

**PROVING LIABILITY IN SLIP AND FALL
CASES**

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INTRODUCTION

A new client comes to your office and advises that he or she recently slipped and fell, sustaining injuries in the process.² You gather information about the client and the circumstances of the accident, and quickly determine that the injuries are fairly serious – they are readily identifiable, and you are confident that the medical documentation will provide objective evidence of the injuries. After speaking with the client at length, you conclude that their claim has merit from a damages perspective, **but you have some lingering concerns about how you are going to prove liability.**

At first glance, slip and fall cases may seem easier to handle for personal injury lawyers than motor vehicle accident cases. For example, there is no statutory threshold or deductible with which to deal, there is no parallel claim for statutory accident benefits to open and manage, and there are fewer requirements to be met under the *Insurance Act*³. However, slip and fall cases can present certain challenges, particularly when it comes to proving liability. This will paper will outline some of the considerations plaintiffs' counsel (and defence counsel) should think about concerning liability in slip and fall cases. It will also briefly highlight how the Ontario Courts have recently treated the issue of liability in slip and fall cases.

¹ I would like to thank Steven Venhuizen, Student-at-Law, for his assistance in the research and drafting of this paper.

² In this paper, unless otherwise indicated, the phrases 'slip and fall' and 'trip and fall' will be used interchangeably.

³ R.S.O. 1990, c. I.8.

Preliminary Considerations

Before turning to the issue of proving liability, it is important to make a few brief comments on two preliminary matters, namely limitation periods and OHIP's subrogated claim.

Limitation Periods

The standard 2-year limitation period applies in slip and fall cases where the potential defendant is not a government body, assuming the accident giving rise to the injury occurred after the changes to the *Limitations Act, 2002*,⁴ which came into effect January 1, 2004. If the accident occurred prior to January 1, 2004, the transitional rules apply. In cases involving a municipality or the Crown, a critical requirement is written notice of the accident which must be served within 10 days of the accident. S. 44 (10) of the *Municipal Act, 2001*⁵ provides that “[n]o action shall be brought for the recovery of damages under subsection (2) unless, within 10 days after the occurrence of the injury, written notice of the claim and of the injury complained of has been served upon or sent by registered mail to, (a) the clerk of the municipality; or (b) if the claim is against two or more municipalities jointly responsible for the repair of the highway or bridge, the clerk of each of the municipalities.”

The *Municipal Act, 2001* also provides two exceptions to the general rule that failure to provide notice within 10 days is a bar to an action against a municipality. Not providing the required notice will not be fatal only if: (1) if the plaintiff dies as a result of

⁴ S.O. 2002, c. 24 Sched. B., s. 4.

⁵ S.O. 2001, c. 25.

the injuries suffered, or (2) if a judge finds that there is a reasonable excuse for failing to provide 10 days' written notice, and the municipality is not prejudiced in its defence.⁶ Similar provisions apply to provincial control over a highway.⁷

In addition, actions against the Provincial Crown in respect of any breach of the duties attaching to the ownership, occupation, possession, or control of property also require 10 days' written notice of a potential claim containing sufficient particulars to identify the occasion out of which the claim arose.⁸ The claimant must then wait at least 60 days after service of the notice to commence an action for a claim against the Provincial Crown.⁹ The 2-year limitation period set forth in the *Limitations Act, 2002* applies to actions against the Provincial Crown in slip and fall cases.

OHIP's Subrogated Claim

It is also important to remember to include a claim for OHIP's subrogated interest when issuing a statement of claim concerning a slip and fall accident. OHIP's right of subrogation is a statutory right under ss. 30-36 of the *Health Insurance Act*¹⁰ and s. 59 of the *Long-Term Care Act, 1994*.¹¹ S. 30 of the *Health Insurance Act* provides that "[w]here, as the result of the negligence or other wrongful act or omission of another, an insured person suffers personal injuries for which he or she receives insured services under this Act, the Plan is subrogated to any right of the insured person to recover the

⁶ *Ibid.* ss. 44(11)–44(12). Recent case law shows that judicial determination of whether there is a reasonable excuse for failing to provide 10 days' written notice will be decided only after considering the injured party's reasons in tandem with the discoverability principles contained in s. 5 of the *Limitations Act, 2002*, *supra* at note 4. See *Blair v. Barrie (City)*, 2006 CanLII 42061 (ON S.C.) and *Kors v. Toronto (City)*, 2006 CanLII 22126 (ON S.C.).

⁷ See *Public Transportation & Highway Improvement Act*, R.S.O. 1990, c. P.50, s. 33(4).

⁸ *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, ss. 7(1) and 7(3).

⁹ *Ibid.* s. 7(1).

¹⁰ R.S.O. 1990, c. H.6.

