

Repair of Roads - The Legal Responsibility of Municipalities



Springtime potholes and other roadway hazards can pose significant risk to persons and property. While many incidents with roadway hazards result in only relatively minor mishaps, serious damage or even injuries can result from the failure to properly maintain roadways including failure to maintain incidentals such as signage per *The Queen v. Jennings et al.*, [1966] S.C.R. 532; guardrails, trees per *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445, among other things, that go beyond merely just the roadway surface. The legal duty imposed upon the municipality to maintain the roadway is enshrined within [section 44](#) of the *Municipal Act, 2001*, [S.O. 2001, Chapter 25](#) where it is stated:

Maintenance

44 (1) The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge.

Liability

(2) A municipality that defaults in complying with subsection (1) is, subject to the Negligence Act, liable for all damages any person sustains because of the default.

Defence

(3) Despite subsection (2), a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if,

(a) it did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge;

(b) it took reasonable steps to prevent the default from arising; or

(c) at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway or bridge and to the alleged default and those standards have been met.

Regulations

(4) The Minister of Transportation may make regulations establishing minimum standards of repair for highways and bridges or any class of them.

General or Specific

(5) The minimum standards may be general or specific in their application.

Duties on Repair of Roads

The above statutory duty was recently referenced within and clarified by the Court of Appeal within the case of *Chiocchio v. Hamilton (City)*, [2018 ONCA 762](#) where it is said:

[8] Section 44 of the *Municipal Act*, S.O. 2001, c. 25, requires a municipality to keep highways under its jurisdiction “in a state of repair that is reasonable in the circumstances, including the character and location of the highway”.

[9] In *Fordham v. Dutton-Dunwich (Municipality)*, [2014 ONCA 891](#) (CanLII), 70 M.V.R. 6, at paras. 28-29, Laskin J.A. described the ordinary reasonable driver standard, the standard of care which governs a municipality’s duty of highway repair. As described by Laskin J.A., a municipality is required to prevent or remedy conditions on its roads that create an unreasonable risk of harm for ordinary drivers exercising reasonable care. Ordinary reasonable drivers are not perfect; they make mistakes. However, a municipality’s duty does not extend to remedying conditions that pose a risk of harm only because of negligent driving.

It is noted per *Chiocchio* that the duty upon the municipality is of reasonableness rather than perfection and that the road need maintenance merely to prevent or correct conditions that would pose an unreasonable risk to an ordinary driver, who may make mistakes; however, the obligation upon the municipality is without a duty to prevent or correct conditions that pose a risk to negligent drivers. This viewpoint that a municipality is obligated to maintain the roads to a standard of reasonableness for use by an ordinary driver, rather than negligent driver was also recently articulated in *Smith v. Safranyos*, [2018 ONCA 760](#) whereas it was said:

[31] “Non-repair” will be established if the plaintiff proves “on a balance of probabilities that the municipality failed to keep the road in question in a reasonable state of repair”: *Fordham*, at para. 26. The applicable legal test is, “was the road at the material time sufficiently in repair that those users of the road, exercising ordinary or reasonable care, could use it in safety”: *Deering v. Scugog (Township)*, [2010 ONSC 5502](#) (CanLII), at para. 100, affirmed [2012 ONCA 386](#) (CanLII), leave to appeal from C.A. refused [2012] S.C.C.A. No. 351. In adopting the *Deering* standard of care test, Laskin J.A. elaborated in *Fordham*, at para. 28, that “ordinary reasonable drivers are not perfect drivers; they make mistakes”, but he cautioned, at para. 29, “a municipality’s duty of reasonable repair does not extend to making its roads safer for negligent drivers.”

For those who may bring legal action against a municipality for the failure to properly maintain roadways, unique concerns may apply including special notice requirements as well as short limitation periods within which to provide the special notice. These unique concerns are provided within the *Municipal Act, 2001* as follows:

Notice

[\(10\)](#) No 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, including the date, time and location of the occurrence, 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.

Exception

(11) Failure to give notice is not a bar to the action in the case of the death of the injured person as a result of the injury.

Same

(12) Failure to give notice or insufficiency of the notice is not a bar to the action if a judge finds that there is reasonable excuse for the want or the insufficiency of the notice and that the municipality is not prejudiced in its defence.

Summary Comment

The statutory law, being the *Municipal Act, 2001*, quite clearly imposes a duty upon municipalities to reasonably maintain roadways. The common law cases subsequently articulate the standard of measure for the reasonableness required as being sufficient to make the roads safe for the diligent driver rather than the negligent driver.

Lastly, do note that the above article provides information regarding the 'duty of care' and is without details regarding the special notices required and the unique limitation periods as may apply to legal action against the government (including municipalities); and accordingly, a lawyer or paralegal should be consulted for assistance in all respects of potential legal proceedings.