

Minimum Maintenance Standards After *Giuliani v. Halton Region*

by Charles M.K. Loopstra, Q.C.

In a recent decision, 2011 ONCA 812 (Ont. C.A. Dec. 21, 2011), the Ontario Court of Appeal has, in a way, clarified the application of Ontario's Minimum Maintenance Standards (MMS) as a statutory defence to actions based on the "non-repair" of a roadway. At the same time, it has created a new hope for plaintiffs' lawyers and significantly weakened the statutory defences available under the MMS regulations.

The appeal resulted from a finding by the trial judge that the municipality was liable to the plaintiff for having failed to keep a roadway free and clear of ice and snow, thereby creating an unreasonable risk of harm to roadway users. This finding was made notwithstanding that the accumulation of snow was two cm at the time of the accident, less than the accumulation specified to trigger the level of service contemplated by s. 4 of the MMS (then O. Reg. 239/02), which required clearing snow within six hours if the accumulation was greater than five cm. The trial judge also held that s. 5 of the MMS did not apply (this required a municipality to treat icy roadways as soon as practicable[1] and within four hours of becoming aware of the icy conditions) because the icy conditions were not caused by freezing rain or ice pellets but by the compaction of the snow by vehicular traffic. Accordingly, the municipality could not rely on the MMS as a defence.

In order to appreciate the impact of the trial and appeal decisions, it is important to note the following facts were not in dispute: snow had fallen to a depth of about two cm over a three-hour period prior to the accident, without any winter maintenance having been performed; proper monitoring of weather forecasts would have enabled an earlier response, by salting the roadway to prevent a buildup of ice and the resulting icy conditions; the municipality failed to inspect the roadway when it ought to have known an inspection was necessary to trigger remedial steps; and the municipality had ample opportunity to schedule a crew to monitor and maintain the roadway.

The Court of Appeal, in a unanimous decision, held:

- s. 44(1) of the *Municipal Act, 2001* only required a municipality to keep the road in a state of repair that was reasonable in the circumstances;
- statutory liability under ss. 44(2), for failing to keep a roadway in a reasonable state of repair, attached to a *specific default*;
- a municipality could avoid liability if it could avail itself of any one of the three defences in ss. 44(3);
- a municipality was not liable for negligently failing to maintain a highway if it complied with the minimum standards that applied to its failure;
- the MMS did not cover all circumstances that could arise in the maintenance of roadways;
- s. 4 of the MMS did not apply to the circumstances of this case because the accumulation was less than five cm, and there was no minimum standard for clearing snow on a class 2 highway (the road at issue) when the accumulated snow was less than five cm;
- s. 5 of the MMS created a minimum standard for icy roadways "after becoming aware that the roadway [was] icy," and the icy condition was not restricted to a cause such as freezing rain or ice pellets, but could include snow having been compacted into ice;
- s. 5 addressed icy roadways after the road had become icy and not before; therefore, it did not address a municipal response to the *anticipation* of icy conditions; and
- the municipality's default in this case was its failure to monitor the weather and deploy resources "so as to avoid the formation of ice," and was not a failure to treat the roadway after becoming aware that it was icy.

Implications

On whether the MMS regulation can still be relied on as an objective standard for municipal levels of service, the simple answer is no. Although it was intended to state the minimum levels of service for municipal highways (depending on the classification of the roadway), it cannot be relied on as a municipal standard for *all* levels of service. The first and most obvious reason why is that it does not cover all circumstances and, as such, offers no defence if a reasonable state of repair is not maintained in situations not covered by the MMS. What was clearly not anticipated was the restrictive manner in which the MMS would be interpreted.

Based on *Giuliani*, it is clear that a municipality cannot rely on the minimum depth standard for snow clearing. It is common knowledge that a minimum amount of snow accumulation on a well-travelled roadway will result in icy conditions in most circumstances. The court has now clearly stated that a municipality has a duty to *prevent* the icy condition if it could be reasonably anticipated. The practical result may well be that municipalities will be required to apply preventative salt and sanding on all roads in anticipation of any forecasted snowfall. This is simply an unreasonable standard and guts the intention of the MMS for practical purposes.

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I have also been advised by municipal operations managers that, in cold windy conditions, it is not advisable to salt a roadway when some snow accumulation will occur due to blowing snow or drifting, since this will actually *create* an icy condition. In such circumstances, based on *Giuliani*, the municipality will have to present evidence that preventative measures were not appropriate and that it did not fail in its duty under s. 44(1), *Municipal Act, 2001*. Unfortunately, the MMS were intended to prevent this very fact-driven type of litigation, and the Court of Appeal has, in effect, encouraged this kind of litigation again given the narrowness of its ruling on the applicability of the MMS.

