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MUNICIPAL LAW BULLETIN

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GIULIANI V. HALTON – THE *MINIMUM MAINTENANCE STANDARDS* AT THE COURT OF APPEAL

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On December 21, 2011, the Court of Appeal for Ontario released its decision in *Giuliani v. Halton (Municipality)*. This was the first time that the *Minimum Maintenance Standards for Municipal Highways* ("*MMS*") had been substantially considered by the Court. For road authorities and their insurers, the decision represents a significant blow to the usefulness of the *MMS*.

BACKGROUND

The *Giuliani* case arose from a motor vehicle collision that occurred on a highway within the Region of Halton that was being maintained by the Town of Milton. The accident occurred at approximately 7:00 a.m. on April 1, 2003, the day after Milton had ceased regular winter maintenance activities. Weather forecasts available on the late afternoon of March 31, 2003 were already indicating the near certainty of snowfall and subzero temperatures for the early morning of April 1. Snow began falling at approximately 4:00 a.m., with roughly 2 centimetres accumulating prior to the accident. This snow was compacted by traffic and refroze into the ice conditions that caused the accident. While there was no agreement as to when the ice conditions formed, the road authorities conceded that the likelihood of ice formation would have been readily apparent as early as 3:30. However, a winter maintenance deployment did not occur until approximately 6:00 a.m. when the shift supervisor arrived at the maintenance yard and ordered one.

The trial judge held that the road authorities breached their duty of care by failing to take reasonable steps to monitor the weather conditions during the early morning hours. The trial judge held that had the road authorities been monitoring the weather conditions they would have known by approximately 3:30–4:00 a.m. that the ongoing snow fall posed a risk of ice formation. Had salting operations

been commenced at that time, the salt would have prevented the snow from compacting and freezing into ice.

THE COURT OF APPEAL'S DECISION

On appeal, the road authorities conceded that they did not take reasonable steps to prevent a default in their obligations to keep the highway in question in a reasonable state of repair. In effect, they admitted a breach of their duty under section 44(1) of the *Municipal Act, 2001*, and proceeded to argue the entire appeal based on the applicability of the *MMS*.

In its decision, the Court of Appeal considered sections 4 and 5 of the *MMS*, which provide the standards for snow clearance and icy roadway treatment respectively.

(a) Snow Clearance

The highway in *Giuliani* was a class 2 road. As such, section 4 of the *MMS* stipulated a threshold snow accumulation of five centimetres with a corresponding standard of six hours in which to clear it to the requirement of the regulation. The Court of Appeal held that this standard had no application as the snow accumulation never reached five centimetres – it only reached two centimetres. Since the standard had never been triggered, it could never have been complied with and, consequently, could not be used as a defence.

This line of reasoning is significant in that it rejects any argument that the purpose of the *MMS* was to create a comprehensive minimum standard for the treatment of snow conditions, regardless of their depth or duration. Instead, the Court of Appeal noted that nothing in the *MMS* or the common law excuses a road authority from having to remove any snow accumulation on its highways that is below the threshold depth created by section 4.

(b) Icy Roadways Treatment

With respect to the section 5 standards for icy roadways, the Court of Appeal held that these did not apply either. In doing so, the Court distinguished between negligence on the part of the road authorities that arose before the threshold conditions of the *MMS* were met, and negligence that arose after the threshold conditions were met:

> In the present case, the allegations of fault directed at the appellants do not include a failure to treat the icy roadway within four hours of becoming aware of the icy conditions, as required by s. 5. The trial judge's findings of default on the part of the municipality are directed at failures to take reasonable steps to avoid ice forming on Derry Road. The failures, as I mention above, included failures to monitor the weather and to have deployed resources much earlier than was done so as to avoid the formation of ice.

Effectively, the Court of Appeal held that the road authorities were liable, not for failing to treat an icy road condition, but for failing to take reasonable steps to become aware of the potential for icy road conditions to form and for failing to take appropriate steps to prevent the formation of the ice conditions.