¹¹ S.O. 1994, c.26.

cost incurred for past insured services and the cost that will probably be incurred for future insured services, and the General Manager may bring action in the name of the Plan or in the name of that person for the recovery of such costs.”¹² The requirement to include a subrogated claim on behalf of OHIP is found in s. 31(1), which states: “[a]ny person who commences an action to recover for loss or damages arising out of the negligence or other wrongful act of a third party, to which the injury or disability in respect of which insured services has been provided is related shall, unless otherwise advised in writing by the General Manager, include a claim on behalf of the Plan for the cost of the insured services.”¹³

PROVING LIABILITY: GATHERING EVIDENCE

One of the first things counsel should consider when taking on a slip and fall case is to gather as much evidence as possible about the circumstances surrounding the accident. You will want to know exactly what time of day the accident happened, what day of the week it happened, the exact location of the accident, what the weather was like when the accident occurred, and what the events were that led to your client’s fall.

It is important to know what your client was wearing at the time of the accident, especially in regards footwear. You will also want to know whether they were required to wear prescription eyewear at the time of the accident, when they last had their prescription updated, what problem was treated by the corrective lens (distance or reading, for example), and, of course, whether or not they were wearing their eyewear at the time of the fall.

¹² *Supra* note 10.

¹³ *Ibid.*

You will want to know whether your client was on any medications (prescribed or otherwise) at the time of the accident, whether they consumed any alcohol, whether your client was familiar with the area where they slipped or tripped, and whether they were alert and paying attention at the time of the fall. As well, you will want to know whether they were prone to slipping or tripping in the past, whether they suffered from dizziness or vertigo, whether they were carrying anything at the time, and whether they had ever experienced episodes of clumsiness prior to the accident. The above list, of course, is not exhaustive and, depending on the circumstances, there may be even more evidence you will need to marshal to prove your client's claim.

Interviewing Your Client

Information can be obtained directly from your client, unless, of course, he or she cannot recall the events surrounding the fall. Be cautioned that a client's memory of his or her accident is likely to fade with time, so it is important to get as much information from the client as early on in the litigation as possible. It should be noted that a client's interpretation of the events surrounding the accident may also change over time, especially after she has told her story a few times to friends, family members, and medical practitioners. She is also likely to have an imperfect perception and recollection of time, distance and measurement as a result of the excitement, and possibly trauma, of her fall, so a visit to the site of the accident with the client is recommended.

Interviewing Witnesses

It is also critical to obtain the evidence of witnesses, if available, including those who may have been with your client when the accident happened, as well as unknown

third parties who may have observed the slip and fall. All witnesses should be contacted as soon as possible after the accident. Their evidence should be canvassed thoroughly, as their memories of the events surrounding your client's fall will only fade with time. If the witness is agreeable, it is important to obtain a concise written statement of the evidence of the witness while it is still fresh in their mind.

In addition, don't overlook the possibility that there may have been an electronic witness to the event in the form of a photographic record of the accident. Most grocery stores, retail stores, and shopping centers have surveillance video located at the entrances and exits of stores and malls. You may be fortunate enough to discover that your client's slip was "caught on tape".

Obtaining Police and Ambulance Reports

Information can also be obtained from a General Incident Report if the police were called to the accident scene. Police officers often interview people at the scene of a slip and fall accident (if called), and with a bit of diligence, an officer's notes can often be obtained. Since the enactment of the *Freedom of Information and Protection of Privacy Act*,¹⁴ the names and contact information of witnesses will be expunged from the officer's notes. However, your client may have been thoughtful enough to ask witnesses for their names and phone numbers.

Similarly, information can be obtained from an Ambulance Call Report if an ambulance was called, or from contacting the paramedics' office. Both police and ambulance investigation can be helpful as they are usually prepared by individuals with

¹⁴ R.S.O. 1990, c. F.31.

whom your client may have spoken in the moments immediately following the accident. Though the accuracy of your client's comments to police or ambulance attendants right after their slip and fall may be affected by the excitement of the moment, those comments can also shed light on what your client observed or experienced in the moments immediately preceding, and following their accident.

An Emergency Treatment Record from the hospital can also be helpful (if your client was taken to the hospital), as it often contains a reported explanation of what happened to cause the accident, as well as a description of the injuries and complaints. Unfortunately, emergency departments are usually hectic and busy places and the information concerning the circumstances of the accident is likely to be sketchy, at best, and inaccurate at worst. Still, it is important to gather as much information as you can.

Taking Photographs

Lastly, it is important to obtain photographs of the accident scene, preferably as soon as possible after the slip or trip. This is particularly important in the case of snow and ice, for obvious reasons. However, you should be careful about choosing who takes the photographs because you may need to call that person at trial to prove the photographs' validity. We recently had a case where our client's son took pictures shortly after his mother tripped and fell at an apartment complex. We wanted to rely on the son's photographs at trial because we felt they accurately depicted the trip hazard. They were better than the insurance adjuster's photographs.

However, after the photographs were taken, our client's son allegedly told the defendant landlord that his mother was going to make a lot of money as a result of her

fall. Needless to say, we had concerns about calling the son at trial to prove the photographs' validity because we didn't want to expose him to questions on cross-examination about his alleged conversation with the landlord.

