



Winter Sidewalk Maintenance

Definitions

“highway” includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof;

“negligence” is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.

“roadway” means the part of the highway that is improved, designed or ordinarily used for vehicular traffic, but does not include the shoulder, and, where a highway includes two or more separate roadways, the term “roadway” refers to any one roadway separately and not to all of the roadways collectively;

“sidewalk” means the part of the highway specifically set aside or commonly understood to be for pedestrian use, typically consisting of a paved surface but does not include crosswalks, medians, boulevards, shoulders or any part of the sidewalk where cleared snow has been deposited.

“winter event” means a weather condition affecting sidewalks such as snowfall, wind blown snow, sleet, freezing rain, frost, black ice, etcetera to which a winter event response is required.

1.0 Duty of Care

A municipality has a duty to keep their sidewalks in reasonably safe conditions for pedestrians who are using

ordinary care. Therefore, a municipality is required to take steps to respond to snow accumulation and slippery conditions on its sidewalks. A duty of care is found in section 44 of the *Municipal Act*, 2001. c 25. Section 44(1) states that “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”. A reference for sidewalk winter maintenance is included in section 44(9) which states: “Except in case of gross negligence, a municipality is not liable for a personal injury caused by snow or ice on a sidewalk”. Gross negligence is not defined in the *Negligence Act*, but in *Holland v. City of Toronto*, Anglin, C.J.C., states that “the term “gross negligence” in this statute is not susceptible of definition. Nor a priori [reasoned] standard can be set up for determining when negligence should be deemed “very great negligence” — a paraphrase suggested in *City of Kingston v. Drennan*, which for lack of anything better has been generally accepted. 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 — these elements must vary in infinite degree; and they seem to be important, if not vital, factors in determining whether the fault (if any) attributable to the municipal corporation is so much more than merely ordinary neglect that it should be held to be very great, or gross negligence”.

2.0 Standard of Care

The 2018 amendment to Ontario Regulation 239/02 Minimum Maintenance Standards for Municipal Highways (MMS) added a standard of care for municipal sidewalks. Snow Accumulation on Sidewalks included in section 16.3(1) sets out a standard to reduce the snow to a depth less than or equal to 8 centimetres within 48 hours and to provide a minimum sidewalk width of 1 metre. For Ice Formation or Icy Sidewalks the standard in section 16.5(1) is to monitor the weather in accordance with section 3.1, of the MMS, in the 24-hour period preceding an alleged formation of ice on a sidewalk and treat the sidewalk, if practicable, to prevent ice formation or improve traction within 48 hours if the municipality determines that there is a substantial probability of ice forming on a sidewalk, starting from the time that the municipality determines is the appropriate time to deploy resources for that purpose. If a municipality, via their documentation of the winter event, can demonstrate that they have met the standard of care as set out in Section 16 of the MMS, it would be difficult for a plaintiff's lawyer to imply that the municipality was gross negligent under Section 44(9) of the *Municipal Act*.

3.0 MMS or Level of Service (LOS)

If a municipality can not meet the MMS, for whatever reason, a municipality should set a reasonable level of service for sidewalk winter maintenance. For example, a municipality may choose to provide a level of service on sidewalks that continues their pre-2018 MMS amendment practice but is less than what is set out in the MMS. If a slip and fall were to occur and the municipality provides sidewalk winter maintenance service that meets their level of service (even though the service is less than MMS) and has documentation that proves they have done so, in a claim, a judge should consider, among other things, a person's familiarity with the sidewalk and whether the level of service provided was reasonable in the circumstance.

Remember, documentation is crucial for defending a claim and there are many methods available to record the sidewalk patrol observations and maintenance accomplishments which may be a manual recording of the patrol and work accomplished using your own paper documentation or the Intact Public Entities Winter Patrol document or one of many patrol and work order management APP's.

4.0 Closing Sidewalks in Winter

A municipality may choose to close some or all sidewalks in winter. For some this has been past practice, for others if you are considering closing sidewalks in winter, Intact Public Entities has posted a document on the Risk Management Centre of Excellence titled Winter Closure of Sidewalks and Bicycle Lanes please review if you are considering this option.

5.0 Achieving MMS or LOS

5.1 Winter Sidewalk Patrol

In a LOS policy the requirements for winter patrol of sidewalks should be set out. Section 16.7 of the MMS will be the standard a judge will use to determine if the patrol is reasonable. MMS requires the patrol of sidewalks that the municipality selects as representative of its sidewalks at intervals deemed necessary by the municipality. In section 3(2) a patrol of representative highways is required should conditions warrant a patrol. Therefore, a patrol of representative sidewalks can be combined with a patrol of representative roadways and both can be inspected simultaneously for snow accumulation and/or ice.

Patrolling a sidewalk in accordance with 16.7(2), "consists of visually observing the sidewalk, either by driving by the sidewalk on the adjacent roadway or by driving or walking on the sidewalk or by electronically monitoring the sidewalk". Patrolling a sidewalk that is monolithic with the curb can be accomplished by driving by the sidewalk. Sidewalks which are separated from the curb with a boulevard area the condition of the surface of the sidewalk may not be visible from the patrol vehicle and may require the patrol person to exit the vehicle and walk upon a portion of the sidewalk to verify the condition of the sidewalk.

5.2 Winter Sidewalk Maintenance Priorities

MMS does not contain a classification table for sidewalks. It will be a municipal decision as to the priorities for clearing snow accumulation or treating ice on sidewalks. Whether complying with MMS or LOS, a municipality could set sidewalk priorities based on the road classification, that is a sidewalk on a Class 1 road before a sidewalk on a Class 2 road and Class 2 before Class 3 and so on. As an alternative, priorities could be determined based on the location of the sidewalk. For example, sidewalks in the downtown core may have priority over sidewalks in industrial areas, which has priority over commercial or residential areas.

Whether using the MMS road classification or location to set priorities, either one is only part of what is needed to set winter sidewalk maintenance priorities. Within each road classification or each of the locations mentioned above, there are generators of pedestrian traffic which includes sidewalks people use to walk to school, a hospital, a community centre, a retirement home, etc. All the above should be considered when planning sidewalk plowing and salting/sanding routes.

If a municipality requires abutting property owners to maintain municipal sidewalks in winter, a bylaw should set out the timeframe to remove snow accumulation or treat ice and include penalties for non-compliance. A bylaw enforcement officer will be required to inspect the sidewalk after each winter event and confirm compliance with the bylaw or issue a fine for non-compliance. In preparing the bylaw a municipality should consider if exemptions will be made for seniors and persons with disabilities and determine how those segments of sidewalk will be maintained.