CLAIMS AGAINST MUNICIPALITIES FOR NON-REPAIR OF ROADS AND SIDEWALKS

A municipality's statutory duty to keep its roads and sidewalks in repair has long given rise to a cause of action to persons injured as a result of the breach of that duty. Injury caused by snow or ice on a sidewalk, however, is a special situation; in those circumstances, the municipality is liable only in case of gross negligence.[1] There are numerous decisions which have held that proof of the existence of a state of non-repair, coupled with proof of causation, amounts to a *prima facie* case of liability. Is it more than that, and does that apply equally to claims for injury caused by snow or ice on a sidewalk? What does the "ordinary reasonable driver" standard mean, and can it be applied with any degree of predictability? And just what does "gross negligence" really mean?

Duty of care

The usual elements of a cause of action for wrongdoing are: a duty of care; breach of the standard of care applicable to that duty; and loss or injury caused by that breach.[2] It is important to note that the cause of action for injury arising from non-repair of a road or sidewalk is founded in statute.[3] Section 42(1) of the *City of Toronto Act, 2006* creates an affirmative duty to keep the highways (a term which includes sidewalks) and bridges under the City's jurisdiction in repair, and s. 42(2) explicitly provides that "If the City defaults in complying with subsection (1), the City is…liable for all damages any person sustains because of the default."[4] Ontario and other

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[1] *City of Toronto Act*, *2006* s. 42(5). More generally, the *Municipal Act*, *2001*, s. 44(9).

[2] *Mustapha v Culligan of Canada Ltd.* 2008 SCC 27.

[3] There is some uncertainty whether, apart from injury due to misfeasance rather than nonfeasance, or a nuisance on the highway, there existed at common law a right of action for injury caused by the non-repair of a road or sidewalk. In *Sandlos v Twp. of Brant* (1921) 49 O.L.R. 142, Meredith, C.J.C.P. said "[N]o private right of action for nonrepair lies unless conferred by enactment or contract". However, in *Cummings v Vancouver (City)* (1912) 46 S.C.R. 457, Idington J. said (at para. 29) "Then again the question constantly arose as to whether or not there was a common law liability [for damages caused by non-repair] independently of the statute".

[4] The corresponding provisions in the *Municipal Act, 2001* are ss. 44(1) and (2).

jurisdictions have, in other words, "created both a statutory duty to keep roads and sidewalks in a reasonable state of repair and a corresponding statutory cause of action for breach of that duty...[T]he plaintiff must seek its remedy under the statute and only the statutory remedy is available."[5]

Standard of care

Not only does the legislation create an affirmative duty, it also specifies the general standard of care applicable to that duty. Section 42(1) of the *City of Toronto Act, 2006* provides that the City must keep highways and bridges under its jurisdiction "in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge".[6] The language of the statute plainly makes the standard of care to be exercised by the municipality one that is associated not with a standard of conduct - such as the tort standard of the level of care that is reasonable in the circumstances - but rather with an outcome (the state of repair) that is the ultimate result of the municipality's conduct in implementing its affirmative statutory duty.[7] The focus on result rather than, as is usual, conduct,[8] renders critical the question: What is it that constitutes "a state of repair that is reasonable in the circumstances"? Or, conversely: What constitutes a state of non-repair?

[5] *Cartner v Burlington (City)* (2008) 54 M.P.L.R. (4th) 70, Ont. S.C.J. at para. 154.
[6] The corresponding provision is s. 44(1) of the *Municipal Act, 2001*.
[7] "The plaintiff must prove on a balance of probabilities that the municipality failed to keep the road in question in a reasonable state of repair": *Fordham v Dutton-Dunwich (Municipality)* 2014 ONCA 891 at para. 26. An almost identical statement was made in *Smith v Safranyos* 2018 ONCA 760 at para. 31.
[8] A loose analogy ("loose" because the following duty focuses on conduct as well as resulting condition) may be drawn to the duty of an occupier to "take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises…are reasonably safe while on the premises": s. 3(1) of the Ontario *Occupiers' Liability Act*.

Having spelled out the nature of the standard of care, by specifying that it turns not on wrongful conduct but on the resulting condition of the roads and sidewalks, the statute then expressly provides for certain defences. Section 42(3) of the *City of Toronto Act, 2006* states:[9]

> Despite subsection (2), the City is not liable for failing to keep a highway or bridge in a reasonable state of repair if,
>
> (a) the City did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge;
>
> (b) the City took reasonable steps to prevent the default from arising; or
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> (c) at the time the cause of action arose, minimum standards established by a regulation made under section 117 applied to the highway or bridge and to the alleged default and those standards have been met.

These statutory defences involve the type of conduct that would normally be considered when determining whether the plaintiff has established that the standard of care has been breached. Some of the earlier case law appears to have conflated the issues of standard of care and defences available to the municipality. Rather than applying considerations of conduct at the cause of action/standard of care stage, the legislation has instead made such considerations applicable at the defences stage of the action. The practical effect of doing this is to reverse the onus of proof insofar as consideration of the municipality's conduct is concerned.

