



Claim Case Studies & Legislation: Crack in the Road Holmes v. Kingston (City), 2009, (ON SC)

Facts

A young woman was writing one of her final exams. Her mother agreed to come and pick her up. Shortly after 10:00 pm, the young woman exited the campus and saw her mother waving at her from across the street. Instead of walking to the crosswalk, she looked both ways and proceeded to cross the road directly across from where her mother was parked. The girl did not notice the crack in the road until her shoe got caught and wedged in the crack, causing her to fall and break her foot.

Issue

Is the Municipality liable for the young woman's injuries for failing to maintain the road for a pedestrian?

Legislation

Section 44 of the *Municipal Act*, 2001, RSO 2001, c.25 states:

"44 (1) The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge.

Liability

(2) A municipality that defaults in complying with subsection (1) is, subject to the *Negligence Act*, liable for all damages any person sustains because of the default.

Defence

(3) Despite subsection (2), a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if, (a) it did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge; (b) it took reasonable steps to prevent the default from arising; or (c) at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway or bridge and to the alleged default and those standards have been met.

Regulations

(4) The Minister of Transportation may make regulations establishing minimum standards of repair for highways and bridges or any class of them".

The Municipality relied on the Minimum Maintenance Standards for Municipal Highways, Ontario Regulation 239/02. Section 8 of the regulation reads:

"8. (1) If a crack on the paved surface of a roadway is greater than 5cm wide and 5cm deep for a continuous distance of three metres or more, the standard is to repair the crack within the time set out in the Table to this section after becoming aware of the fact. (2) A crack is deemed to be in a state of repair if its width or depth is less than or equal to 5cm."

Findings

In this case, the crack fell below the 5cm width and depth set out in the regulation. The Municipality therefore claimed that the crack was 'deemed to be repaired'.

The woman submitted that although the road was safe for vehicles, pursuant to these regulations, a different standard for maintenance should apply when the Municipality knew there was an increased volume of pedestrian traffic using the road.

There was a crosswalk further down the street, but students routinely ignored the crosswalk and crossed the street wherever it was convenient for them. The woman maintained that the Municipality knew this was happening and should have repaired the crack in the road.

Court's Ruling

Based on the facts and the evidence presented, the Court found that the Municipality was not negligent in meeting its statutory duty under the *Municipal Act*. The roadway was intended for vehicular traffic and was in a reasonable state of repair for its intended purpose. The judge stated that "roads are primarily intended for motor vehicle traffic, and pedestrians cannot reasonably expect them to be in a perfectly flat and level condition at all times and locations". He goes on to say "a municipality is not obliged to maintain roadways as if they were primarily used for pedestrian traffic, except in the confines of established crosswalks. Pedestrians who choose to convenience themselves by crossing a roadway primarily designed for motor vehicle traffic, excluding highly unusual circumstances, must take the roadway as they find it."

Lessons Learned

Accidents that result in injury or property damage are unfortunate occurrences, but they do not necessarily mean that a municipality is negligent or liable for damages. Each incident will be assessed by the court on its own merits.

Municipal staff and elected officials should be reminded that at the time of a claim they should adhere to the following recommended protocol:

1. Listen and document the conversation.
2. Offer empathy, not monetary restitution.
3. Do not admit fault.
4. Let the claimant know that you will report the incident to the appropriate party within the municipality and proceed with a thorough investigation.
5. If contacted by the media, inform them that the
6. If appropriate, instruct the claimant to report the incident to their insurer.
7. Refrain from commenting on the incident to avoid prejudicing the insurer and/or breaching any privacy laws.

For more information on what to do at time of claim, see our article [Risk Management Considerations for When a Claim Occurs](#).