# What's Old Is New Again: Ontario Court Of Appeal Affirms First Principles In Roadway Liability

**May 16, 2017**

*Lloyd v Bush*, 2017 ONCA 252

A recent decision by the Ontario Court of Appeal has underscored the "reasonableness" standard set by the *Municipal Act, 2001,* S.O. 2001, c. 25, in assessing a road authority's winter maintenance of its highways. The Act requires municipalities to keep its roadways in a "state of repair that is reasonable in the circumstances", including the character and location of the roadway. The Act states that a municipality is not liable for failing to keep a roadway in a state of repair if it took reasonable steps to prevent the condition of non-repair from arising.

This case arose from a head-on motor vehicle collision between a car and propane truck, which left the plaintiff with significant injuries. The collision occurred at approximately 10:30 a.m. on the morning of January 3, 2003, on a curved portion of a country road outside of Napanee, Ontario. It had been snowing in the hours leading up to the accident, and the road conditions were said to be snow covered and slippery.

The trial judge found that that the roadway was in a state of non-repair because it was not center-bare during the snow event and that the municipality had failed to show that it undertook reasonable efforts to address the condition of non-repair, despite exceeding the municipality's by-law in this regard. The trial judge further found that the municipality's practice of applying a 3:1 sand/salt mixture to the roadway was not appropriate in the circumstances and that straight salt should have been applied.

The Court of Appeal ordered a new trial on the issue of liability. In doing so, the Court of Appeal highlighted the obligations and defences outlined in the Act and reiterated the four-step analysis that is to be applied when a claim is made against a municipality for roadway non-repair:

1. The plaintiff must prove the existence of a condition of non-repair, that is, a hazard that poses an unreasonable risk of harm to non-negligent users of the road, considering the “character and location” of the road.

2. The plaintiff must prove that the condition of non-repair caused the loss in question.
3. The municipality bears the onus of proving that one of the three defences outlined in the Act applies, which includes the defence that the municipality took reasonable steps to prevent the condition of non-repair from arising.
4. The municipality bears the onus of proving any contributory negligence on the part of the plaintiff.

The Court of Appeal reiterated that difficult winter conditions exist in Canada, and that a municipality is not to be treated as an insurer of the safety of users of its roads by imposing overly onerous maintenance obligations.

The Court of Appeal took issue with the trial judge's finding that a condition of non-repair existed on the morning of January 3, 2003, reminding that a court must analyze all of the surrounding circumstances when considering whether a road is in a state of non-repair. Furthermore, a lower standard will apply with respect to the state of repair on low-traffic rural roadways (such as was in issue in this case), than on higher-traffic thoroughfares or highways. By their very nature, rural roads are susceptible to the development of adverse conditions and drivers have to adjust to these conditions. The Court of Appeal found that no such analysis was carried out by the trial judge.

The Court of Appeal also set aside the trial judge's finding that the municipality did not take reasonable steps to prevent the state of non-repair from arising. The trial judge focused on what, in theory, the municipality could have done in order to prevent or correct the state of non-repair before the accident occurred, rather than on the reasonableness of the municipality's response. The fact that the municipality's actions did not achieve center-bare pavement or non-slippery conditions before the collision was not determinative of whether the municipality acted reasonably; rather, the focus ought to be on the evidence related to the municipality's response to the snow event. The resources of the municipality and the cost of the proposed measures can be relevant considerations in determining whether the municipality acted reasonably. The trial judge's failure to admit evidence of the financial impact that applying straight salt would have had on the municipality was found to constitute a reversible error.

The decision of the Court of Appeal reminds parties that the Act does not create a regime of absolute liability. The actions taken by a municipality need only be within the range of what is reasonable in the circumstances, considering the character and location of the roadway.

By

Laura M. Day, George R. Wray

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## BLG Offices


**Calgary**

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

**Ottawa**

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

**Vancouver**

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

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1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

**Toronto**

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749



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