The plaintiff continues to bear the onus of proof that the municipality breached the applicable standard of care. In that sense, there is no reversal in the onus of proof; but the plaintiff can satisfy that onus merely by showing that the condition of the road or sidewalk where the injury-causing incident occurred was not in "a state of repair that was reasonable in the circumstances",

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[9] The corresponding provision is s. 44(3) of the *Municipal Act, 2001*.

regardless of whether that state of non-repair was due to negligent or other wrongful conduct on the part of the municipality. If the plaintiff satisfies that onus (and also shows a causal connection between the state of non-repair and the injury), then it is for the municipality to establish a defence to the claim by showing that its conduct satisfied one of the grounds of defence specified by the statute. The onus of proof on the issue of the blameworthiness or otherwise of the municipality's conduct therefore has effectively been reversed.

Negligent conduct is not a necessary element of the cause of action, but proof of absence of negligence is a defence

A corollary of the standard of care being defined in terms of the resulting condition of the roads and sidewalks is that negligent conduct is not a necessary element in the cause of action,[10] although references to negligence have crept into some decisions,[11] and contradictory, anomalous, and confusing remarks were made in an early appellate decision in which each of the five judges gave separate reasons and which continues to be cited from time to time.[12] On the other hand, and as discussed later in this paper, the nature of the statutory defences afforded to municipalities shows that the absence of negligence (broadly speaking) will constitute a defence to the claim, notwithstanding the fact that the plaintiff has no obligation to prove negligent conduct on the part of the municipality. As previously mentioned, the real difference created by the statute is not that negligence is no longer a relevant matter, but that the onus of proof regarding the issue of negligence has been reversed.

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[10] *Cartner v Burlington*, at para. 155; *Goudie Estate v Eramosa (Twp.)*1983 CarswellOnt 1684, H.C.J., at para. 11; *Greer v Tp. Mulmur* (1926) 59 O.L.R. 259.

[11] *Goudie Estate v Eramosa*, at para. 13; *R. v Gardam* [1948] O.W.N. 570, C.A.

[12] *Sandlos v Twp. of Brant*: "Negligence on the part of the defendants – a neglect of the duty imposed on them by statute"; "That the action is one for negligence seems to me to be self-evident. It is for neglect of duty; and it cannot make any difference that the duty is imposed by statute"; "A road, or any structure, may be put out of repair without any kind of fault on the part of him whose duty is to keep it in repair"; "From almost the beginning of municipal control of and responsibility for highways, it has in this Province been considered that an action of this kind is based upon negligence"; "I am not yet quite convinced that 'this action is not an action for negligence'…I am of opinion that disregard of a statutory duty imposed upon a municipal corporation, as distinguished from unavoidable failure to perform it, is negligence".

What constitutes non-repair? Part 1

As indicated above, the statute specifies that non-repair consists of the absence of "a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge". That, of course, is a broad and general standard which has been fleshed out in the case law. It need hardly be said that "It is a question of fact in each case as to whether or not the sidewalk [or roadway] is in a state of non-repair."[13]

The number and variety of situations which have been considered when determining whether or not a state of non-repair existed is too large for discussion here.

The broad language of the statute was supplemented by other general language in the earlier case law:

> 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.[14]
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> The clear intent of the statutory duty imposed on the municipality is to allow for the safe passage of a pedestrian using the sidewalk with ordinary care for his or her own safety.[15]
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> [T]he standard of repair is a reasonable one and…a municipality is not an insurer which guarantees that citizens who use its sidewalks will not sustain injuries.[16]

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[13] *Michalak v Oakville (Town)* 2000 CarswellOnt 4485, S.C.J. at para. 104. "What is deemed to be a reasonable state of repair will depend on the facts of each case": *Lloyd v Bush* 2017 ONCA 252 at para. 69. "What is reasonable repair is a question of fact depending upon all these surrounding circumstances, and hence the facts of one case afford no fixed rule by which to determine another case where the facts are different": *Greer v Tp. Mulmur*.
[14] *Lloyd v Bush*, at para. 62.
[15] *Michalak v Oakville*, at para. 117. "I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied": *Bankey v Belleville (City)* [1941] O.W.N. 11, H.C.J., aff'd [1942] O.W.N. 570, C.A. "[T]he classic articulation of Armour C.J. that municipalities are bound to maintain their roadways 'in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety": *Cartner v Burlington*, at para. 164.
[16] *Cartner v Burlington*, at para. 157.