Examinations for Discovery

Regardless of whether the defendant is a municipality or a private property owner, it is important to determine whether the defendant has a policy or set of standards related to the maintenance of the property on which the accident occurred, particularly in regards the removal of snow and ice and the treatment of ice conditions, if they caused or contributed to the slip and fall. Questions related to the existence and development of the defendant's policies, their adequacy, and whether or not they were followed on the day of your client's accident should be thoroughly canvassed at examination for discovery.

It is also important to inquire about whether regular inspection of the property took place, as well as the means through which the defendant was to be made aware of conditions that might, if not otherwise addressed, potentially present a hazard to pedestrians or passersby. Questions about the training, supervision, and management of employees or personnel assigned the responsibility to uphold property maintenance standards should also be asked on examination for discovery. Don't forget to make enquiries about the availability to the defendant of a policy of insurance (homeowners' or general commercial liability, for example) and the limits of any such policy.

PROVING LIABILITY: IMPORTANT DEVELOPMENTS IN THE LAW

*Kamin v. Kawartha Dairy Ltd.*¹⁵

As a result of *Kamin v. Kawartha Dairy Ltd.*, a recent decision of the Ontario Court of Appeal, **an injured party in a slip and fall accident is no longer required to prove the precise location of his or her fall, if he or she can show on a balance of probabilities that the general condition of the defendant's property was unsafe, and that the unsafe condition caused their accident.**

At trial, the plaintiff claimed against the defendant Kawartha Dairy Ltd. for damages resulting from falling in its parking lot while walking with her husband and granddaughter from their car to the dairy.¹⁶ Notwithstanding the trial judge's finding that the parking lot was unsafe and that the dairy's system of inspection was inadequate and failed to meet the standard found in s. 3(1) of the *Occupiers' Liability Act*¹⁷, Mrs. Kamin's claim was dismissed on the ground that neither she, nor her husband, knew the precise location in the parking lot where she fell, or how she fell. In dismissing the claim, the trial judge relied on the opinion of Urquhart J. in *Cock v. Windsor*,¹⁸ that, in a claim against a municipality for injuries suffered in a fall on a sidewalk, the plaintiff had the onus of establishing where she fell, that there was a depression at that location, and that the depression was the cause of the fall.

¹⁵ [2006] O.J. No. 435 (C.A.) [hereinafter *Kamin*].

¹⁶ *Kamin v. Kawartha Dairy Ltd.*, [2004] O.J. No. 1056 (Ont. S.C.).

¹⁷ R.S.O. 1990, c. O.2.

¹⁸ [1944] 2 D.L.R. 778 (Ont. H.C.).

The Court of Appeal allowed Mrs. Kamin's appeal. The Court held that the trial judge erred in her analysis by imposing too high an onus on Mrs. Kamin to show exactly where and how she fell. In the words of Borins J.A.:

“[w]hile *Windsor* may have represented the state of the law respecting proof of causation 60 years ago, it has been replaced on this issue by *Snell v. Farrell*, 1990 CanLII 70 (S.C.C.), [1990] 2 S.C.R. 311 at paras. 29 and 30, where it was held that causation need not be determined by scientific precision. At para. 29, Sopinka J. adopted the following statement of Lord Salmon in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475 at p. 490 in which he held that causation is “...essentially a practical question of fact which can best be answered by ordinary common sense rather than metaphysical theory”. *Snell v. Farrell* was applied in *Athey v. Leonati*, 1996 CanLII 183 (S.C.C.), [1996] 3 S.C.R. 458, where the Supreme Court held that liability is established where the defendant's negligence caused or materially contributed to the plaintiff's injury.”¹⁹

The Court of Appeal found that there was considerable, uncontradicted evidence that the entire parking lot was in very poor condition at the time of the accident. They also found that Mrs. Kamin had provided evidence at trial that she was a careful person who was not prone to accidents. **In reaching its decision, the Court of Appeal held that the failure of Mrs. Kamin to recall the precise location of her fall should not have resulted in the trial judge's finding that she had failed in the proof of the cause of her injuries.** In the Court's words:

“[a]s the evidence established, the appellant fell on the dairy's parking lot which was in an unsafe condition caused by its failure to maintain it properly. Had the trial judge not erred in her causation analysis by setting too high an onus for the appellant to meet, there was ample evidence on which to find that the appellant's injuries were caused, or materially contributed to, by the respondent's negligence. This is particularly so given that there was no evidence of any other probable reason for her to have fallen. In my view, the trial judge erred in failing to

¹⁹ *Kamin*, *supra* note 15 at para. 4.

find, or to draw the only reasonable inference, that on all the evidence the respondent's negligence caused or materially contributed to the appellant's fall and her resulting injuries. Applying the causation analysis discussed in *Snell v. Farrell* and *Athey v. Leonati*, in my view the probable reasonable cause of the appellant's fall was the state of disrepair of the asphalt surface of the respondent's parking lot.²⁰