Does a municipality owe a higher duty of care when it adopts a higher level of service (LOS) than what is prescribed by the MMS? The simple answer is maybe. Strictly speaking, adopting a higher LOS than prescribed does not negate the defences available under s. 44(3) of the *Municipal Act, 2001* and the MMS. However, it is now clear that the alleged default must fall squarely within the saving provision of the MMS. If the municipality adopts a certain maintenance policy and then negligently carries it out, it may be held liable: if the LOS requires the application of a certain mixture to prevent icing, and the road crew uses an improper mixture that *causes* the accident, there may be liability. Thus, the wording of the policy is crucial in determining whether there is a negligent breach. If the municipality adopts standards that exceed the MMS, it would be wise to use words such as "it is the objective of the municipality to attempt to achieve the following LOS," and "due to practical considerations, such levels of service may not be achievable in all circumstances." (The LOS should, at a minimum, meet the requirements of the MMS.)

In view of *Giuliani*, municipalities also are well advised to create LOS with respect to those matters that are now identified as not being covered by the MMS, such as preventative measures to prevent icing. It may be that, due to budgetary and manpower constraints, a policy that only addresses potential icing *after* the commencement of a snowstorm would be considered reasonable in the circumstances. The main lesson from *Giuliani* is that the defendant municipality did nothing to address the icing until the icy condition actually existed.

Many municipalities adopt LOS policies because they contract out certain services, like winter maintenance. In most cases, if the LOS are not maintained by the contractor and liability results, the liability passes to the contractor by means of insurance and indemnification clauses. One issue that has arisen is whether the LOS dictated by contract, to a third-party contractor, creates a higher duty of care to users of the roadway. In *Giuliani*, the Regional Municipality of Halton had contracted out winter maintenance to the Town of Milton for all roads under Regional jurisdiction; Milton was the Region's contractor and was required to indemnify the Region for any liability resulting from the negligent winter patrolling and maintenance of the road in question. In the trial decision, Justice Murray stated:

> The law does not impose a higher standard of care on the contractor, ...the Town of Milton, than on the Regional Municipality. Even if the provisions of the [LOS] agreement...imposed higher standards for road maintenance than do the relevant provisions of the *Municipal Act*, the Town will not be liable to users of the highway by virtue of breach of contract with the Regional Municipality.[2]

Conclusion

Municipalities should now be on guard against simply relying on the MMS for winter patrolling and maintenance, as the courts have sent a strong message that they will find liability when the municipality, given reasonable diligence, could have prevented the unsafe condition, even if it did comply with the MMS, when the cause of the accident is based on a default not covered by the MMS. The courts have also given a narrow interpretation to the application of the MMS in determining what constitutes a default. Municipalities should be seeking amendments to the underlying legislation, as well as the MMS regulations, to ensure that the prescribed LOS in the MMS are all-encompassing and do not create hybrid situations which eviscerate the very reason underlying the enactment of the MMS.

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Notes

1. The reference to deploying forces to treat icy roadways "as soon as practicable after becoming aware that the roadway is icy" was repealed by Ont.Reg.23/2010. The former section was still in effect for *Giuliani*, but the Court of Appeal noted the amendment made no difference to the result.
2. 2010 ONSC 4630 at para. 174. **ML**

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Under TRFRA, the court applied a four-part test of (1) whether the government's regulation burdened the plaintiffs' free exercise of religion; (2) whether the burden was substantial; (3) whether the regulations furthered a compelling governmental interest; and (4) whether the regulations were the least restrictive means of furthering that interest. The court found sufficient evidence existed from which a jury could conclude the ordinance substantially burdened the plaintiffs' free exercise of religion, as it hampered their ability to spontaneously share food with homeless people, and to actively seek them out in hard to reach, unpredictable, and ever-changing locations. The case is *Big Hart Ministries Ass'n v. City of Dallas*, No. 3:07-CV-0216-P, 2011 U.S. Dist. LEXIS 128443 (N.D. Tex. Nov. 04, 2011).

