

## MUNICIPAL LAW BULLETIN

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### *McLeod v. Dutton-Dunwich*

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Ontario Municipalities have been faced with several adverse court decisions in the recent past. However, the newly released decision in *McLeod v. Dutton-Dunwich* (reported as *McLeod v. General Motors of Canada Ltd.*, 2014 ONSC 134) represents a positive restatement of the law of municipal liability, and demonstrates that municipal liability claims are still defensible.

### **BACKGROUND**

*McLeod* arose from a motor vehicle accident that occurred on a low-use gravel roadway in Dutton-Dunwich on the evening of September 18, 2004. The plaintiff, an 18 year old G2 driver who lived on the road, had been travelling alone in her parents' car. As she crested a hill, she encountered another vehicle heading in the opposite direction. Startled by the sudden appearance of the oncoming vehicle, she slowed down and moved to the right side of the road to pass. Shortly after passing the oncoming vehicle, the plaintiff lost control of her car, went into a yaw and flipped over, landing in an adjacent field. The plaintiff claimed that her loss of control was the result of travelling over a series of potholes on the roadway, which caused her vehicle to lose traction. At trial, the plaintiff raised additional allegations that the accumulation of loose gravel along the side of the road was also a causal factor in her loss of control.

### **THE TRIAL DECISION**

In a lengthy decision, released on January 6, 2014, Mr. Justice Leach dismissed the plaintiff's action and took the opportunity to thoroughly restate the principles underlying municipal liability.

### **(a) A Reasonable Duty of Repair**

The trial judge reaffirmed that a municipality is not to be treated as the insurer of those who use its roads. The duty of repair is one of reasonableness and is relative to the nature of the road in question. Rural roads, by their very nature, cannot be held to a higher standard of repair as they are “susceptible to the development of adverse conditions, to which drivers must adjust”. Rough and uneven roads are simply a reality of life in rural areas.

In *McLeod*, the plaintiff had led considerable evidence from residents living on the road in question who had complained about potholes, dust and other concerns. However, the trial judge held that a municipality cannot be liable for the condition of its roads in a general sense. Instead, liability can only arise if there is a specific risk of harm proven to exist on a road that directly causes an accident.

The supposed non-repair in *McLeod*, a series of 8-10 potholes on the road, was held to not constitute an unreasonable risk of harm to a driver. The evidence showed that the potholes were shallow, dish-shaped potholes, without any sharp edges, that measured, at most, 2 inches in depth. Given the suspension of the plaintiff’s car, there was no realistic way these potholes could have caused the plaintiff to lose control. Beyond this, the trial judge held that there was “nothing unusual or unexpected about these potholes.” With respect to the accumulation of gravel along the sides of the road, the trial judge held that this similarly could not be a condition of non-repair as gravel buildup along a gravel road is simply a reality given the construction and maintenance of gravel roads. Gravel build up along roadsides is a condition “entirely typical of such roads, and something which ordinary drivers undoubtedly would expect and reasonably anticipate without requiring any enhanced notice...”

### **(b) The Reasonable Driver Standard**

In principle, the municipal duty of repair is only owed to reasonable drivers. In practice, this concept has been eroded recently in cases such as *Deering* and *Fordham*, where courts have allowed recovery to plaintiffs (often young, inexperienced drivers) whose driving was well beyond the realm of reasonable. Similarly, *McLeod* also dealt with a young, inexperienced driver who was not driving reasonably. It was found at trial that she was driving more than 90 kph on an unlit gravel road with an unposted speed limit of 80 kph. The plaintiff argued that, regardless of the speed limit, her driving should have still been acceptable as she was still within the alleged design speed of the road (95 kph).

The trial judge rejected this argument, holding that the plaintiff’s driving was clearly negligent. In doing so, the trial judge noted that a reasonable driver not only obeys the speed limit, but also does not always drive at the outer limits of legal conduct. On the facts of *McLeod*, the trial judge held that a reasonable driver would be driving well below the speed limit and would also slow down as he/she was cresting a hill due to the possibility of meeting oncoming vehicles.

### **(c) *Minimum Maintenance Standards***

While the trial judge dismissed the plaintiff's claim in *McLeod* on the basis that there was no non-repair of the roadway, the trial judge went on to consider the municipality's statutory defences. The trial judge found that the inspection and maintenance practices the municipality employed were both reasonable and properly implemented, and had further gone unchallenged at trial. He then went on to assess the impact of the *Minimum Maintenance Standards*. After the decision of the Court of Appeal in *Giuliani v. Halton* the usefulness of the *Minimum Maintenance Standards*, or at least the provisions dealing with winter conditions, has been undermined. However, *McLeod* dealt with the pothole provisions of the *Minimum Maintenance Standards* which had not yet received any significant treatment by courts.

The trial judge concluded that the *Minimum Maintenance Standards* had, in fact, been met in *McLeod*, and would have applied to preclude liability had non-repair been found. The trial judge's assessment of the *Minimum Maintenance Standards* is particularly noteworthy given the approach he took to interpreting the regulation. It was not debated that the potholes in issue did not meet the minimum depth and surface requirements stipulated in the regulation. The plaintiff, however, argued that the risk from the potholes did not derive from a single pothole, but rather derived from the potholes being located in close succession to each other. As such, it was argued that the *Minimum Maintenance Standards* should not apply as the regulation only referred to "pothole" in the singular. In *Giuliani*, technical arguments like this one succeeded. However, in *McLeod* the trial judge rejected this overly technical interpretation. Instead, he held that the *Minimum Maintenance Standards* had to be interpreted so as to give them some substantial meaning, and also had to be interpreted in light of their purpose: to limit municipal liability. He held that "pothole", under the regulation, should also be understood as including "potholes" and, therefore, the regulation could apply to the potholes in this case. In concluding, the trial judge noted that the technical interpretation advanced by the plaintiff "seems inconsistent with the court's legislated obligation to interpret an Act or regulation in a remedial way, and give it such fair, large and liberal interpretation as best ensures the attainment of its objects".

### **COMMENTARY**

*McLeod* is an excellent development for municipalities. It resembles, in length and analysis, the 2010 trial decision in *Deering v. Scugog (Township)*. However, it also represents a positive restatement of the existing law of municipal liability and provides an important guide and corrective to numerous areas where legal principles in this area were being eroded, often in favour of allowing plaintiffs to recover. *McLeod* also reinforces the idea that municipal liability cannot be based on general findings of negligence but must instead be based on specific conditions that are proven to cause risks to road users.

*McLeod* is also encouraging as it represents something of a revitalization of the *Minimum Maintenance Standards*. While it is unlikely to change the principles laid down in *Giuliani* with respect to winter maintenance, what *McLeod* does demonstrate is that some issues of road maintenance may be more amendable to the application of the *Minimum Maintenance Standards*. It is to be hoped that the approach taken in *McLeod* can be used in cases involving the *Minimum Maintenance Standards* for other non-winter conditions.