PROVING LIABILITY: THE APPLICATION OF THE OCCUPIERS' LIABILITY ACT

The *Occupiers' Liability Act*²¹ codifies the law regarding an occupier's liability in respect of dangers to persons entering onto an occupier's premises or the property brought onto their premises by those persons. The *Act* applies in place of the rules of the common law that formerly determined the care that occupiers were required to show for the purposes of determining the occupier's liability in law.²² This is the *Act* that applies in most cases in Ontario when a slip and fall claim is brought against a private property owner, a commercial establishment, or a municipality for non-sidewalk related cases.²³

S. 3(1) of the *Act* provides that “[a]n occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.”

This duty applies regardless of whether the danger is caused by the condition of the premises or by an activity carried on on the premises.²⁴

²⁰ *Ibid.* at para. 8.

²¹ *Supra* note 17.

²² *Ibid.* s. 2.

²³ Municipal sidewalk cases will be discussed later in this paper

²⁴ *Supra* note 17 at s. 3(2).

However, an occupier is free to restrict, modify or exclude the occupier's duty,²⁵ and no duty attaches in respect of risks willingly assumed by the person who enters on the premises. However, in that case, the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property.²⁶ A person who is on the premises with the intention of committing, or is in the commission of, a criminal act, or a person who is trespassing, is deemed to have willingly assumed all risks.²⁷

In *Waldick v. Malcolm*,²⁸ the Supreme Court of Canada, in commenting on an earlier version of the *Act*, stated that **the clear intention of the *Act* was to “replace, refine and harmonize the common law duty of care owed by occupiers of premises to visitors on those premises.”**²⁹ The Court agreed with the trial judge, who quoted with approval from *Preston v. Canadian Legion, Kingsway Branch No. 175*,³⁰ in which a plaintiff had slipped and fallen in an icy lot, and in which Moir J.A. (for the court) in considering an analogous Alberta statute said:

“In my respectful opinion the effect of the act is twofold. Firstly, it does away with the difference between invitees and licensees and puts both invitees and licensees into the common defined class of visitor... Secondly, and more importantly, **the statute now imposes an affirmative duty upon occupiers to take reasonable care for the safety of people who are permitted on the premises. This change is most marked because it does away with the old common-law position that an occupier was only liable for unusual dangers of which he was aware or ought to have been aware.** Under the

²⁵ *Ibid.* s. 3(3).

²⁶ *Ibid.* s. 4(1).

²⁷ *Ibid.* ss. 4(2) and 4(3).

²⁸ [1991] 2 S.C.R. 456.

²⁹ *Ibid.* at para. 40, emphasis added.

³⁰ (1981), 123 D.L.R. (3d) 645 (Alt. C.A.).

old law the occupier could escape liability by giving notice. Now, the occupier has to make the premises reasonably safe. That does not absolve the visitor of his duty to take reasonable care but does place an affirmative duty on each and every occupier to make the premises reasonably safe.”³¹

As has been the case for some time now, **a plaintiff’s mere knowledge of a trip hazard and its potential danger does not absolve the occupier of liability in law.** For example, in *Waldick v. Malcolm*³² Iacobucci J. adopted and relied upon another quote from *Preston v. Canadian Legion, Kingsway Branch No. 175*³³: “[m]erely because a visitor, upon arrival at a premises, sees that there is a risk in using the premises cannot in my opinion relieve the occupier of the duty placed upon him by the statute.” The Court went on to hold in *Waldick v. Malcolm* that in order for s. 4(1) of the *Occupiers’ Liability Act* to completely deny the plaintiff a remedy, it must be shown that the injured party not only had knowledge of the virtually certain risk of harm, but that in essence, he or she bargained away his or her right to sue for injuries incurred as a result of any negligence on the defendant’s part.

However, despite the fact that knowledge of a trip hazard will not necessarily prevent a plaintiff from recovering, defendants are still free to vigorously advance arguments based on contributory negligence. Contributory negligence remains a factual issue in slip and fall cases – one to be determined by the trier of fact only after considering all of the evidence in the particular case-at-hand

³¹ *Ibid.* at p. 648, emphasis added.

³² *Supra* note 28.

³³ *Supra* note 30.

*Henhawk v. Brantford (City)*³⁴

In this case, a plaintiff brought an action in negligence for damages for personal injury after tripping and falling in a parking garage owned by the City of Brantford. The plaintiff alleged that there were inadequate demarcation markings between the parking surface and the platform and walkway surface where she tripped. The defendant had applied yellow paint to many of the curbs in its parking garage but not to the area where the plaintiff tripped and fell.

