



Focus On



INSURANCE LAW

Municipalities testing new road standards

Insurance coverage affected as province changes maintenance rules

BY JUDY VAN RHIJN
For Law Times

As the snowy season continues, municipal lawyers will likely be redesigning their maintenance regimes to take into account changes to the minimum maintenance standards for municipal highways introduced last year.

Now that municipalities are deemed to have “constructive knowledge” of the state of slushy roads, sidewalks, and the extent of snow accumulation, the vigilance of their maintenance departments will be key to ensuring that slippery conditions don’t make for insurance headaches.

Since 2002, those rules have been the regulatory embodiment of the minimum standards of repair for highways and roads established by s. 284(1.5) of the Municipal Act. They’ve been relevant to municipal insurance arrangements not only because they affect liability but also because some policies may contain exclusions if they’re not met.

Previously, a road authority’s duty of care was triggered on notice or constructive notice of a condition of non-repair, including a situation at a specific place or one that extended across a wide area such as during an ice or snow storm. One of the criticisms of the standards was that

the patrolling requirements were inadequate to respond to winter road conditions. By way of example, Jennifer Stirton of McCall Dawson Osterberg Handler LLP in London, Ont., explains that before the amendments, the standard patrolling requirement for a class 1 highway was three times every seven days. “If there is a winter storm and we are sitting in two feet of snow, three times in a seven-day period wouldn’t be sufficient,” she says.

Stirton points out that while the standards were introduced to limit liability for municipalities, they have yet to amount to a complete defence. “The legislation provides for an objective standard of care. Prior to this, courts were finding a way around the [standards].”

As of Feb. 18, 2010, the revamped standards provide that a municipality is deemed to be aware of a fact if the circumstances are such that it reasonably ought to have knowledge of it.

The standards also now state that during the winter maintenance season, municipalities must conduct the routine patrols that were previously required but must also monitor routes that are representative of their highways, as necessary, for snow and ice conditions. As neither “representative” nor “as



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necessary” are defined terms, Stirton expects to see claims challenging municipal decisions in that regard. Despite the risk, municipalities and their lawyers appear to be pleased with the change as it gives more certainty. “Now the municipality can identify their representative highways and say, ‘We’ve inspected them three times in 24 hours,’” Stirton says. “They have then satisfied the [minimum standards] as well as the objective standard of care.”

Charles Painter of Paterson MacDougall LLP in Toronto

is looking forward to applying the new standards. “It’s the first full winter season that they’ve been on board,” he says. “From my perspective, they are something very helpful, guiding a municipality’s understanding of what’s required. They are a direct response to some of the criticisms in the case law.”

Craig Brown, a partner at Thomson Rogers in Toronto, agrees. “It solves the problem that Justice [Peter] Howden had in *Thornhill v. Shadid*. Howden commented that the [standards] ignored the common law which implied constructive knowledge on municipalities or road authorities if a reasonable road authority should have known. Those magic words didn’t seem to appear.”

Brown believes the changes will help plaintiffs deal with what he considers to be unfair and unrealistically lenient standards. “The defendants had been arguing that they couldn’t be found to have known before the time imposed in the standard for patrolling a particular category of road. Say it patrolled a class 2 road on a Saturday, which requires checking two times every seven days, and the hazardous condition was created on a Sunday. It said the court couldn’t find it should’ve known until Tues-

day. But with constructive knowledge, if you’re looking out your front window and it’s obvious that the weather is creating hazardous conditions, you can’t look to the minimum patrolling standards.”

On the municipal defence side, the rules also help by specifically allowing the use of technology for monitoring purposes. “This reflects the capability to monitor with technology, including devices embedded in the pavement that read humidity and road temperature to help predict when ice will form,” Painter says. There are also trucks that can record where they went through GPS technology, electronically monitor the roads they drive over, and measure how much sand and salt they put out. But Stirton says the electronic monitoring option is limited by cost. “It’s a fairly capital-intensive thing to switch over to. Municipalities have to balance the cost of technology against the cost of litigation.”

Among the plaintiffs’ bar, there’s still significant dissatisfaction that the minimum standards exist at all. “This is far below what municipalities actually do,” says Brown. “If they look at this and say, ‘This is all we have to do,’ we’ll all be driving on roads that are more hazardous at the most hazardous time of the year.” **LI**