COMMENTARY

A reading of the trial judge's decision indicates a clear criticism directed at the road authorities' failure to conduct overnight weather monitoring and road patrols. Furthermore the road authorities' defence under the *MMS* was somewhat complicated by the fact that it was asserted pursuant to section 5. It was argued that since the highway did not become icy until anywhere from one hour to immediately before the accident, the road authorities' 6:00 a.m. deployment was reasonable. However, it was also conceded that the snow accumulation which led to the ice conditions had been going on for some time without any monitoring or response. The trial judge criticized the defence argument as effectively allowing a road authority to escape liability based on the classification of the default:

> This was not a case of ice forming by freezing rain or as a result of ice pellets. Neither was it a situation where the Town was notified of a dangerous patch of ice on the road. This is a case of snow falling and covering the road which was then compacted by vehicular traffic into hard packed snow and ice or icy conditions at various places. The remediation, salting of the roads, was intended to prevent the compacting of snow and the creation of ice and slippery conditions. It makes no common sense to interpret this section of the *MMS* as being applicable in the circumstances of this case. If it were otherwise, municipalities could avoid any of their obligations to clear the roads of snow by waiting until the snow becomes compacted and turns into ice and then claiming that a new time limit is triggered from the time when the municipality becomes aware that the roadway is icy.

Regardless of what one may think of the trial judge's reasoning on this issue, it is unfortunate that the Court of Appeal did not delve very deeply into this analysis. The Court simply accepted a distinction between liability for a failure to treat icy road conditions, which could feasibly be subject to an *MMS* defence; and liability for a failure to take reasonable steps to monitor weather conditions and conduct patrols (which has no defence under the *MMS*).[*]

[*] In its decision, the Court of Appeal did not consider the routine patrolling standards under the *MMS*. However the trial judge had discussed this issue and had rejected their applicability.

The approach taken in *Giuliani* is very similar to earlier decisions of the Court of Appeal, particularly *Montani v. Matthews* and *MacMillan v. Ontario*. In both of those cases, a road authority was held liable for failing to take pre-emptive, remedial measures to prevent a condition of non-repair from arising when it was nearly certain that the condition of non-repair would form absent any preventative measures. In some more recent cases, including the 2011 Court of Appeal decision of *Frank v. Municipality of Central Elgin*, courts have entertained the idea that the principles deriving from *Montani* and *MacMillan* were limited to highly dangerous and atypical situations, such as preferential icing on bridges. However, the Court's decision in *Giuliani* appears to extend the availability of a cause of action from *Montani* and *MacMillan*, while weakening the *MMS* in the process.

Finally, with respect to the *MMS* itself, *Giuliani* appears to significantly undermine their usefulness by affording an opportunity for trial judges to effectively circumvent the *MMS* (or perhaps even common law defences) by imposing liability on a road authority for a failure to take reasonable steps to inspect for a condition of non-repair before it comes into existence. As an initial point, the threshold standards created by the *MMS* for conditions such as snow accumulation are not necessarily synonymous with the existence of an actionable state of non-repair on a roadway. There are likely cases where snow accumulation could exist well below the threshold level imposed by the *MMS* but still constitute a legally actionable state of non-repair. Furthermore, as a matter of practical reality, conditions of non-repair, particularly those deriving from winter conditions, do not spontaneously appear. They accumulate over time. In such cases the *MMS* would likely have little application given that the non-repair could well have come into existence well before the *MMS* would apply.[†] A plaintiff in such a case would only need to bring the action with respect to the treatment of the condition of non-repair at the point in time before the *MMS* threshold was met.

Viewed from a wider prospective, the *Giuliani* case continues a trend in winter maintenance liability cases where the safest situation for a road authority to find itself in is one where it can prove that it was actively taking remedial measures before a condition of non-repair came in to existence. The standard of care imposed in *Giuliani* requires a road authority to be ever vigilant with respect to the condition of the highways within its jurisdiction. Courts have generally been hostile to road authorities which advance defences in the face of a failure by them to do anything in reaction to developing road conditions. Despite not being

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Following the decision in *Thornhill v. Shadid*, since winter storm conditions were not covered by the *MMS*, the *MMS* patrolling standards did not apply to winter storm conditions.

[†] While there is no judicial pronouncement on the question, it seems highly doubtful that a court would accept the idea that a road authority which fails to appropriately deal with a condition of non-repair below the threshold levels of the *MMS* could escape liability with the passage of time and the breaching of the threshold standard by the condition of non-repair.

expressly mentioned by either the trial judge or the Court of Appeal, this hostility may very well have been a subtext to the *Giuliani* case.