The Court allowed the plaintiff's claim. It held that the uniform material and uniform colour of the parking surface and platform, together with a very minor rise of three inches created by the curb, made it reasonable for the defendant to take care in making the premises reasonably safe by applying a strip of yellow paint along the curb edge.³⁵ However, the Court further held that negligence should only be attributed 2/3rds to the defendant, as the subject curb and platform area would have been in the plaintiff's vision for a considerable time as she approached it on foot.³⁶

*Litwinenko v. Beaver Lumber Company*³⁷

In this case, the Court held that a 69-year-old lady who tripped and fell over a 1-1.5 inch toe stub on a walkway was contributorily negligent because the dangerous toe stub was obvious, and was one that a person, taking reasonable care for his or her own safety, would have and could have easily avoided. The Court noted that the plaintiff was familiar with the trip hazard, as she frequented the store once a week and had discussed

³⁴ [2005] O.J. No. 5140 (Ont. S.C.).

³⁵ *Ibid.* at para. 8.

³⁶ *Ibid.* at paras. 10-11.

³⁷ 2006 CanLII 28740 (ON C.A.).

the situation with friends previously. The Court held that the “risk was there to be seen, she knew about it, it could have been avoided had she taken proper care but she did not avoid it.”³⁸ Negligence was allocated equally between the plaintiff and the defendant.

*Desjardins v. Arcadian Restaurants Ltd.*³⁹

In this case, a 60-year-old lady, who had been physically disabled for most of her life, tripped and fell on the sidewalk or curb of a Kentucky Fried Chicken restaurant as she was entering with a friend to have supper. There was no snow or ice on the ground at the time. She alleged that she suffered injury as a result of the unsafe condition of the sidewalk and/or parking lot in contravention of s. 3(1) of the *Occupiers’ Liability Act*.

The trial judge dismissed the claim, holding that there was no evidence to suggest there were any trip hazards on the sidewalk itself, and, if the plaintiff tripped on the curb between the parking lot and the sidewalk, the slight elevation of the curb did not constitute a tripping hazard. **The trial judge relied on photographs of the scene taken shortly after the accident in holding that there was nothing in or on the asphalt parking lot in the area where the plaintiff fell that could be said to be unsafe, or a trip hazard.**⁴⁰

*Fragomeni v. 1080486 Ontario Corp. (c.o.b. Ward Funeral Home Ltd.)*⁴¹

In this case, a 75-year-old man slipped and fell in the parking lot of a funeral home after attending a funeral. It had snowed on the morning of the accident and it was

³⁸ *Ibid.* at para. 24.

³⁹ [2005] O.J. No. 5613 (Ont. S.C.).

⁴⁰ *Ibid.* at para. 108.

⁴¹ [2006] O.J. No. 1630 (Ont. S.C.).

very cold. The plaintiff alleged that the funeral home, and/or the snow removal company with whom it had a contract for the removal of snow and ice, failed to maintain the parking lot in a safe condition, and that as a result of the negligence of one or both of the defendants, he sustained a skull fracture and subsequent cognitive and behavioural problems.

The Court allowed the plaintiff's action on the issue of liability, finding that **there was no clear procedure in place between the funeral home and the snow removal company to determine who was responsible for deciding if and when to salt the parking lot.**⁴² The Court further held that **even if the funeral home and snow removal company had a system of snow and ice removal in place at the time of the plaintiff's fall, the evidence suggested that the system was not working on the day of the accident.** Though the parking lot was salted on the morning of the accident, the Court held that the salting had not occurred sufficiently in advance of the plaintiff's arrival on the premises. Each defendant was held to be equally responsible for the plaintiff's loss but no contributory negligence was attributed to the plaintiff.⁴³

*Flentje v. Nichols*⁴⁴

In this case, a 24-year-old woman slipped and fell in the restaurant parking lot of the defendant's premises, suffering a broken leg which required two surgeries. The parking lot was snow-covered and slippery at the time of the accident. The plaintiff

⁴² *Ibid.* at para. 27.

⁴³ *Ibid.* at para. 51.

⁴⁴ [2006] O.J. No. 3836 (Ont. S.C.).

alleged that the restaurant was negligent in failing to properly maintain the parking lot, and that the restaurant had a duty of care to maintain and implement a reasonable system of snow and ice removal in the parking lot, in order to ensure that the premises were reasonably safe.

The Court allowed the plaintiff's action, holding that, while the restaurant owner had normally been diligent and conscientious in maintaining the parking lot on his own, his system of maintenance was haphazard and not reasonable for a commercial establishment at the time of the plaintiff's accident. The restaurant owner had not taken reasonable steps to ensure his numerous customers were reasonably safe from slipping and falling due to weather conditions.⁴⁵ The Court further held that even if the restaurant owner had a reasonable maintenance system in place at the time of the slip and fall, it was not functioning appropriately on the evening of the plaintiff's accident.

PROVING LIABILITY: RECENT MUNICIPAL CASES

It should be noted that, unlike *Occupiers' Liability Act* cases, a slightly different set of rules and principles applies to slip or trip and fall accidents that occur on municipal roads or sidewalks. In addition, there is a different standard of care to be applied to municipalities depending on whether the slip and fall involved snow or ice on the sidewalk. The following cases will be divided into 2 categories: trip and fall cases on municipal properties, and slip and fall cases involving snow and ice on municipal sidewalks.