> [T]here is no statutory obligation to make roads passable in all places, at all times, and in all kinds of weather.[17]

> The word "repair" is to be given a broad and elastic meaning. It is to be sufficient from time to time for the reasonable needs of traffic…[T]he highways should be kept in such a condition of repair as the reasonable demands of traffic over them should from time to time require. Regard should be had to surrounding material circumstances. The road should be reasonably sufficient for the requirements of the particular locality.[18]

> In summary, I accept that the City is not an insurer of pedestrians that use its sidewalks. Neither is it required to maintain its sidewalks in a perfectly level condition free from all imperfections. Pedestrians must use ordinary care for their own safety as they pass along the sidewalk, as must motorists in the use of municipal roads. It does not follow merely because an accident occurs that a sidewalk or roadway is necessarily in a state of non-repair, regardless of how tragic such an accident might be.[19]

The following statement emphasized the need to show not just any state of non-repair, but one that violated the statutory standard of "a state of repair that is reasonable in the circumstances":

> Assuming, without deciding, that the ice on the crosswalk did, as a threshold matter, constitute a state of non-repair, that is not the end of the inquiry because a state of non-repair alone is insufficient to establish that the standard of maintenance has been breached. The standard is not an absolute one, and the plaintiff must show that the City failed to meet the flexible standard of a state of repair that is reasonable in the circumstances.[20]

It should be noted that "As regards sidewalks, the jurisprudence indicates that a higher standard of maintenance or care is required than for roadways",[21] although that comment appears to relate to the standard of care that applies to the defences available to a municipality, rather than to the

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[17] *Ondrade v Toronto (City)* (2006) 23 M.P.L.R. (4th) 111, Ont. S.C.J. at para. 74. A similar statement was made in *Greer v Tp. Mulmur*.

[18] *Schraeder v Grattan (Twp.)* [1945] O.R. 657, H.C.J. at paras. 43-44.

[19] *Cartner v Burlington*, at para. 174. "It is…recognized in the jurisprudence that perfection is not the appropriate standard": *Bramer v Hamilton (City)* 2015 ONSC 713 at para. 78.

[20] *Ondrade v Toronto*, at para. 21. A similar statement was made in *Lloyd v Bush*, at para. 64.

[21] *Cumberbatch v Toronto (City)* 2015 ONSC 4859 at para. 71. "Even in the context of sidewalks, where the cases have indicated that a higher standard of maintenance is required than for roadways…": *Ondrade v Toronto*, at para. 75.

state or condition of a sidewalk which the plaintiff must show to have been in existence and to have been a cause of the injury. The following statement is a more pertinent comment as regards the condition in which sidewalks are to be maintained:

> The governing principle to be gathered from these judgments is that the statute requires or demands no more than that a municipality shall keep its sidewalks in a reasonably safe condition for pedestrians using the same…[22]

Some of the factors that were viewed to be relevant to the determination whether a state of non-repair existed were:

> The jurisprudence is clear that a lower standard will apply with respect to the state of repair on a low-traffic rural roadway than on higher-traffic thoroughfares and highways. The character and population of the area are to be considered as well as the amount of traffic using the road.[23]
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> I agree with the trial judge that mere compliance with minimum standards or guidelines is not, in itself, sufficient to avoid liability if there was an obvious deficiency or risk. The overriding question remains: in all of the circumstances, does the condition of the road pose an unreasonable risk of harm to reasonable drivers?[24]

What constitutes non-repair? Part 2

The recent case law has established a more targeted test, described as "the ordinary reasonable driver standard", whereby the municipality's obligation is to keep its roads in a condition that is reasonably safe for drivers who drive reasonably, and also for those who make non-negligent mistakes.[25] In regard to the latter extension:

> The ordinary motorist includes those of average range of driving ability – not simply the perfect, the prescient, or the especially perceptive driver, or one with exceptionally fast reflexes, but the ordinary driver who is of average intelligence, pays attention, uses

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[22] *Berthiaume v Ottawa (City)* [1946] O.R. 788, C.A. at para. 3.
[23] *Lloyd v Bush*, at paras. 70 and 71.
[24] *Lloyd v Bush*, at para. 75.
[25] *Deering v Scugog (Township)* 2010 ONSC 5502, aff'd 2012 ONCA 386, leave to appeal denied [2012] S.C.C.A. No. 351; *Fordham v Dutton-Dunwich*; *Smith v Safranyos; Chiocchio v Hamilton (City)* 2018 ONCA 762.

> caution when conditions warrant, but is human and sometimes makes mistakes.[26]

There is no obligation to keep roads in a state of repair that would be reasonably safe for negligent drivers:

> [A] municipality is required to prevent or remedy conditions on its roads that create an unreasonable risk of harm for ordinary drivers exercising reasonable care. Ordinary reasonable drivers are not perfect; they make mistakes. However, a municipality's duty does not extend to remedying conditions that pose a risk of harm only because of negligent driving.[27]

The fact that an accident involved a negligent driver does not, however, necessarily mean that the municipality is excused from liability. If it is shown that the condition of the road posed an unreasonable risk of harm for ordinary drivers exercising reasonable care, including those who might make a non-negligent mistake, and that the state of non-repair was a "but for" contributing cause of the accident, then the municipality will be held liable as a joint contributing wrongdoer. In other words, merely because the defendant driver was negligent does not mean that there was not, at the same time, a state of non-repair that was a contributing cause of the injury.[28]

Both *Smith* and *Chiocchio* involved a negligent driver. In one case the municipality was held jointly liable, while in the other it was not.

