Agenda

- The Law
  - Municipal Act
  - Negligence Act
  - Limitations Act
  - Occupier's Liability Act

- Picture of Lawyers in Ontario

- Why sue?
  - Damages

- Case Review

- Risk Exposures

- What CAN we do about it???
Municipal Act

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. 2001, c. 25, s. 44 (1).

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. 2001, c. 25, s. 44 (2).
Defences

- Section 44(3) states:

“despite subsection (2). A municipality is not liable for failing to keep the highway or bridge in a reasonable state of repair if,
Defences

a) it did not know and could not have reasonably 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. 2001, c. 25, s. 44 (4).
O. Reg. 239/02: MINIMUM MAINTENANCE STANDARDS FOR MUNICIPAL HIGHWAYS
under Municipal Act, 2001, S.O. 2001, c. 25

Versions

Current May 3, 2018 – (e-Laws currency date)
January 25, 2013 – May 2, 2018
February 18, 2010 – January 24, 2013
3 more

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Negligence is the failure to do what a reasonably prudent person would do

OR

Doing that what a reasonably prudent person would not do in a like situation.
Negligence Act

The Law

• Ontario Joint & Several Liability also known as the 1% Rule is governed under the Negligence Act. Which states......

• Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence.....

• Common law does not agree with this policy as it states that you’re only responsible for your proportionate share of the damages.

• This Act never intended to place the burden of insurer of last resort on municipalities.
Negligence Act

Issue

An accident victim’s harm is often caused by the joint or concurrent acts of several parties.

This system can leave defendants who are found to be as little as 1% at fault to pay 100% of the damages and be “jointly” liable to the plaintiff.

Municipalities who have taxation power are considered “Deep Pockets” and as such are targeted and included in matters for which they really shouldn’t be involved in. As such, J&S imposes a disproportionate burden on municipalities propelling municipalities to settle out of court claims to avoid disproportionate awards under J&S.

Minimum limits and AB reductions under Ontario auto insurance are directly affecting municipalities under the Act often leaving a shortfall to catastrophically injured claimants.
Joint & Several Liability

A Defendant who is held just 1% liable for a Plaintiff’s injuries or damages may also have to pay the share of any other defendant who cannot afford to pay.
**Limitation Act**

**Basic Limitation Period**

Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.

**Discovery**

(1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).
Occupiers Liability Act

Occupier’s duty

3 (1) An 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.

There are more, but let’s move on.
Picture of Lawyers in Ontario

What will Ontario do with more lawyers?
BY Anita Balakrishnan 13 Aug 2018

Toronto is home to 50 per cent of Ontario’s lawyers, according to the Law Society of Ontario.

Ryerson’s program had 206 participants in the 2017-2018 term, down from a high of 232 the prior year, the law society’s May report said.

By the numbers (Sidebar)

4,000 to 5,000: Number of candidates completing the licensing process in Ontario each year.
200: Approximate number of Canadians educated abroad seeking licensure in Ontario each year.
80: Percentage of articling students who currently pass solicitors and barristers exams on the first attempt, as do about 60 per cent of LPP participants.
60: The percentage increase of graduates from Ontario law programs between 2007 and 2012.
8: The number of law school in Ontario, of 23 across Canada.

Sources: Law Society of Ontario Professional Development & Competence Committee
Why Sue a Municipality?

Adverse cost insurance, also known as “after-the-event insurance,” has two main functions, says Frank Csathy, an insurance defence litigator at Stieber Berlach LLP in Toronto. It serves to protect plaintiffs in insurance liability litigation against a costs award and protect the lawyer against the cost of disbursements for things such as expert reports, private investigators or photocopying and couriers.

Proponents of adverse cost insurance say it increases access to justice by allowing plaintiffs without resources to bring an action against their insurer without financial risk.

https://www.canadianlawyermag.com/practice-areas/personal-injury/adverse-cost-insurance/275495
In the past 30 years we have seen a greater apportionment of liability against municipalities. We’ve gone from commonly seeing liability apportioned from 10% – 25% to 50% – 70% and some cases holding the municipality 100% liable.
Case Review

Deering – inexperienced driver in a hurry to get to the movies
-- 66 2/3% Liability Apportioned to Municipalities

Fordham – 16 year old driver drinking, driving without a seatbelt and blows through a clearly visible stop sign
-- 50% Liability Apportioned to Municipality
*** Appeal won!!***

Ferguson – inexperienced winter driver going too fast for the conditions
-- 55% Liability Apportioned to Municipality

Bruce County Mountain bike Accident
-- 100% Liability Apportioned to Municipality
Damages

Damages are broken down into four areas..