⁴⁵ *Ibid.* at para. 45.

Trip and Fall Cases on Municipal Property

The basic rule regarding the liability of a municipal authority in a trip and fall on a public road or sidewalk is set out in s. 44(1) of the *Municipal Act, 2001*⁴⁶ which makes a municipality liable if it leaves a road or public sidewalk in a state of non-repair. In an action against a municipality as a result of a trip and fall on a road or public sidewalk, a plaintiff must first establish on a balance of probabilities that the place where the fall occurred was in a state of non-repair. For this purpose, non-repair refers to an unreasonably dangerous condition that prevents a person from using the road or sidewalk with ordinary care in a safe manner, having regard to all the surrounding circumstances.

Then, the plaintiff must establish a causal link between the state of non-repair, and the injury. If the plaintiff satisfies these evidentiary requirements, the municipality must then establish that it has a reasonable system in place for inspection and repair in order to escape liability. If the municipality can meet this burden, it will not be held liable. Otherwise, as MacFarland J. (as she then was) held in *Stojadinov v. Hamilton (City)*,⁴⁷ the municipality would virtually be the insurer of every pedestrian who walked its streets.

Under s. 44(3) of the *Act*, a municipality is not liable for injuries suffered by the plaintiff if (a) the municipality did not know and could not reasonably have been expected to have known about the state of the repair of the road or sidewalk; (b) the municipality took reasonable steps to prevent the default from arising; or (c) at the time the cause of action arose, minimum standards established under Ministry of

⁴⁶ S.O. 2001, c. 25.

⁴⁷ [1988] O.J. No. 2038 (Ont. H.C.).

Transportation Regulations applied to the road or sidewalk and the alleged default, and those standards have been met.

The cases of *Michaluk v. Oakville (Town)*⁴⁸ and *Blaquiere v. Burlington (City)*⁴⁹ provide that a municipality is not liable for failing to keep a public sidewalk in a reasonable state of repair if the municipality took reasonable steps to prevent the default from arising. **These two cases also stand for the proposition that it is not unreasonable for a municipality to take financial considerations into account, along with physical considerations.** The determination of whether disrepair exists and whether the disrepair caused the incident depends on the facts of each individual case.

*Bourgoin v. Leamington (Municipality)*⁵⁰

In this case, a 45-year-old woman claimed against the defendant municipality for injuries suffered when she slipped into a hole in a public sidewalk, injuring her ankle. The hole was approximately 1 ¼ to 1 ½ inches deep. The weather was warm and clear at the time of the accident, and the plaintiff was familiar with the area, as she had walked the same sidewalk at least three times per week for three years prior to her trip and fall.

The Court allowed the action. It found that at the place where the plaintiff fell, the depression in the sidewalk exceeded the ½ inch depth that the municipality had set as the level at which a crack or depression in a sidewalk should be repaired.⁵¹ The Court

⁴⁸ [2000] O.J. No. 4466 (Ont. S.C.).

⁴⁹ [1999] O.J. No. 2558 (Ont. S.C.).

⁵⁰ [2006] O.J. No. 1474. (Ont. S.C.).

⁵¹ *Ibid.* at para. 24. Ontario caselaw confirms that municipalities in Ontario will be found liable for trip hazards on sidewalks in excess of ¾ of an inch in height. See *Michalak v. Oakville (Town)*, [2000] O.J.

further held that “[w]hile it may have been reasonable for the municipality not to replace the sidewalk because of budgeting constraints, it does not excuse its failure to follow its own policy of inspecting and patching areas of sidewalk with depressions over ½ inch in depth. If the municipality knew that a portion of sidewalk was in the condition that warranted replacing, and the replacement could not be done for budgetary reasons, there was an obligation on the municipality to pay particular attention on inspection to that area and the need for patching.”⁵²

*Ondrade v. Toronto (City)*⁵³

In this case, the plaintiff’s claim for damages against the City of Toronto for failing to properly remove snow from a crosswalk was dismissed. The plaintiff slipped and fell mid-way across a crosswalk on a wintry day, breaking his wrist in the process. In the preceding 48 hours, the City had experienced snow, ice pellets, rain and freezing rain. Weather statistics indicated that the temperature had fluctuated from 2.4 degrees Celsius to -9.3 degrees Celsius. There was also blowing and drifting snow. It was common ground that the weather was very bad all over the City on the weekend of the plaintiff’s accident.

The Court held that the severe weather was the principal circumstance to be taken into account in the plaintiff’s claim, and in that context, the City had not failed to keep the road in question in a state of repair. The Court further held that the City had a reasonable plan for winter road maintenance, centered on a salt management plan; that

No. 4066 (Ont. S.C.), *Ford v. Windsor (City)*, [1955] O.J. No. 242 (C.A.). This is the case even if an individual municipality establishes a higher tolerance of 1 inch. See *Boyce (Litigation Guardian of) v. Woodstock (City)*, [1993] O.J. No. 2532 (Ont. S.C.C.).