In *Smith*, a stop line painted at the edge of an intersection had been removed, and that, together with other related factors, was found to have "enhanced the risks that the absence of a stop line

[26] *Deering v Scugog*, at para. 154.
[27] *Chiocchio v Hamilton (City)* 2018 ONCA 762 at para. 9 (see also paras. 17-18); *Smith v Safranyos*, at paras. 31 and 37; *Fordham v Dutton-Dunwich*, at para. 29.
[28] *Smith v Safranyos*, at paras. 32-45. *Nota bene* the word "only" in the passage reproduced above.

presented to drivers exercising ordinary reasonable care".[29] A finding of "but for" causation was also made:

> The trial judge had ample evidence that this intersection was confusing, even to drivers of ordinary care. She was entitled, in the circumstances, to accept [the negligent defendant driver's] evidence that had there been a stop line she would have stopped there, just as she had at the [preceding] stop sign. There is nothing inconsistent in the trial judge's finding that, despite her negligence, [the driver] would have stopped had there been a stop line.[30]

In *Chiocchio*, the negligent driver similarly had stopped at a stop sign and then accelerated into the intersection without stopping or slowing at a faded stop line. Reversing the decision of the trial judge, the C.A. exonerated the municipality from liability, finding that the intersection was not in a state of non-repair:

> Ordinary reasonable drivers would not stop their cars in a location where their view of oncoming traffic from one direction would be completely obscured and then proceed into the intersection without stopping again. They would know to come closer to the intersection before stopping initially or before stopping again, in order to have a clear view of traffic from both directions.[31]
>
> …..
>
> The evidence before the trial judge did not support the conclusion that the intersection at issue posed an unreasonable risk of harm to ordinary reasonable drivers. As we have said, even if they did not stop immediately before entering the intersections as required by the HTA, such drivers would bring their vehicles to a stop, or stop again, within a zone in which they had sightlines in both directions.[32]

While *Smith* was considered and distinguished in *Chiocchio*, there is a plausible conflict between the two decisions. It was held in *Chiocchio* that ordinary reasonable drivers "would [have brought] their vehicles to a stop, or stop again, within a zone in which they had sightlines in both

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[29] *Smith v Safranyos*, at para. 22.
[30] *Smith v Safranyos*, at para. 74.
[31] *Chiocchio v Hamilton*, at para. 19.
[32] *Chiocchio v Hamilton*, at para. 24.

directions". The road, in other words, was reasonably safe for ordinary reasonable drivers, including those who might make a non-negligent mistake, notwithstanding the fact that the stop line at the intersection was faded. The corresponding finding in *Smith*, however, was that the road was in a state of non-repair because, in the absence of a stop line, there was a real risk that an ordinary reasonable driver, including (and particularly) one who might make a non-negligent mistake, might not have stopped or slowed (after stopping at the preceding stop sign) before entering the intersection. The intersections in the two cases were not, of course, identical, and those differences may account for the different results. There is, nevertheless, at least a superficial conflict between the two decisions.

The ordinary reasonable driver standard – Comment

The municipality's duty is to keep its roads reasonably safe for use by ordinary reasonable drivers, including those who might make a non-negligent mistake. It has no obligation to protect against negligent drivers – it has no obligation, in other words, to take extraordinary measures which would keep negligent drivers or the victims of negligent driving safe from harm. The protection afforded to municipalities, however, does not extend to injury caused by a non-negligent mistake made by a motorist. The municipality must take such potential non-negligent mistakes into account when designing and maintaining its roads.

The question is not whether the motorist drove negligently, but rather whether the road was reasonably safe. Whether a road was reasonably safe for an ordinary motorist driving reasonably is usually not difficult to answer. However, the question whether a road was reasonably safe for an ordinary driver who might make a non-negligent mistake is a more demanding issue. There is, to begin with, the question whether the motorist was driving negligently, or whether he or she merely made a non-negligent mistake. A pertinent question here might be: Did the condition of

the road lend itself to the making by an ordinary driver of a non-negligent mistake? Additional assistance is contained in the following statement:

> The concept of the ordinary driver must have room for those who are inexperienced, elderly, or have only average perception, reflexes and reaction time. They are all licensed to drive, and they make mistakes of perception and/or reaction and/or judgment in relation to unexpected road-based changes, and they may, without some guidance, miss a subtle cue of potential change in road conditions, amid all the information unfolding as that motorist is driving.[33]

If the driver made a non-negligent mistake, there arises the additional question whether the road was reasonably safe for a driver making that non-negligent mistake. Finally, even if the driver drove negligently, that does not necessarily mean that the road was reasonably safe for ordinary motorists driving reasonably or actually or potentially making a non-negligent mistake. There is also, of course, the added element of causation to be considered.

While the result in *Chiocchio* can be explained as a finding that the faded stop line did not pose an unreasonable risk except for those who drove negligently, the opposite finding in *Smith*, on apparently similar facts, is troublesome because it indicates a degree of vagueness in the standard that undermines predictability in its application. The boundary line between negligent driving and actual or potential non-negligent mistakes may be difficult to discern, as shown by the differing results in *Smith* and *Chiocchio*.

