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Back to Basics: Attempting to Make Sure a Trial Judge Applies the Proper Analysis to Cases Alleging Non-Repair of a Roadway

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Back to Basics: Attempting to Make Sure a Trial Judge Applies the Proper Analysis to Cases Alleging Non-Repair of a Roadway

The underlying premise of this paper is that over the past 20-30 years Ontario courts have, on a number of occasions, both at the trial level and on appeal, failed to properly apply the traditional test for non-repair set out in the leading decisions of the Supreme Court of Canada. Whether this has been done intentionally by the trier of fact to achieve a result they felt was fair, because the law was not properly presented to them or because they misunderstood the test, the result of this trend is that Ontario municipalities and their insurers are losing confidence in the ability of the judicial system to provide justice in accordance with what they understand the law to be. What the end result of this trend will be is not yet clear, however, it is fair to say that if it continues without judicial or legislative correction municipalities will likely find themselves unable to obtain insurance for road non-repair claims at anything other than extremely high premiums and multi-million dollar deductibles.

The intention of this paper is not to dwell on what motivates judges to do what they do in specific tragic cases. There is no doubt that being a judge is tough and that one of the more difficult things a judge has to do is listen to a seriously injured individual and then determine that either they alone are responsible for their loss or that others are responsible for their injuries knowing that it is unlikely those parties will have sufficient insurance or assets to compensate the injured party. As defence counsel there is very little we can do to assist a judge in properly ignoring that emotional issue. What counsel can do, however, is provide him or her with the proper legal framework and case law so that, if they follow the steps the test for liability calls for, no liability will be found except where the facts actually justify it. This paper is intended to assist counsel in that process.

The Statutory Duty

In Ontario the starting point for any analysis of whether a municipality is liable to an injured party for non-repair of a roadway is section 44 of the Municipal Act.[1] That section creates a statutory obligation on a municipality to keep its roads "in a state of repair that is reasonable in the circumstances, including the character and location of the roadway". The statute requires the plaintiff to establish non-repair and causation on a balance of probabilities. If the plaintiff succeeds, the road authority is liable unless it establishes one of the statutory defences available to it. As the statutory wording requires and leading authorities indicate, courts properly analyzing the fact situation before them should approach the issues in sequence:

1) Determine the character and state of the road (a matter of fact).

2) Determine if the road authority has defaulted in its duty to keep the road in a state of "repair". This is decided by the "ordinary driver exercising reasonable care" test discussed below. This is the part of the test where much of the confusion and debate arises in the case law.

3) Determine whether the default identified caused the alleged injuries.

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[1] *Municipal Act*, 2001, S.O. 2001, c. 25

4) If both default and causation are established, determine whether a statutory defence applies – s. 44(3) and (8) of the Municipal Act.

5) If the statutory defences do not apply, decide whether the claimant is contributorily negligent and undertake a proper apportionment analysis.

Properly applied this 5 part test should result in a structured, disciplined analysis of the facts leading to consistency and a certain degree of predictability in our courts with respect to individual cases. Unfortunately, judges often do not follow this framework blurring the statutory duty with general negligence principles where foreseeability of harm and the cost of preventing that harm often become the focus of the analysis. In other cases, they fail to apply an objective ordinary driver test focussing on the involved driver's conduct and whether the municipality could have done something to make the road safer and prevented that accident. In still other cases they simply misstate the test.

Step #1- Determine the character and state of the road

These determinations are fundamental to a proper analysis of whether a road is or is not in a state of non-repair. Prior to 1996 the wording of what is now s. 44(1) simply stated that "(e)very highway …shall be kept in repair ".[2] The 1996 amendment, which modified the wording of the duty to "keep it in a state of repair that is reasonable in the circumstances, including the character and location of the roadway", was part of the Better Local Government Act reforms.[3] The amendment to the section was intended to clarify that the duty of care required of a municipality was not to be an onerous one or that roads needed to be maintained perfectly. The language used directed judges to take in to account both the character and state of the road in assessing what an objective driver could reasonably expect when driving on that road - something that courts had been directed to do by the Supreme Court of Canada since at least 1917 when Chief Justice Fitzpatrick stated in *Fafard v. City of Quebec* (1917), 39 D.L.R. 717 (S.C.C.) at 718:

> "A municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety.
>
> Moreover, it is only common sense to distinguish between highways and byways. Precautions that might well be required to be taken on a much travelled main thoroughfare would often be quite uncalled for on an unimportant and little frequented side street. The city cannot be held liable because every street is not equally safe for all possible purposes of traffic."