⁵² *Ibid.* at para. 37.

⁵³ [2006] O.J. No. 1769 (Ont. S.C.).

the city had constantly been watching both actual and forecasted weather; and that it responded promptly, reasonably, and appropriately to the winter storm on the weekend in question. In the words of the Court:

“That the actions taken by the City did not achieve the goal of bare pavement or a non-slippery condition before Mr. Ondrade's fall at 6 or 6:30 p.m. on February 23, 2003 is not determinative of whether the steps it took were reasonable. Section 44(3)(b) speaks to action rather than to result. In my view, the Legislature must have contemplated and, in s. 44(3)(b), was addressing circumstances like those present here where the municipality has reasonably deployed its resources around the clock in an attempt to keep roads safe and yet has been hindered by the forces of nature. Otherwise the municipality virtually becomes an insurer against acts of God. Clearly that was not the intention of the Legislature or it would have imposed an absolute liability base upon an absolute standard.”⁵⁴

Slip and Fall Cases Involving Snow or Ice on Municipal Sidewalks

Under s. 44(9) of the Act, a municipality is not liable for injuries suffered by the plaintiff arising out of a slip and fall caused by snow or ice on a municipal sidewalk unless the municipality was grossly negligent in regard to the circumstances which led to the accident.⁵⁵ This means that on public sidewalks, slip and fall cases involving snow or ice are treated differently from trip and fall cases that don't involve snow or ice - the slip and fall cases involving snow or ice require the plaintiff to meet the higher burden of proving **gross negligence** on the municipality in order to succeed in an action to recover damages.

⁵⁴ *Ibid.* at para. 65.

⁵⁵ *Supra* note 5.

*Cerilli v. Ottawa (City)*⁵⁶

In this case, a 42-year-old lady slipped and fell on a snow-covered and icy patch of sidewalk in the City of Ottawa, sustaining a severe injury to her ankle. She brought a claim against the City alleging that City officials, in an attempt to save costs, did not follow their own quality standards as provided for the street on which she fell.

The Court allowed the plaintiff's claim. It adopted the reasoning of *Dorschell v. City of Cambridge*⁵⁷ where it had been held that **even where a city had a policy of removing ice and/or snow from sidewalks, which was the cause of an accident, and such policy was ineffective leading to injury, this would constitute gross negligence provided the city had sufficient notice, either actual or implied, that the icy conditions existed and had opportunity to remedy the conditions.** The Court also noted that a number of factors will be considered by a trial judge in slip and fall cases on snowy or icy sidewalks, including: the length of time the dangerous conditions existed; the knowledge or imputed notice to the city of the dangerous conditions; the inherently dangerous condition of the sidewalk regardless of whether snow or ice was present; the knowledge or imputed notice to the city that the ice and snow would exacerbate such conditions; the amount of pedestrian traffic expected on a particular street; and the reasonableness of the expectation that the city would rectify the dangerous condition prior to the accident.⁵⁸

In the words of the Court:

⁵⁶ [2006] O.J. No. 4850 (Ont. S.C.).

⁵⁷ (1980), 30 O.R. (2d) 714 (C.A.).

⁵⁸ See also *Bannon v. Thunder Bay*, [1998] O.J. No. 3569 (Ont. S.C.) at para. 30, *Semenuk v. Hamilton (City)*, [1995] O.J. No. 2271 (Gen.Div.) at para. 8, and *Humenick v. City of Toronto*, [1949] O.R. 362.

“If a layer of ice had been allowed to remain on a level of sidewalk for two or three days a city would be grossly negligent. A city will also be deemed to have knowledge that in Ontario a thaw accompanied by rain, followed by a drop in the temperature to below freezing would likely cause icy conditions and if the city did not move with reasonable speed to correct these icy conditions it would be grossly negligent. Also, where evidence demonstrates that the city made a decision not to perform its duty as evidenced by its own standards to ensure the safety of its citizens from snow and ice on the sidewalk, there is evidence of serious negligence. In such situation, the court can find that the accident was caused by the gross negligence of the city unless the city can demonstrate that it was not liable for what occurred. The onus would be on the city in such case because its decision to breach its own standards to keep the sidewalk clear of ice and snow cannot be used by the city to impair the plaintiff's opportunity of proving liability.”⁵⁹

The Court found that City officials responsible for the maintenance of the sidewalk in question knew or ought to have known that, given the freeze/thaw conditions and the probability of snow banks melting and bleeding onto sidewalks, together with snow falling, icy conditions would be created. The Court held the defendant municipality liable for the damages suffered by the plaintiff.

