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MUNICIPAL LAW BULLETIN

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Lloyd v Bush – Municipal Highway Liability at the Court of Appeal

The statutory responsibility of Ontario municipalities to maintain their highways in a reasonable state of repair, and the concomitant liability that results if they fail to do so, has been the source of both significant liability exposures to municipalities and their insurers, and the subject of much comment, debate and suggestions for reform. Controversy has not been limited to the insurance or municipal industries - it has also been playing out inside Ontario's court system. This is illustrated by the fact that in the last decade approximately ten significant cases involving municipal highway liability have reached the Court of Appeal for Ontario, with 50% of those appeals being allowed in whole or in part.[*] This is a rate of appellate interference that is double the average for civil appeals to the Court over the same time period.

A review of the Court of Appeal's jurisprudence demonstrates that the Court's interventionist behavior in this area is not simply an error-correcting response to a cluster of aberrant trial decisions. Rather, the Court has been actively trying to build a coherent legal framework around the statutory duty created by the *Municipal Act, 2001*. The framework the Court has been articulating is entirely its own - external attempts to dictate legal doctrine in this area have not been well received. The decision in *Giuliani v Halton* was a stern judicial rebuff to an attempt to legislate what would and would not constitute legal liability through the *Minimum Maintenance Standards*. In *Deering* and

[*] The cases considered here are: *Johnson v Milton (Town)*, 2008 ONCA 440 (finding of liability against municipality upheld, but judgment below varied to reflect contributory negligence on the plaintiff); *Frank v Central Elgin (Municipality)*, 2010 ONCA 574 (upholding trial decision absolving municipality of liability in a winter condition case); *Morsi v Fermar Paving Limited*, 2011 ONCA 577 (reversing trial decision holding a municipality and its contractor liable for failing to install construction signs); *Giuliani v Halton (Municipality)*, 2011 ONCA 812 (upholding trial decision finding municipality 50% liable for accident caused by winter conditions); *Greenhalgh v Douro-Dummer (Township)*, 2012 ONCA 299 (upholding finding that municipality bore no liability for failing to install additional signs on low volume highway); *Lloyd v Bush*, 2012 ONCA 349 (trial decision set aside due to reasonable apprehension of bias); *Deering v Scugog (Township)*, 2012 ONCA 386 (upholding finding of 66% liability against municipality due to failure to have proper pavement markings on road surface); *Mark v Guelph (City)*, 2013 ONCA 536 (trial decision finding municipality 100% liable for winter highway conditions upheld); *Fordham v Dutton-Dunwich (Municipality)*, 2014 ONCA 891 (reversing trial decision holding municipality liable for failing to install checkerboard sign); *Lloyd v Bush*, 2017 ONCA 252 (finding of 60% liability against municipality set aside due to legal errors).

Fordham, the Court made it clear that while human factors evidence could be taken into consideration when assessing the legal standard of reasonable driving, scientists were not permitted to dictate legal conclusions to courts. *Fordham*, and the earlier decisions in *Morsi* and *Greenhalgh*, also saw the Court hold that industry guidelines and standards, such as the Ontario Traffic Manual, may be probative but could not be treated as determinative when it came to questions of legal liability.

***Lloyd v Bush* – The Background**

Lloyd arose from a January 2003 motor vehicle accident that occurred when the plaintiff's vehicle lost control while traversing an S-curve and collided with an oncoming tank truck. The highway was owned by the County of Lennox and Addington, and was maintained for the County by the Town of Greater Napanee. A claim was brought against the truck driver and his employer, and both the County and the Town were sued under the *Municipal Act* for failing to keep the highway in a proper state of repair. The specific allegations of non-repair related to snow on the highway which allegedly caused the plaintiff's loss of control. At trial, the municipalities were held to be 60% liable, with the truck driver bearing 30% and the plaintiff subject to 10% contributory negligence. On appeal, the Court of Appeal set aside the findings of liability and ordered a new trial.