Prima facie liability

Idington J., delivering the majority judgment in an early leading decision, had this to say:

> [I]s it not clear that…when the facts demonstrate an actual want of repair, causing damage, an action is *prima facie* of necessity shown to be well founded, because the statute has not been duly observed

[33] *Deering v Scugog*, at para. 142 – see also para. 139.

> or complied with and hence the party in default called upon to offer some excuse?
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> *Prima facie* the duty is imperatively obligatory and its consequences can only be got rid of by some valid excuse for a failure to discharge the duty so imposed.
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> …
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> It is beyond my province here to further define the limits of that presumption.[34]

Subsequent decisions have similarly referred to a *prima facie* case resulting from a presumption arising from evidence of a state of non-repair coupled with the element of causation:

> 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) [of the *Municipal Act, 2001*] applies.[35]
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> …..
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> The first two steps of the four-step test – (1) determining whether the plaintiff has first proved non-repair, and (2) causation – resolve whether there is a *prima facie* case of liability.
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> If a *prima facie* case of liability is established, step three requires the municipality to establish, on a balance of probabilities, any statutory defences outlined in s. 44(3) that it seeks to rely on.[36]

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[34] *Cummings v Vancouver*, at paras. 15-16 and 39.

[35] *Lloyd v Bush*, at para. 62. "When want of repair is shown, a *prima facie* case is made out; it is then for the municipality to show that the want of repair existed notwithstanding all reasonable efforts on the part of the municipality to comply with the law": *Greer v Tp. Mulmur*. "[H]igh authority [*Cummings v Vancouver*] supports the submission that the onus shifts to the municipality upon a finding of a state of non-repair and causation": *Thornhill (Litigation guardian of) v Shadid* (2008) 289 D.L.R. (4th) 396, Ont. S.C.J. at paras. 107-09. "[T]he onus first falls to the plaintiff to show on a balance of probabilities not only that the sidewalk was in a state of non-repair, but also that such state of non-repair was a cause of the plaintiff's injuries applying the 'but for' test…Only once that onus has been met by the plaintiff and a *prima facie* case established that non-repair was a cause of the plaintiff's injuries does the burden of proof shift to the City of Burlington to avoid liability by showing either that it took reasonable steps to maintain the sidewalk in a state of repair or that it could not reasonably have known of the presence of the state of non-repair of that sidewalk": *Cartner v Burlington*, at para. 156. See also *Schraeder v Grattan*, at para. 41; *R. v Gardam*; *May v R.* [1948] O.W.N 669, H.C.J. at paras. 7, 10, and 17-23; *Goudie Estate v Eramosa*, at para. 11; *Michalak v Oakville*, at paras. 102 and 118; *Zaravellas v Armstrong* 2016 ONSC 3616, S.C.J. at paras. 163-64 and 175, aff'd 2018 ONSC 4047, Div. Ct.

[36] *Smith v Safranyos*, at paras. 27-28.

There is a decision which, to some extent at least, appears to challenge that view. It is the aforementioned decision in *Sandlos*,[37] in which separate reasons were given by the various judges, some of whom took issue with the *Cummings* principle.[38]

A related issue is whether the municipality must have actual or constructive knowledge of the state of non-repair before the presumption and resulting *prima facie* case come into existence. Given that the statute makes such actual or constructive knowledge a defence matter,[39] it is unsurprising that the presumption and *prima facie* case arise without that actual or constructive knowledge,[40] although there are decisions in which the matter appears to have been left open, or at least not clearly resolved.[41]

Reference to a *prima facie* case of liability is a bit misleading. A *prima facie* case essentially means that there is a presumption of liability. Proof of a state of non-repair (coupled with causation), however, goes beyond that; the cause of action at that point is complete and has been established. The onus resting with the defendant municipality is not merely an evidentiary onus to rebut a *prima facie* case, but rather to affirmatively establish one of the statutory defences.

Statutory defences given to municipalities

As noted above, the legislation explicitly provides three separate defences to municipalities.[42] Here again, the decisions which have considered those defences are too numerous and varied for discussion in this article. A helpful general comment is:

> These defences include proof that the municipality took reasonable steps to prevent the default from arising…In other words, the

[37] *Sandlos v Twp. of Brant*.
[38] Although it was later stated in *Greer v Tp. Mulmur* that *Cummings* and a related decision "were followed by this court in *Sandlos v Tp. Brant*".
[39] Section 42(3)(a) of the *City of Toronto Act, 2006*; s. 44(3)(a) of the *Municipal Act, 2001*.
[40] *Cummings v Vancouver*, at paras. 18-21 and 37; *Greer v Tp. Mulmur*; *R. v Gardam*.
[41] *May v R.*, at paras. 26-27; *Goudie Estate v Erasmus*, at para. 12.
[42] Section 42(3) of the *City of Toronto Act, 2006*; s. 44(3) of the *Municipal Act, 2001*.