PROVING LIABILITY: MIXED PRIVATE PROPERTY/MUNICIPAL SIDEWALK CASES

Sometimes a question arises as to whether a slip and fall accident occurred on municipal property or private property, especially if the accident occurred on a sidewalk. **In most cases, the municipality will be legally responsible for the removal of snow and ice on public sidewalks and liability will not flow through to adjacent private property owners. However, there are two exceptions to this general rule.**

⁵⁹ *Supra* note 56 at para. 50.

First, a private property owner may be deemed in law to be an occupier of adjacent public property if the private property owner assumes control of that public property. This was the case in *Bogoroch v. Toronto (City)*⁶⁰ where the Divisional Court held that a store owner who used the adjacent public sidewalk to display its wares on a continuing basis was an occupier of the public sidewalk and subject to the duties imposed by the *Occupiers' Liability Act*.

Second, the duty of care on a private property owner extends to ensuring that conditions or activities on their property do not flow off the property and cause injury to persons nearby walking on a public sidewalk. An example of this category of case is *Brazzoni v. Timmins (City)*⁶¹ where the Ontario Court of Appeal held a private property owner partially liable for water that had flowed off its property, frozen, and then caused injury when a passerby slipped on the resulting ice that had accumulated on the adjacent public sidewalk.

Both of these exceptions were confirmed in *Bongiardina et al. v. York (Regional Municipality)*⁶², where the Ontario Court of Appeal held that **there is no common law duty on the owner of private property to clear snow and ice from public sidewalks adjacent to their property, and that the two exceptions to the general rule that private property owners are not responsible for accidents that occur on public sidewalks are a) if the private property owner assumes control of the public sidewalk such that her or she is akin to an occupier of the sidewalk at common law, or b) if the private**

⁶⁰ [1991] O.J. No. 1032 (Gen. Div.).

⁶¹ [1992] O.J. No. 254.

⁶² 2000 CanLII 5408 (ON C.A.).

property owner allows something to escape from his or her property and the escaped substance causes injury on the public property.

Peterson v. Windsor (City)⁶³

In this case, the Court followed *Bongiardina et al. v. York (Regional Municipality)*⁶⁴ and granted summary judgment in favour of a private property owner after finding that there was no evidence upon which a Court could conclude that the private property owner had become an occupier of the public sidewalk on which the plaintiff had fallen. The plaintiff had slipped and fallen on the public sidewalk adjacent to the private owner's property. **In reaching its decision, the Court drew attention to the importance of proper pleadings, pointing out that the plaintiff and the City of Windsor had not properly pleaded that the private property owner fell under one of the exceptions to the common law rule regarding occupation of public premises.**

Lytle v. Toronto (City)⁶⁵

In this case, the Ontario Court of Appeal upheld a trial decision finding a defendant private property owner liable for placing pipes on a municipal sidewalk for "special collection" by the City of Toronto. The plaintiff claimed damages for injuries sustained as a result of a fall when she caught her foot and tripped over the pipes that had been placed on the sidewalk in front of the defendant's house. The Court's decision finding that the private property owner had breached the appropriate standard of care was

⁶³ 2006 CanLII 6458 (ON S.C.).

⁶⁴ *Supra* note 61.

⁶⁵ 2006 CanLII 33300 (ON C.A.).

supported by the property owner's failure to meet the City of Toronto's standards for placing the pipes on the sidewalk, and the evidence that the pipes constituted a danger to pedestrians.⁶⁶

It should be noted that the private property owner was not found to be an occupier of premises under the *Occupiers' Liability Act* in this case. Rather, the Court applied the common-law exception to the general rule, as stated above, and found that the private property owner was akin to an occupier in the sense that he owed a duty to ensure that conditions or activities on his property did not flow off his property and cause injury to persons nearby.

CONCLUSION

Proving liability in slip (or trip) and fall cases is not always as easy as it might seem. There are a variety of factors to consider, including whether the accident occurred on public or private property, whether it occurred on a municipal road or on a municipal sidewalk, and (if it occurred on a municipal road or sidewalk) whether snow or ice was involved. An assessment of these factors will help determine whether a claim should be made in reliance on the *Occupiers' Liability Act* and the common law, or whether the claim should be pleaded on the basis of the *Municipal Act*.

In addition, it goes without saying that it is always important to gather as much evidence as possible in the early stages of the litigation. This can be accomplished by thoroughly canvassing the potential testimony of your client and any witnesses to the

⁶⁶ *Ibid.* at para. 4.

accident, by gathering police, ambulance and hospital emergency room records, and by taking photographs of the scene within a reasonable time of your client's slip and fall.

Lastly, the recent decision of *Kamin v. Kawartha Dairy Ltd.* bodes well for injured plaintiffs who cannot prove precisely where they slipped and fell. This case continues a judicial trend in Canada towards applying a common sense approach when it comes to proving liability and causation in negligence cases. This is good news for plaintiff's counsel as it makes the onus of proving liability slightly less onerous. Whether this trend will continue, or whether in time the pendulum will swing in the opposite direction, remains to be seen.