Ontario municipality has trip and fall claim dismissed due to late notice and lack of duty of care

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In the recent decision of *Marderosian v. City of Niagara Falls*, 2024 ONSC 1043, the defendant municipality had the claim dismissed based on sections 44(8) and (10) of the *Municipal Act*, confirming that municipalities owe no duty of care for property maintained by private homeowners, even when technically located on a municipality's road allowance.

Background

The plaintiff was walking her dog and encountered a crowd of people waiting for a bus and blocking the sidewalk. The plaintiff stepped off the sidewalk and onto the snow-covered front lawn of the adjacent property. She tripped over a tree root and fell. It was unclear whether the tree was located within the city's road allowance or on private property. From the view of a bystander, the tree would appear to be on the adjacent property owner's front lawn.

Decision

Lack of notice

The plaintiff provided a notice to the city more than 70 days after her fall.

Section 44(10) of the *Municipal Act* requires that an individual who intends to make a claim against a municipality on an alleged disrepair of a highway provide written notice of the claim within 10 days of the occurrence of the injury.

Under section 44(12) of the *Municipal Act*, failure to give notice is not a bar to the action if a judge finds that:

- there is a reasonable excuse for the want of the notice; and
- the municipality is not prejudiced in its defence.

The plaintiff bears the legal burden of satisfying both elements.

In this case, the plaintiff was unaware of the 10-day notice requirement. As well, she offered the following additional explanations for failing to give notice within the 10-day period:

- She was solely focused on trying to heal her injuries.
- She was "stuck at home" and had little mobility.
- She attended physiotherapy several times, hoping she would overcome her injuries.
- She visited her doctor several times and realized that her condition was not improving.
- Until the date she retained her lawyer, she believed that her injuries would improve and that pursuing a claim would not be necessary.

The court concluded that the plaintiff failed to provide any reasonable excuse for her failure to provide the city with notice of her fall.

The court recognized that an examination of the sidewalk may not have been fruitful even if notice had been given within a few days after the fall, as changing weather conditions may have taken place. Nevertheless, the court found that the delay in receiving notice deprived the city of the opportunity to investigate the incident by examining the sidewalk conditions, interviewing witnesses and making inquiries, all of which caused significant prejudice. The plaintiff argued that the city was not prejudiced in its defence, as it did not provide any evidence to that end. The court accepted the city's submissions that prejudice was presumed and that the onus was on the plaintiff to disprove or rebut the presumption of prejudice.

No duty of care

The court accepted the city's submission that regardless of whether the fall occurred on private property or on property occupied and maintained by private homeowners and located on the city-owned road allowance, there was no duty owed by the city under the *Municipal Act*.

Section 44(8) of the *Municipal Act* states that no action shall be brought against a municipality for damages caused by "any construction, obstruction or erection, or any siting or arrangement of any earth, rock, tree or other material or object adjacent to or on any untravelled portion of a highway."

Citing previous decisions, the court reiterated that "there is no obligation, statutory or otherwise, on the City to maintain the road allowance where the plaintiff fell, if, indeed, she did fall on the City-owned road allowance."

Takeaway

This decision provides some guidance as to what may or may not constitute a "reasonable excuse" under section 44(12) of the *Municipal Act*. As well, the decision confirms that there is no duty owed by municipalities for failure to maintain areas

occupied and maintained by private homeowners, even if the area is located within the municipality's road allowance.

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