Municipal statutory defences remain alive and well: Hamilton-Dawkins v Town of Ajax

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The Ontario Superior Court of Justice recently released a decision in *Hamilton-Dawkins v Ajax*. This claim involved a trip and fall over a municipal sidewalk in the Town of Ajax (the Town) due to a surface discontinuity. It was uncontroverted at trial that the sidewalk surface discontinuity constituted a state of non-repair and caused the plaintiff's injuries. Damages were also agreed upon.

The only issue to be decided at trial was whether the Town could rely on the statutory defences afforded to municipalities in section 44(3) of the *Municipal Act* (which are replicated in the *City of Toronto Act*). Ultimately, the court held that the defence under section 44(3)(a), the reasonable knowledge defence, applied and dismissed the plaintiff's claim on this basis.

The accident

On May 9, 2011, the plaintiff was walking on the sidewalk in the Town, when she tripped and fell due to a surface discontinuity in front of 38 Clements Road East. The plaintiff and her husband called the City on May 12 or 13, 2011, to report the accident (incorrectly stated as "2022" in the decision). The plaintiff also filled out an accident form for the Town on May 13, 2012.

The plaintiff drove by the loss location with her husband one day after her fall and noticed there was neon painting by the area of her fall. She subsequently returned to the loss location about one week later to take a photograph and saw that the sidewalk bay and slab had been completely replaced.

Evidence of the Town

The Town's witness testified that the Town inspected its sidewalks once per year between May and August. During these inspections, students would patrol the sidewalks and mark on a GPS device any issues, including cracked panels and surface discontinuities. Any height discrepancy of 19mm or more was marked with orange paint and forwarded for repair.

The sidewalk at issue was inspected a year before the accident on May 27, 2010. No height discrepancy over 19mm was noted. There was some cracking, but it did not meet the standard for repair. Following the plaintiff's report of her accident, the Town repaired the sidewalk within one week.

Court's decision

The court began by reiterating the four-step test for analyzing the statutory cause of action against a municipality: (i) non-repair, (ii) causation, (iii) statutory defences; and (iv) contributory negligence.

As the Town had conceded the first two steps, the court turned to the Town's statutory defences under section 44(3) of the *Municipal Act*: (a) the reasonable knowledge defence, (b) the reasonable steps defence, and (c) the minimum standards defence. The court re-iterated that the Town need only establish, on the balance of probabilities, that one of the defences applies to avoid liability.

The Town argued that the prevailing caselaw established that a court has to determine whether or not the municipality knew or ought to have known of the *specific condition* which justified a finding there was a failure to keep the highway in a reasonable state of repair.

The court however noted that caution had to be taken that a municipality should not readily benefit from its own failure to document or circulate complaints properly and noted that, at the time of the trip and fall, the Town knew there was a concern with the sidewalk (the crack noted on the sidewalk patrols).

Ultimately however, the court found that there was no evidence the Town knew or could have known of the surface discontinuity that caused the plaintiff's fall or that the Town did not follow their own policy of inspection and repair. The court therefore held that the Town had established the first defence in section 44(3)(a) of the *Municipal Act* and dismissed the claim on this basis, noting that there was no need to conduct an analysis of the defences found in 44(3)(b) and 44(3)(c).

Key takeaways

Statutory Defences remain Alive and Well

Municipalities should continue to plead and rely on the statutory defences in the *Municipal Act* as this case emphasizes that the courts seriously consider these defences and continue to recognize that each establishes a full and complete defence to a claim against a municipality.

Continue to Ensure Compliance with Inspections

In this case, the Town's evidence of its sidewalk walkover inspections completed just less than a year prior to the accident was key to showing the court that the Town complied with its required inspections and was unaware of any issue with this area prior to the accident.

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