Fast Food Outlets Ban

The Village Code of the Village of Victor prohibited what it defined as "Formula Fast-Food Restaurants" (FFFRs) in the Central Business District, on the basis that the ban helped to maintain the unique village character and vitality of the commercial district. FFFRs were defined as facilities with: standardized menus, ingredients, food preparation and/or uniforms; prepared food in a "ready to consume" state; food that was selected from a limited menu, sold for immediate consumption on or off premises, and sold over the counter in disposable

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containers and wrappers; and where the customer paid before eating. The plaintiff company bought property in the Village that was subject to the ban. One of its potential tenants was a national chain sandwich shop. The company sought to invalidate the ban on the basis that the prohibition of FFFRs was based solely upon ownership and was unlawful, unconstitutional and void, premised on the fundamental rule that zoning dealt with land use and not with the person who owned or occupied the land. The ban, it alleged, was based on the nature or identity of the owner or operator, and not upon the land use itself. The court disagreed: the FFFR ban was not based "simply upon who owns or operates the restaurant. The challenged Code is not 'plainly personal' and does not seek to regulate a specific entity," but was a neutral rule that applied to the entire business district, and addressed conduct that affected the character of the community. *Mead Sq. Commons, LLC v. Village of Victor*, 930 N.Y.S.2d 431, 2011 N.Y. Misc. LEXIS 4630 (N.Y. Sup. Ct. 2011). ML

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immunities secured by the Constitution and laws...") (emphasis added). What I, among others, have been awaiting is the right set of facts to determine if a city also can be an injured "other person within the jurisdiction" of the United States for the purpose of being a civil rights plaintiff. In *South Macomb Disposal Authority v. Washington Tp.*, 790 F.2d 500, 503 (6th Cir. 1986), the Sixth Circuit confronted this situation and opined:

> We are of the opinion that in light of *Monell*, it would be a strained analysis to hold, as a matter of statutory construction, that a municipal corporation was a "person" within one clause of section 1983, but not a "person" within another clause of the same statute. Rather, we believe the outcome in this case is dictated by a different body of law, which analyzes whether the appellant, as a municipal corporation, may assert constitutional claims against its creating state, or political subdivisions thereof, and, if so, in what context may it assert such claims. *See, e.g.*, Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301, 1308 (5th Cir.) (per curiam), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980).

In a footnote, the court added that, in *Moor v. County of Alameda*, 411 U.S. 693 (1973), the Supreme Court stated that section 1983 was enacted to provide a new remedy to "private parties," although the Fifth Circuit had concluded that a municipal corporation was not such a "private party" entitled to section 1983 relief. However, after *Monell*, the Sixth Circuit concluded that whether a municipal corporation was or was not a "private party" did not necessarily pose the correct question, and declined to focus on that inquiry. The court resolved the *South Macomb* case on the constitutional grounds that one political subdivision of a state lacked standing to challenge the constitutionality of the acts of another political subdivision of the same state. 790 F.2d at 505. But what if a city sued a business corporation or individual acting under color of state law for a violation of the city's federal constitutional or statutory rights? An aside: What is a "private party" in the sense used by the *South Macomb* court? Is a publicly-traded business corporation a "private party"? What about a city official or employee?

5. *See, e.g.*, Fed. R. Civ. P. 1 (rules "should be construed and administered to secure the just, speedy, and inexpensive determination").

6. Of course, business corporations, unlike municipal corporations, are often considered "persons" for Bill of Rights purposes. The way that corporations sidled their way into constitutional personhood is a pretty frightening tale, but not my subject today. *See* Katie J. Thoennes, *Frankenstein Incorporated: The Rise of Corporate Power and Personhood in the United States*, 28 HAMLINE L. REV. 203 (2005), particularly the discussion of *Santa Clara Cnty. v. Southern Pac. RR Co.*, 118 U.S. 394 (1886), in *Frankenstein* at 209 *et seq.* No discussion on this general topic would be complete without mention of *Citizens United v. Fed. Election Com'n*, 130 S. Ct. 876 (2010). Consider it mentioned.

7. *See, e.g.*, Texas Workers' Comp. Com'n v. City of Bridge City, 900 S.W.2d 411, 414 (Tex. App.-Austin 1995, writ denied).

8. The U.S. Supreme Court articulated the doctrine as follows:

> [T]hat whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.

Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244–45 (1933) (quoting John Norton Pomeroy, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 397 (4TH ED. 1918)).

9. *See* T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L. J. 63, 65 (2010-2011). ML

Code Enforcement

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Because human nature is what it is, you may run into situations where you first believe the individual is a particular type, only to find out later he is completely different. In light of that, I believe one of the most beneficial ordinance provisions is one that allows a city to correct violations and charge the costs to the responsible person if he can't (or won't) correct them. Although it's a difficult proposition to spend tax dollars to clean up or otherwise correct violations on private property, the alternative—letting the problem continue or get worse—is not very appealing, and you'll likely have elected officials and neighbors pounding down your door to get the problem corrected.

Good luck in your battles. ML