**Compensatory damages** – Return them back to pre-loss condition.

**General damages** – Compensate for pain and suffering & future expenses.

**Special damages** – Out-of-pocket expenses.

**Punitive damages** – Bad faith, punish, deter similar action, publicly condemn.

In general, damages can be defined as a loss or harm resulting from an injury to a person, property, or reputation. These damages may be awarded to a claimant if the court finds the City was responsible for a negligent condition, design or act.
Municipal Liability Claims (Severity)

- Roads 41%
- Sidewalks 19%
- Sewer 13%
- Fire 3%
- Public Works 4%
- Arenas 6%
- Parks & Rec 7%
- Other 7%
Risk Exposures

1. GPS
   1. Plows – working/not-working – plow up/down
   3. Supervisor vehicles
2. Compliance to Legislation & By-laws
   1. Municipal Act
   2. OMMS
3. Compliance with Corporate Policy and Procedures
   1. Vehicle inspection & maintenance
   2. Maintenance Operations – Asset inspections
4. Automobiles – Physical damage – Accident Benefits
5. Telematics – Pro/Cons
Telematics – Pro/Cons
Risk Exposures – Bicycle Lanes

Snow accumulation, bicycle lanes

4.2 (1) Subject to section 4.3, the standard for addressing snow accumulation on bicycle lanes is,

(a) after becoming aware of the fact that the snow accumulation on a bicycle lane is greater than the depth set out in the Table to this section, to deploy resources as soon as practicable to address the snow accumulation; and

(b) after the snow accumulation has ended, to address the snow accumulation so as to reduce the snow to a depth less than or equal to the depth set out in the Table to this section to provide a minimum bicycle lane width of the lesser of 1 metre or the actual bicycle lane width. O. Reg. 366/18, s. 7.

(2) If the depth of snow accumulation on a bicycle lane is less than or equal to the depth set out in the Table to this section, the bicycle lane is deemed to be in a state of repair in respect of snow accumulation. O. Reg. 366/18, s. 7.

(3) For the purposes of this section, the depth of snow accumulation on a bicycle lane and, if applicable, lane width under clause (1) (b), may be determined in the same manner as set out in subsection 4 (4) and by the persons mentioned in subsection 4 (3), with necessary modifications. O. Reg. 366/18, s. 7.

(4) For the purposes of this section, addressing snow accumulation on a bicycle lane includes,

(a) plowing the bicycle lane;

(b) salting the bicycle lane;

(c) applying abrasive materials to the bicycle lane;

(d) applying other chemical or organic agents to the bicycle lane;

(e) sweeping the bicycle lane; or

(f) any combination of the methods described in clauses (a) to (e). O. Reg. 366/18, s. 7.
Risk Exposures – Bicycle Lanes

Summer Maintenance??

Municipal Act
Section 44
Road cut during the winter
So what can we do about it?
Policy Vs. Operational Decisions

• A **Policy Decision** is made by Council on whether or not to provide a service.

• An **Operational Decision** is made at the staff level as a result of a policy decision made by council.

If the operational decision is negligently made, the municipality can be held liable.
Documentary evidence is any evidence introduced at a trial in the form of documents. Although this term is most widely understood to mean writings on paper (such as an invoice, a contract), the term actually include any media by which information can be preserved. Photographs, PIN’s, text messages, recordings, video, and e-mails are all forms of documentary evidence.
Records

• Supervisor notes
  – Thought process documented
  – Staffing issues
  – Details

• Record production format very important.

• 10 day notice period – establish a process.

• GPS – is it working when the equipment leaves the yard?

• Video
Early Investigation

• When you become aware of an accident or incident.

• When do you engage legal?

• Centralize where information is stored.

• Mechanism for staff and public reporting.
Sometimes, you just have to pick yourself up

Dust yourself off, and try again