Court of Appeal reverses course on “untravelled portion of a highway”

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On Nov. 7, 2025, the Court of Appeal for Ontario released its decision in *Bello v Hamilton (City)*, 2025 ONCA 758, reversing a lower court decision that had granted summary judgment in favour of the defendant municipality based on a statutory provision in the *Municipal Act* addressing the “untravelled portion of a highway.” In doing so, the Court of Appeal refined prior jurisprudence interpreting this section and narrowed its use going forward.

Background

The action arose out of a tragic cycling accident that occurred on Aug. 4, 2019. The plaintiff was cycling as part of a group on an “off-road path” adjacent to Stone Church Road East in Hamilton, when he rode into a culvert, broke his neck, and was rendered a tetraplegic. He subsequently commenced a claim in negligence as against the City of Hamilton. The City moved for summary judgment on the basis that the action was statute-barred by virtue of s. 44(8) of the *Municipal Act*, which provides that no claim for damages shall be brought against a municipality in respect of an accident occurring on an “untravelled portion of a highway.”

The motion decision

The motion judge granted the City’s summary judgment motion, relying heavily on the fact that there was a paved bicycle path on Stone Church Road, adjacent to the off-road path, which the plaintiff could have used instead. The motion judge cited the Divisional Court’s decision in *McHardy v Ball*, 2013 ONSC 6564 for the proposition that a key consideration under s. 44(8) was whether the use of the off-road path by members of the public was reasonably foreseeable to the City. Given that the City had constructed a designated bicycle path nearby, she concluded that it was not.

The motion judge also discounted the evidence of an affiant who swore that he had seen pedestrians and cyclists frequently using the off-road path, since it was unclear whether this evidence referred to the period before or after the paved bicycle path was installed on the roadway.

The appellate decision

The plaintiff appealed, arguing that the motion judge had misinterpreted s. 44(8) of the *Municipal Act* in dismissing his action. The Court, reviewing the decision on a standard of correctness, granted the appeal and restored the action to the trial list.

In reviewing the historical caselaw on s. 44(8) and its predecessors, the Court reiterated that s. 44(8) will not apply where the area in question is intended by the municipality to be used for ordinary and normal travel or if the public commonly and habitually used that portion for ordinary and normal travel. This two-part test applies whether the area is designed for or used by vehicles, pedestrians, cyclists or any other members of the public. The Court went on to find that the Divisional Court in *McHardy* had erred in suggesting that if it is not reasonably foreseeable to a municipality that members of the public will use a certain portion of a highway, it is necessarily "untravelled" within the meaning of s. 44(8).

Accordingly, the Court concluded that the motion judge asked the wrong question as to whether it was reasonably foreseeable to the City that cyclists would use the off-road path rather than the nearby bicycle lane, instead of whether members of the public did in fact "commonly and habitually" use the off-road path, foreseeable or not. In that regard, the Court rejected as "speculative" the motion judge's discounting of the affidavit evidence as to frequent use of the path due to the ambiguity surrounding the dates at issue. The Court also noted the Plaintiff's uncontradicted evidence that he chose to use the off-road path not because it was more scenic or exciting, but because he thought it safer than using a bicycle lane that was closer to vehicular traffic.

Finally, the Court emphasized that a finding that s. 44(8) does not apply will not necessarily render a municipality liable. A municipality may still argue that the subject portion of highway was in a state of repair reasonable in the circumstances, which analysis may be informed by whether or not the municipality intended it for public use or improved it for that purpose. Further, a municipality may also rely on the statutory defences enumerated under the *Municipal Act*.

Commentary

This decision reiterates the high threshold to defeat a claim based on s. 44(8) of the *Municipal Act*. The provision may still apply in certain circumstances, but its use has been narrowed considerably, as a municipality will need to prove that the area in question not only was not intended for public use, but was not, in fact, "commonly and habitually" used by members of the public.

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