> *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.[43]

Some of the factors that are relevant to the determination whether a defence is available to the municipality are:

> Whether a municipality's actions are reasonable or not depends in part on the resources that were available to the municipality. In considering whether reasonable efforts have been made to keep the road in a state of repair, regard must be had to a number of factors including the means available to the municipality…[F]inancial constraints will not in themselves justify a municipality's failure to take steps to correct a state of non-repair for a particular road. Financial considerations are, however, plainly recognized as one factor to be considered and weighed among others when assessing a municipality's efforts to maintain a road were reasonable in the circumstances…[F]inancial constraints are a relevant factor in the analysis, though not in itself determinative or to be overemphasized to the exclusion of other relevant factors.[44]
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> Canadian courts have taken into account the difficult weather conditions that exist and the cost of clearing the roads of snow. The courts have emphasized that a municipality is not to be treated as an insurer of the safety of the users of its roads by imposing overly onerous maintenance obligations. Specifically, a municipality's failure to salt or sand its roads does not automatically expose it to civil liability: [t]he driving public cannot expect municipalities to keep the roads free and clear of snow and ice at all times during the winter.[45]
>
> Even in the context of sidewalks, where the cases have indicated that a higher standard of maintenance is required than for roadways, the jurisprudence discloses that the municipality is entitled to a reasonable time to do whatever is necessary to safeguard pedestrians who walk upon the streets.[46]
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> The condition of snow and slush on a roadway is a common feature of most Canadian winters. However the requirement of "as soon as practicable" in section 4(1)(a) of the MMS [a regulation for minimum maintenance standards] and the municipal duty of

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[43] *Lloyd v Bush*, at paras. 62 and 82 respectively.
[44] *Lloyd v Bush*, at para. 97.
[45] *Lloyd v Bush*, at para. 63.
[46] *Ondrade v Toronto*, at para. 75. A similar comment was made in *Berthiaume v Ottawa,* at para. 3.

> reasonable care to ascertain and remedy a hazardous situation within a reasonable time are important to this case.[47]
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> The municipality is bound to take every reasonable means through its overseeing officers and otherwise, to become acquainted with such possible [dangerous conditions]…[48]

A finding that a defence is not available will usually turn not on the municipality's policy regarding maintenance of roads or sidewalks, but rather on the implementation of that policy.[49] "It is unwise for the court to become involved in rewriting policies on an *ad hoc* basis and dictating priorities to the City or its employees."[50]

Sidewalk snow/ice claims

The legislation singles out claims arising from snow or ice on a sidewalk. Apart from situations discussed below involving concurrent causes, liability in such cases will be imposed only if there was gross negligence on the part of the municipality.[51] How that lower standard of care has been interpreted and applied is considered hereafter.

As noted in the following comments, gross negligence is a separate and additional required element in the cause of action:

> In order to be successful, the plaintiff must establish that the alleged snow and/or icy conditions on the sidewalk gave rise to dangerous conditions sufficient to constitute the non-repair *and* the City was grossly negligent in failing to address that state of non-repair.[52]

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[47] *Thornhill (Litigation guardian of) v Shadid*, at para. 104 – see also paras. 114-15. The relevance of the adherence by a municipality to its own maintenance policies and procedures is considered in *Cartner v Burlington*, at paras. 175-76.

[48] *Cummings v Vancouver*, at para. 38.

[49] As in *Cumberbatch v Toronto*, at paras. 84-85; *Zaravellas v Armstrong*, at para. 169. A case where the determination was based on the municipality's policy is *Michalak v Oakville*, at paras. 126 and 132.

[50] *Sutherland v North York (City)* (1997) 35 O.R. (3d) 189, C.A. at para. 17, followed in *Billings v Mississauga (City)* 2010 ONSC 3101, S.C.J. at para. 30, aff'd 2011 ONCA 247.

[51] Section 42(5) of the *City of Toronto Act, 2006*; s. 44(9) of the *Municipal Act, 2001*.

[52] *Cumberbatch v Toronto*, at para. 73 (emphasis added).

> [I]t is clear that there must be more than a breach of a duty of care; the breach must rise to a level that can properly be described as gross negligence.[53]

Unlike the situation involving other types of road/sidewalk claims, the nature of the municipality's conduct is a necessary element in the cause of action, and the plaintiff has the onus of proof on it.[54]

Proof of gross negligence may, however, not be necessary where there is another concurrent cause of the injury. In the *Fogg* decision,[55] the second cause was an excessive slope on the sidewalk. As that separate and independent cause "was sufficient to support the judgment even if there were no negligence whatever in respect of [the sidewalk's] icy covering",[56] it was held that the municipality was liable regardless of whether or not there had been gross negligence insofar as the icy condition of the sidewalk was concerned.[57] *Fogg* has, however, been both distinguished[58] and not followed.[59]

Does a state of non-repair of a sidewalk, involving snow or ice, raise a presumption of gross negligence, resulting in a *prima facie* case of liability, as some decisions have held to be the case in other road and sidewalk cases? The answer must surely be No.