This is a common sense starting point since a key part of any analysis of what an objective driver should expect and how they should drive on a specific road is based on "driver expectancy", a concept which is fundamental to road design and construction manuals. Failure to properly categorize a road at the outset will lead to errors later when the analysis of what an objective driver could reasonably expect when driving on that road is considered or the court needs to evaluate whether, even though the road was in a state of non-repair at the material time, the municipality is excused from liability by reason of one of the statutory defences.

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[2] *Municipal Act*, R.S.O. 1990 c. M. 45, section 284(1)
[3] *Better Local Government Act*, S.O. 1996, c. 32

Step #2- Was the road in a state of non-repair?

Once the court has properly characterized a road it is then able to make a proper assessment of whether the road was in a state of non-repair applying the ordinary/reasonable driver test. While the test has been articulated in slightly different ways in different leading authorities, in *Housen v. Nikolaisen* , [2002] 2 S.C.R. 235 both the majority and the dissent cited with approval the decision of the Saskatchewan Court of Appeal in *Partridge v. Rural Municipality of Langenburg*, [1930] 1 D.L.R.939 where the court stated:

> "The extent of the statutory obligation placed upon municipal corporations to keep and repair the highways under their jurisdiction, has been variously stated in numerous reported cases. There is, however, a general rule which may be gathered from the decisions, and that is, that the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety. What is a reasonable state of repair, is a question of fact, depending on all the surrounding circumstances; "repair" is a relative term and hence the facts in one case afford no fixed rule by which to determine another case where the facts are different."

In *Deering v. Scugog (Township),* 2010 ONSC 5502 Justice Howden, while finding liability existed on the facts of the case, analyzed the history of the law of statutory non-repair in Canada concluding: "the standard of care of road authorities rests on the notion of the ordinary motorist driving without negligence". Earlier in his reasons he notes that in *Housen* the majority made clear that "ordinary driver" means "reasonable driver"- that the two terms are used interchangeably in the leading decisions. Elsewhere in his reasons he stated:

> Reasoning which simply leads from a finding of a road situation which could have been improved, or a finding of a road in a condition of some risk to motorists due to, say the sudden onset of a winter storm of heavy rain, to a conclusion that the road is in a state of disrepair, does not accord with *Housen* or prior appellate authorities.

It is at this location in the analysis that judges most often go off the rails, finding liability where on proper application of the test no liability should exist. In *Roycroft v. Kyte*[4] Justice Shaughnessy approved of the English decision in *Rider v. Rider*[5] where it was indicated that the duty of care of municipalities there included "negligent drivers". That decision was not appealed so the error in the analysis was not addressed.

In *Morsi v. Fermar Paving*[6] the trial judge, again Justice Shaughnessy, repeated this error. After citing the correct test from *Housen* as well as the decision in *Rider* and his own earlier decision in *Roycroft v. Kyte* he stated : "A highway is not kept in repair by a mere warning that it is dangerous, if, in the circumstances, something better can reasonably be provided." He went on to find the municipality and the contractor a total of 50% at-fault (25% each) on the basis that they could have done more to make the roadway safe in the area of the accident. This approach is directly contrary to the required analysis, which is not based on whether a road can be made safer or a specific accident prevented. On this point the words of Chief Justice Fitzpatrick in *Fafard* are as applicable today as they were in 1917:

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[4] *Roycroft v. Kyte*, [1999] O.J. No. 296
[5] *Rider v. Rider*, [1973] 1 All E.R. 294
[6] *Morsi v. Fermar Paving et al.*, 2010 ONSC 3851 (Can LII)

> There is no standard of perfection set for the condition of highways even if such were ever attainable. There is no limit to what might be done for ensuring greater safety. Every hill would have to be levelled and every valley filled, the roads widened, the most suitable paving used, the ways lighted and fenced or as is claimed here protected by stone walls and all liable to be altered at any time to suit the varying modes of vehicular traffic. It is an extravagant and impossible idea.