In sending the case back for a new trial, the Court of Appeal left open the final determination of liability. Yet in its decision (reported at 2017 ONCA 252) the Court took the opportunity to further build on its pre-existing jurisprudence in this area, and also refined the test for liability under the *Municipal Act* in a manner that may be of assistance to municipalities.

Section 44: A Unified Test

In opening its analysis, the Court of Appeal put to rest a lingering question about whether the legal test for liability under section 44 of the *Municipal Act* might be different in a case involving winter conditions. The Court confirmed that the test for liability is the four step *Fordham* test:

1. *Non-Repair*: The plaintiff must prove the existence of a condition of non-repair, that is, a road-based hazard that poses an unreasonable risk of harm to ordinary, non-negligent users of the road, with a view to the circumstances including the "character and location" of the road.

2. *Causation*: The plaintiff must prove that the condition of non-repair caused the loss in question.

3. *Statutory Defences*: If the plaintiff has proven both non-repair and causation, a *prima facie* case is made out against the municipality. The municipality then bears the onus of proving that one of the three independently sufficient defences in s. 44(3) applies. These defences include proof that the municipality took reasonable steps to prevent the default from arising (s. 44(3)(b)), or that the municipality had no actual or constructive knowledge of the default (s. 44(3)(a).

4. *Contributory Negligence*: If the municipality cannot establish any of the statutory defences, it will be found liable. The municipality can, however, still demonstrate that the plaintiff's driving caused or contributed to his or her injuries.

This statement in *Fordham* was the explication of an idea that has run through municipal highway liability at least as far back as the early 20th century: the assessment of a breach of the municipal duty of highway repair must be analytically separated from the question of whether the municipality exercised reasonable care in preventing the breach.

The lingering question resolved in *Lloyd* stemmed from the Court of Appeal's earlier decisions in *Frank* and *Giuliani*. In those cases, both of which involved winter conditions, the Court's reasons did not involve significant discussions of non-repair or a shifting onus, and instead focused on the reasonableness of the defendant municipalities' actions. This approach is likely explained by the fact that both cases turned on the whether the municipalities could rely on the defences in section 44(3) of the *Municipal Act*, which are properly assessed under step #3 of the *Fordham* test. Yet the language employed in those earlier decisions suggested that a separate set of legal concepts and tests might apply when deciding cases involving winter conditions. But in *Lloyd* the Court put such suggestions to rest. Both *Frank* and *Giuliani* were specifically referred to in *Lloyd* and, in discussing the *Fordham* test, the Court affirmed that the assessment of non-repair is distinct from the reasonableness of a defendant municipality's conduct:

> *[P]roof of a state of non-repair [step #1 under Fordham] is not in itself enough to establish liability. Rather, a municipality will only be liable for failing to salt and/or sand and clear the road of snow where it had actual or constructive knowledge that road conditions created an unreasonable risk of harm to users of the highway [step #3: section 44(3)(a)], and where the municipality unreasonably neglected that risk [step #3: section 44(3)(b)].*

The strict distinction between a breach of the duty of repair and the reasonableness of a municipality's conduct is crucial for the proper and fair adjudication of cases involving municipal highway liability. It runs contrary to the general mindset in negligence law that the presence or absence of reasonable care is determinative of whether a breach of a duty of care occurred. However, the use of the general negligence approach in municipal highway cases will often make it too easy to proceed from the existence of a road-based risk of harm to a finding of liability on the municipality. This is the precise mistake the Court of Appeal held the trial judge made in *Lloyd* by finding the municipalities liable simply because the highway in question was not centre-bare at the time of the accident:

> *The trial judge was clearly focused on what, in theory, the Town would have had to have done in order to have prevented or corrected the state of non-repair before the accident occurred, rather than on the reasonableness of the Town's response to the state of non-repair in the circumstances. In my view, however, the fact that whatever actions the Town took did not ultimately achieve the goal of centre-bare pavement or non-slippery road conditions at Rankins Corners before the collision occurred is not determinative of whether the actions the Town took were reasonable. Given unlimited resources, any town might be able to keep its roads centre-bare even in the middle of the worst snow storm. That, however, is not the standard to be met.*
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> *… s. 44(3)(b) of the Municipal Act, 2001 speaks to action rather than to result. In other words, the Municipal Act, 2001 does not create a regime of absolute liability. The steps to be taken by a municipality need only be within the range of what is reasonable in the circumstances.*

Liability Based on Standards

The trial judge in *Lloyd* held that the accumulation of 2-5 centimeters of snow on the highway in question constituted a breach of the municipalities' duty of repair. In doing so, express reference was made to the decision in *Giuliani*, where a similar snow depth had existed on a highway that was found to be out of repair. *Giuliani* is noteworthy for the fact that the Court of Appeal was considering the *Minimum Maintenance Standards* provisions related to snow removal, which required the accumulation of 5 centimeters of snow before remedial action was required. In *Giuliani*, the Court's refusal to apply the *MMS* was effectively a repudiation of the idea that the state of repair of a highway could be determined solely by reference to objective measurements of particular conditions. Instead, as was held in *Giuliani* and later summarized in *Fordham*, the test for non-repair is subjective: "*The overriding question remains: in all of the circumstances, does the condition of the road pose an unreasonable risk of harm to reasonable drivers?*"

This subjective assessment continued in *Lloyd*, with the Court of Appeal maintaining a legal and intellectual consistency. If objective measurements alone cannot dictate when a highway is in repair, they cannot be used to dictate when the highway is out of repair. On this basis, the Court held that the trial judge in *Lloyd* had erred in the non-repair analysis by relying solely on findings as to the snow depth, and by failing to consider "*all of the surrounding circumstances*".

A Modified Duty

A further set of errors identified by the Court of Appeal concerned the trial judge's failure to consider the character and usage of the highway and the circumstances of the municipal defendants. With respect to the character of the highway, the evidence in *Lloyd* was that the highway in question was a lower use highway. A considerable body of trial level jurisprudence has held that the threshold for a finding of non-repair on a rural highway can be more onerous than on a higher use highway, given that motorists cannot expect all highways to be in the same condition and need to adjust their driving behavior accordingly. Much of the pre-existing jurisprudence on this subject involves allegations of physical defects on the highway, but in *Lloyd* the Court confirmed that the rural nature of a highway can affect the non-repair analysis in cases involving winter conditions.

With respect to the circumstances of the municipalities, the Court of Appeal held that the trial judge erred in failing to consider the financial and other resources available to the municipalities when considering whether they had established one of the statutory defences. This affirmation of the relevance of a municipality's financial circumstances in assessing whether it exercised reasonable care is another key aspect of claims under section 44 of the *Municipal Act*, and another way in which the liability analysis under that section differs from a traditional negligence analysis. In regular negligence cases, a defendant is not normally entitled to avoid a finding of liability by claiming that he or she did not have the resources necessary to take sufficient care to avoid injuring the plaintiff. The general rule in negligence is that one must either take reasonable care or, if one cannot, avoid putting oneself in a situation where the absence of such care might harm others. But municipalities do not have the luxury of avoiding situations where motorists might come to harm on their highways. To the contrary, municipalities are subject to a mandatory duty to maintain their highways. Therefore, giving consideration to what particular municipalities actually have the capacity to do is necessary for their fair treatment by the tort system.

The Court of Appeal's comments about funding should not be taken too far. Since no municipality has unlimited resources, there will always be a need to prioritize particular highways within a municipal jurisdiction. However, the Court made it clear that *"financial constraints will not in themselves justify a municipality's failure to take steps to correct a state of non-repair for a particular road*". Instead, they are "*one factor to be considered and weighed among others when assessing whether a municipality's efforts to maintain a road were reasonable in the circumstances*". As such, municipalities will not be able to avoid liability just by pleading poverty, nor can they reallocate funds away from highway maintenance without worrying about increasing their liability exposure.