To begin with, those decisions did not hold that a state of non-repair raises a presumption of any form of negligence; they held instead that it raises a *prima facie* case of liability for breach of the

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[53] *Crinson v Toronto (City)* 2010 ONCA 44 at para. 47.
[54] *Cumberbatch v Toronto*, at para. 85.
[55] *Fogg v Kenora (Town)* [1940] O.R. 421, C.A.
[56] *Fogg v Kenora*, at para. 10.
[57] This is analogous to the principle established in the leading decision *Athey v Leonati* [1996] 3 S.C.R. 458, where the following was said (at paras. 17 and 19): "It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury…The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm."
[58] *Bankey v Belleville*. The question may be asked, however, why the basis for distinguishing *Fogg* was not treated as a matter of contributory negligence, rather than as a complete defence to the claim.
[59] *Duret v Calgary (City)* (1990) 110 A.R. 304, Q.B. at paras. 47-53.

statutory duty to maintain roads and sidewalks in a reasonable state of repair. There is no presumption of gross negligence merely because a sidewalk was in a state of non-repair due to snow or ice. There are numerous reasons other than gross negligence, or even the lower standard of ordinary negligence, why that state of non-repair could have been present. As indicated in the passage from *Crinson* quoted above, a breach of the duty to keep a sidewalk in repair is not sufficient *per se* to found a cause of action; the plaintiff must show that the breach was the result of gross negligence on the part of the municipality.[60]

Recall that the cause of action for claims arising other than from snow or ice on a sidewalk does not include any element of misconduct on the part of the municipality - that element is relevant only on the defence side of the equation. The additional statutory requirement for gross negligence for sidewalk snow/ice claims, however, clearly involves a form of misconduct. A presumption of liability for breach of the statutory duty to keep the sidewalk in a reasonable state of repair therefore would involve a form of circular reasoning; it would effectively read out of the statute the requirement for proof of gross negligence. Thus, unlike other claims involving roads and sidewalks, the mere fact that there was a condition of non-repair which caused or contributed to the injury does not give rise to a claim.

The meaning of "gross negligence" - Part 1

The meaning most often given to the term "gross negligence" is "very great negligence".[61] Other definitions that have been used are: "a very marked departure from the standards by which

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[60] A similar statement was made in *Occhino v Winnipeg (City)* (1988) 53 Man. R. (2d) 257, C.A., quoted with approval in *Sutherland v North York*, at para. 13.

[61] *Drennan v Kingston (City)* (1897) 27 S.C.R. 46 and *Holland v Toronto (City)* [1927] S.C.R. 242. That meaning was adopted in *Crinson v Toronto*, at para. 46; *Berthiaume v Ottawa*, at para. 3; *Costerus v Kitchener (City)* 2017 ONSC 6030, S.C.J. at para. 38; *Ryan v Sault Ste. Marie (City)* (2008) 55 M.P.L.R. (4th) 191, Ont. S.C.J. at para. 38; *Zaravellas v Armstrong*, at para. 160; *Duret v Calgary,* at para. 57.

reasonable and competent people…habitually govern themselves;[62] "serious" or "at least great" negligence;[63] "only ordinary negligence with a superlative epithet".[64] None of those descriptions is terribly helpful in more precisely defining the meaning of the term,[65] but to some extent at least that is because the meaning is so tied to the facts and circumstances of each particular case.[66]

> [T]o a great extent, the determination of gross negligence depends on the facts of each case. It depends on the application of a less than precise definition of gross negligence, interpreted through the prism of common sense.[67]
>
> The Supreme Court of Canada [in *Holland v Toronto*] indicated that the circumstances giving rise to the duty to remove a dangerous condition, including the notice, actual or imputable, of its existence, and the extent of the risk which it creates, the character and the duration of the neglect to fulfil that duty, including the comparative ease or difficulty of discharging it, are elements that vary in infinite degree and are important, if not vital, factors in determining whether the fault attributable to the municipal corporation is so much more than ordinary neglect that it should be held to be very great, or gross negligence.[68]

On the other hand, the term is not so strict as to require misconduct that is wilful, reckless, wanton, or flagrant.[69]

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[62] *Burke v Perry* [1963] S.C.R. 329 at para. 4.
[63] *Sutherland v North York*, at paras. 19 and 20.
[64] *Sandlos v Twp. of Brant*.
[65] "[T]he courts have not defined gross negligence with any degree of linguistic precision. However, it is clear that there must be more than a breach of a duty of care; the breach must rise to a level that can properly be described as gross negligence": *Crinson v Toronto*, at para. 47.
[66] "[G]ross negligence is a question to be decided on the facts of each case": *Crinson v Toronto*, at para. 48. "A determination of gross negligence is fact specific and it is difficult to find a rule of general applicability in the jurisprudence": *Cumberbatch v Toronto*, at para. 100. See too *Billings v Mississauga,* at para. 7; *Bramer v Hamilton*, at para. 77.
[67] *Crinson v Toronto*, at para. 47, quoting from *McNulty v Brampton (City)* [2004] O.J. No. 3240, S.C.J. See also *Bramer v Hamilton*, at para. 77.
[68] *Ryan v Sault Ste. Marie*, at para. 38.
[69] *Crinson v Toronto*, at para. 46; *Costerus v Kitchener*, at para. 39; *Duret v Calgary,* at para. 56. *Contra*, however, *Berthiaume v Ottawa*, at paras. 3-6.