In allowing the appeal the Court of Appeal[7] noted that Justice Shaughnessy, while citing the correct test, did not apply it. While this conclusion is the correct one, unfortunately, instead of focussing its corrective analysis on how an objective ordinary driver exercising reasonable care would have driven the road and then deciding that no state of non-repair existed, the court blurred its analysis somewhat by focussing its discussion of driver behavior on the conduct of the late Mr. Morsi who it described as operating his vehicle recklessly in a manner which "absolves York Region under the test enunciated in the leading decisions of the Supreme Court of Canada". With all respect to the Court of Appeal, this confuses the second part of the test- which is based on the "ordinary driver" not the individual driver with the third part of the test- which is whether any situation of non-repair found causally contributed to the specific accident and injuries which occurred. Put another way, if the court had found that an ordinary driver exercising reasonable care required additional signage to navigate this section of road safely, it could still have determined that no liability existed on the part of the municipality because Mr. Morsi's driving was so unreasonable that an additional sign, although it would have been of assistance to a reasonable motorist, would not have made any difference to him. It may be that the court focussed on Mr. Morsi's driving behavior because it was such a blatant departure from what anyone would describe as an ordinary driver exercising reasonable care, however, it would have been better if the court had followed the structured approach set out above so that there was no doubt about how the test was applied.

A similar problem exists in the Court of Appeal's decision in *Johnson v. Milton (Town),* 2008 ONCA 440. In that case the plaintiff and her late husband were operating a tandem bicycle on a country road when they lost control of it on a steep hill, crossed a one lane bridge, left the road and struck a rock embankment. At trial the municipality was found 100% at fault. On appeal the court found that the Johnsons were 40% at fault. In upholding the finding of liability against the municipality the court stated:

> [71] The picture that emerges is one of obvious danger – two inexperienced cyclists traveling down a very steep slope on an unfamiliar secondary road with a single land bridge and an embankment in the near distance. The situation clearly called for extreme caution. Regrettably, Mr. Johnson drove the bicycle down the hill at an excessive rate of speed while not keeping a proper lookout. He was negligent in doing so and his negligence materially contributed to the accident. Had he been traveling under 40 kilometres per hour, he would not have experienced "speed wobble" before reaching the bridge and there would have been no reason for him to lose control of the bicycle.
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> [72] However, it is clear that the accident would likely not have occurred had Oakville posted better warning signs and taken care to ensure, as far as possible, that the road grades were not excessive and that there were no undulations in the steepest part of the road that could potentially cause a loss of control due to "speed wobble". In the circumstances, given the location of the

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[7] *Morsi v. Fermar Paving Limited*, 2011 ONCA 577 (Can LII)

> undulations on the steepest part of the slope and the fact that they could not be seen or anticipated, they constituted a trap for the unwary. In my view, they were a substantial contributing factor to Mr. Johnson's loss of control of the bicycle and the ensuing accident.

Absent from these paragraphs is a clear analysis of how "an ordinary cyclist exercising reasonable care" would have traversed this section of roadway. Certainly in the first paragraph Justice Moldaver is describing a situation of "obvious danger"- a situation which "clearly called for extreme caution". If that is true then the proper analysis is to ask whether an ordinary cyclist exercising the reasonable care that this situation called for-slow speed and caution-would have experienced difficulty traversing this section of roadway. If the answer is yes-because of the undulations which could not be seen referred to in the next paragraph- then the required test is met. If the answer is no-because an ordinary cyclist exercising reasonable care would not have suffered a loss of control on this section of roadway then liability should not result. Instead what Justice Moldaver does is base his analysis on the fact that "the accident would likely not have occurred" had the municipality taken additional steps to warn or upgrade its road. As noted above, this analysis should occur during step 3 - causation not during a proper application of the objective ordinary driver test. By proceeding in the manner he did Justice Moldaver was in essence applying the common law negligence standard for liability to the statutory cause of action for non-repair. In *Housen* the appellants asked the court to reject the structured test called for by the traditional analysis of non-repair stating:

> … the application of the common law duty of care would free the Court from the need to focus on how a reasonable driver exercising ordinary care would have navigated the road in question. The appellant submits that the Court would instead apply the "classic reasonableness formulation" which, in its view, would require the Court to take into account the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost of preventing that harm. The appellant argues that the respondent would be held liable under this test.

