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.

The Court of Appeal in reversing Justice Eberhard's decision was silent on this issue.

The wording of S. 44(3)(c) seems abundantly clear, and unless the particular municipality adopts higher standards I believe that compliance with minimum standards should be a complete defence.

DISCOVERABILITY

An interesting recent municipal case on this issue is *Blair v. Barrie,* [2006] O.J. No. 4997, a decision of Howden J.

In that case the plaintiff tripped and fell on April 5th, 2005; she did not notify the City of her claim in writing until May 17th, 2005.

The City moved for summary judgment on the 10 day notice ground.

Justice Howden was satisfied that on the day of the accident the plaintiff knew the facts in subsection (I), (ii) and (iii) of S. 5(1) (see page 15, (supra), but held that the record before him was not sufficient to conclude that a reasonable person with the abilities and in the circumstances of the plaintiff ought to have known that a proceeding would be appropriate (iv);

she was not cross-examined on her affidavit wherein she stated that it was not until May 20th that "it first dawned on me that I might have a claim against the City of Barrie."

Justice Howden pointed out that an earlier decision of Justice Lederman, *Kors v. City of Toronto,* [2006] O.J. No. 3237 did not make reference to Section 5.

In that case a slip and fall accident occurred February 9th, 2005.

The plaintiff did not give notice until five months later, on July 11th.

The City's motion for summary judgment succeeded.

Justice Lederman held that there was no reasonable excuse for the delay and also held that the City was prejudiced.

The City had hired a contractor and the evidence was that the contractor did not have any documents from persons responsible for cleaning the area on February 5th and no one had any independent recollection.

Justice Lederman stated that the lack of timely notice "is particularly acute in this case, since the plaintiff has no photographs of the condition of the area; has not provided any detailed description of the snow and ice problem that existed; and has no corroborating evidence from witnesses with respect to the alleged state of the snow and ice conditions at the location of this fall."

He concluded that the City had no opportunity to view the scene close to the time in question , had been unable to adequately investigate the claim and had lost the opportunity to obtain photographs soon after the fall.

TRIP AND FALLS

It seems to now widely believed that the judicial "rule of thumb" with respect to difference in elevation is that 3/4" is the dividing line, that a 3/4" difference will not amount to non-repair, at least on a sidewalk not heavily travelled. See *Daley v. Toronto,* [1960] O.W.N. 480 (CA) .

It is important, however to be mindful that each case depends on its own facts.

In *Stojadinov v. Hamilton,* [1988] O.J. No. 2038 a difference of 1 ½" - 2" in a built-up area did not amount to non-repair.

ACCIDENTS OFF THE HIGHWAY

With respect to accidents off the highway, in parks, arenas etc., as mentioned the *Occupiers' Liability Act* is applicable.

If you have a case where the accident occurred in a park and arguably on a recreational trail that would be an extremely difficult one in which to succeed, because breach of the S. 4 duty would be almost impossible to prove.

In *Dally v. London,* [2004] O.J. 3179 Misener, J. applied an objective test and held that a bike path in London constituted a recreational trail.

He opined that "the ordinary Canadian would consider the pathway a trail".

THE *KAMIN* CASE

In *Kamin v. Kawartha Dairy* (2006), 79 O.R. 3rd 284 (C.A.) the plaintiff fell in the defendant's parking lot.

The trial judge found that the defendant's system of inspection was inadequate and also found that the parking lot was unsafe, but dismissed the action because the plaintiff could not identify precisely where she fell.

The Court of Appeal reversed the decision on the basis that the entire parking lot was in very poor condition and the disrepair so extensive that the plaintiff's inability to pinpoint the accident location was not surprising.

There was no evidence suggesting any alternative cause of the accident.

The court noted that there may be some cases where the ability to identify the exact location will be a significant factor in the causation analysis.

Some have argued that this is a significant decision, but I do not agree.

In the *Glazman* case (supra) Justice Lane did not find it necessary for the plaintiff to identify precisely where she fell; an entire section of the road was in non-repair.

If there is a widespread area of non-repair I don't believe it is startling that the courts do not require a precise location.

In *Kamin*, Borins, J. conceded that there may be cases where the ability to identify the exact location of a fall will be a significant factor in the causation analysis, but the *Kamin* case "is not one of them".

POLICY DECISION

Another section of the *Municipal Act* you ought to review is Section 450 which relates to policy decisions, but it seems clear that the municipality cannot use a policy defence to excuse its failure to perform a statutory **duty** (as opposed to statutory authority).

SEWER BACKUPS AND WATERMAN BREAKS ETC.

Section 449 of the Act abolished claims against municipalities for sewer or water backups in nuisance, so that in those cases it is necessary for the plaintiff to prove negligence.

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