Some of the factors that are relevant to the determination whether there was gross negligence on the part of a municipality are referenced in the following comment:

> Whether there has been gross negligence depends on whether the city had notice or imputed notice of the existence of a dangerous condition which it is responsible for, whether the city had an opportunity of remedying the condition, the state of the weather immediately before the accident, and the relative situation of the place of the accident. The law is clear that if a municipality takes reasonable care within a reasonable time it cannot be found liable.[70]
>
> It has long been the law in Ontario that if a municipality permits a slippery, icy sidewalk in a busy part of the city to remain unprotected or ignores it altogether and someone is injured, that would constitute gross negligence.[71]

Cited here are some examples of situations where a finding of gross negligence has been made,[72] not made,[73] or where other cases involving the determination of the issue were reviewed.[74]

The Billings test

The following test was proposed in the *Billings* decision:

> A careful review of all the authorities provided to me makes the point very clearly that attempting to define gross negligence is neither helpful nor necessary; whether or not a defendant is gross[ly] negligent is a question which must be decided based on the particular facts of each case, considered in context. The authorities make it clear, and counsel agree, that in order for me to find that a defendant municipality acted reasonably, and therefore not negligently, a two-part test must be considered:
>
> (1) Was the municipality's general policy with respect to snow and ice removal a reasonable one?

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[70] *Lear v London (City)* (1999) 5 M.P.L.R (3d) 17, Ont. S.C.J. at para. 67.
[71] *Crinson v Toronto*, at para. 54. There was no gross negligence in *Billings v Mississauga (City)* 2011 ONCA 247 despite the sidewalk not having been cleared of snow and ice within the 36-hour period following a severe storm, and the sidewalk allegedly having remained dangerous for more than 100 hours.
[72] *Crinson v Toronto*; *Costerus v Kitchener*; *Bramer v Hamilton*; *Cumberbatch v Toronto*; *Thornhill (Litigation guardian of) v Shadid*; *Lear v London*; *Ryan v Sault Ste. Marie*.
[73] *Sutherland v North York*; *Berthiaume v Ottawa*; *Billings v Mississauga*; *Bankey v Belleville*; *Knowlton v Westport (Village)* [1945] O.R. 221, H.C.J.; *Zaravellas v Armstrong*; *Duret v Calgary*.
[74] *Ryan v Sault Ste. Marie*, at paras. 38-52; *Lear v London*, at paras. 68-71; *Cumberbatch v Toronto*, at paras. 74-82 and 99; *Duret v Calgary*, at para. 69.

> (2) Was the defendant municipality's response on the occasion in question (that is to say, the implementation of its policy) reasonable?[75]

It is apparent that this is a test for ordinary negligence ("and therefore not negligently"), not gross negligence. That is confirmed by this later passage in the decision:

> I have concluded without any hesitation that the City's response in all of the circumstances was completely reasonable. It goes without saying, therefore, that it was neither negligent nor, obviously, grossly negligent.[76]

Subsequent decisions, however, appear to have employed this two-part test for the determination of whether there had been gross negligence on the part of the defendant municipality.[77]

The meaning of "gross negligence" - Part 2

Another and perhaps more accurate, or at least more rigorous, way of attempting to define "gross negligence" is to first consider the meaning of ordinary negligence. The ordinary standard of care required by the law of negligence is summarized in the following statement:

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.[78]

A breach of the ordinary standard of care – i.e. the failure to exercise care that would be reasonable in the circumstances of a given case – is negligent conduct; but it is not, *per se*, grossly negligent conduct. That stricter standard is realized only if the level of care that was

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[75] *Billings v Mississauga*, at para. 7.
[76] *Billings v Mississauga*, at para. 30.
[77] *Cumberbatch v Toronto*, at paras. 76 and 83; *Zaravellas v Armstrong*, at paras. 160-61 and 175.
[78] *Ryan v Victoria (City)* [1999] 1 S.C.R. 201 at para. 28.

exercised, taking into account all of the circumstances and the various factors identified in the passage reproduced above, was *grossly* below the standard of care that would be expected of an ordinary, reasonable, and prudent person in the same circumstances.

Viewed in that manner, the threshold for proving gross negligence might well be more difficult to surmount than it currently is. Even “very great” seems an inadequate descriptor. “Gross negligence” is a term which can be interpreted to signify conduct that amounts almost to an indifference to the harmful consequences of a failure to exercise reasonable care,[79] but it is unlikely that the courts would interpret and apply the term so strictly as to make largely illusory recovery for claims arising out of seriously unreasonable conduct.

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[79] Although that approach has been rejected: see fn. 69 above.