The dissent in *Housen* rejected that argument stating:

> The courts below rejected the above argument when it was put to them by the appellant. I would not interfere with their ruling on this issue for the reason that it is unnecessary for this Court to impose a common law duty of care where a statutory one clearly exists.

The majority held that it did not need to address that issue as the case could be disposed of on the traditional test and its conclusion that the trial judge had applied that test properly to the facts.

The distinction between the two approaches to liability is not insignificant. In contrast to the common law of negligence where the cost of preventative measures goes to the standard of care, the cost of measures needed to maintain a road in a state of repair does not enter into the analysis of whether there has been default. If an ordinary driver exercising reasonable care could have used the road safely, there is no default even if the road authority could have foreseen and addressed unreasonable driver conduct at reasonable expense. In the alternative, if a reasonable driver could not have used the road safely then there is default regardless of the expense of correcting it unless one of the statutory defences is established or the default is determined not to have been causative of the accident.

In Ontario, the problem of general negligence principles being imported in to the statutory test is not new. While there may be earlier examples, in the case of winter maintenance cases, it

appears to have begun when the Court of Appeal affirmed a decision that extended the duty of repair beyond "trap" situations: *Gould v. County of Perth*.[8] In that case it was held that a road authority must address generalized winter storm conditions, which are apparent to ordinary drivers, in a reasonably timely way. This approach detaches the statutory definition of repair from the "ordinary driver" test and frames the duty as an obligation to ensure that road conditions do not "give rise to an unreasonable risk of harm to users of the highway" for an unreasonable period of time. As the Court of Appeal later recognized in *Frank v. Central Elgin*[9], this formulation embodies the "general negligence standard". Ironically, in *Morsi*, the Court of Appeal made it clear that the statutory test applicable to the municipality and the common law duty of care in negligence were different. These two cases were decided by different panels exactly one year apart.

While it is true that different considerations come in to play with respect to winter maintenance issues because winter storms impact large areas of a municipality and a timely broad based response is required, failing to require the plaintiff to prove step 2 obliterates the traditional test turning it in to a general negligence analysis based on foreseeability of harm. Proceeding on this basis will almost always lead to liability unless the municipality can prove one of the statutory defences identified in step 4. The threshold test in all cases of non-repair is not supposed to be whether an accident occurred because of the condition of the roadway but whether an ordinary driver exercising reasonable care could travel on it safely. As Justice Bastarache correctly noted in *Housen*:

> The ordinary driver is often faced with inherently dangerous driving conditions. Motorists drive in icy or wet conditions. They drive at night on country roads that are not well lit. They are faced with obstacles such as snow ridges and pot holes. These obstacles are often not in plain view, but are obscured or "hidden". Common sense dictates that motorists will, however, exercise a degree of caution when faced with dangerous driving conditions. A municipality is expected to provide extra cautionary measures only when the conditions of the road and the surrounding circumstances do not signal to the driver the possibility that a hazard is present.

As Justice Iddington noted in *Raymond v. Bosanquet (Township)(*1919),59 S.C.R. 452 after referring to the ordinary driver test as formulated in *Foley v. Township of East Flamborough*:[10]

> The right to impute negligence in law to anyone else as the cause must rest upon other relevant facts and cannot be assumed merely from the accident and its consequences.

A recent example of a winter maintenance situation where the trial judge correctly applied this stage of the test to the facts before him is *Lloyd v. Bush*, 2010 ONSC 669. Although a new trial was recently ordered on other grounds,[11] in dealing with a fact situation where a road was determined to be slippery and covered with 1 to 2 inches of snow at the time of the accident, the trial judge, after determining the character and location of the road, went on to ask the threshold question of whether an ordinary driver exercising reasonable care would be able to pass through the curve safely. Based on admissions made by the plaintiff's expert he concluded that

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[8] *Gould v. County of Perth*, (1983) 42 O.R. (2d) 548 (H.C.J.), aff'd (1984), 48 O.R. (2d) 120 (C.A.)
[9] *Frank v. Central Elgin (Municipality)*, [2010] O.J. No 3736 (C.A.)
[10] *Foley v. Township of East Flamborough*, 29 O.R. 139
[11] *Lloyd v. Bush*, 2012 ONCA 349 (CanLII)

no situation of non-repair existed because a "cautious prudent driver" would be able to go through that curve at the time of the accident at 80 km per hour.

Another problem that arises with respect to application of the statutory test is how road design manuals are used. The underlying purpose of most design manuals is to provide current "best practices" with respect to a variety of road related issues, including road design and construction issues, temporary signage, road marking, permanent signing and signals. There is no doubt that this is a worthwhile goal and municipalities should be attempting to follow the recommendations in these manuals, however, failure to do so should not automatically lead to an inference that the roadway is in a state of non-repair. Road manuals are of assistance in providing guidance to a court on the types of things a municipality that was engaging in "best practices" would do in relation to the roadway in question. It is an error, however, to equate "best practices" with the statutory duty. While they may provide assistance to a judge in determining what an ordinary driver exercising reasonable care could expect to exist on an individual roadway given its character and location, it is not correct to find a failure to comply with one of the manuals means that the road is in a state of non-repair pursuant to the test. The standard of care required of a municipality with respect to its roads is not that high. As Justice Lauwers noted in *Greenhalgh v. Douro-Dummer (Township)*[12] in rejecting this argument:

> "I am not prepared to find that the MUTCD standard should apply as a matter of law in the specific circumstances of Rusaw Lane; given its low traffic load and the absence of hazardous conditions on or near the road; a judicial decision effectively imposing the MUTCD standard as the enforceable standard of care would amount to a form of judicial legislation with wider fiscal and other ramifications, since very few Ontario roads could escape if Rusaw Lane could not."

This conclusion is consistent with the following statement in the Transportation Association of Canada's "Canadian Guide to 3R/4R"[13] – a book designed to assist road authorities and design engineers with respect to cost effective improvements that can be made to existing roads that are not being redesigned to present day criteria – where in commenting on the Association's design manual for new roads "The Geometric Design Guide for Canadian Roads"[14] the authors state:

> "The Geometric Design Guide for Canadian Roads provides nationally recognized guidance in the selection of appropriate design criteria for roadways in Canada. The safety, comfort and convenience of roadways designed in accordance with this framework provides a strong rationale for adhering to the design domain suggested in the Guide. However, a significant percentage of the existing roadway infrastructure in Canada does not conform to this guidance. Consequently, it is important that designers recognize that changes incorporated into the design domains, or differences between these and previous "standards" do not imply that roads designed on the basis of former guidelines are necessarily inadequate or inappropriate."

The recent decision in *Fordham v. Municipality of Dutton-Dunwich*, 2012 ONSC 6739 is a case where the trial judge appears to have gotten this stage of the analysis wrong on numerous

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[12] *Greenhalgh v. Douro-Dummer (Township)*, 2009 CanLII, 71014 (ONSC)
[13] TAC Canadian Guide to 3ER/4R – Identifying Cost Effective Geometric Improvements for Resurfacing Restoration, Rehabilitation and Reconstruction Projects, August 2011
[14] TAC Geometric Design Guide for Canadian Roads, September 1999, Updated 2007

levels. In that case the 16 year old plaintiff had been drinking but was below the legal limit. Shortly before 9pm on January 20, 2007 he proceeded down a relatively flat, very low volume, dirt/ gravel country road without shoulders at or near the unposted speed limit of 80 kilometers per hour. On reaching the road's intersection with another road he failed to stop for a clearly visible stop sign, travelled through the intersection without slowing and then lost control of his vehicle as a result of a slight change in direction in the road surface colliding with a concrete bridge abutment. The trial judge found the municipality 50% at fault for this accident for failing to post a warning sign on the abutment. In doing so she acknowledged that all parties agreed that the stop sign was there to be seen and reacted to and that if the plaintiff had stopped for the stop sign he would have been able to manoeuver safely through the intersection. In spite of this Her Honour concluded that "ordinary rural drivers do not always stop for stop signs" and that as a result something more was required to give ordinary "rural" drivers reasonable notice of potentially catastrophic hazards ahead. She distinguished the Court of Appeal's analysis in *Morsi* by noting that the deceased's conduct in that case was reckless–with the disregarding of numerous signs- while in the case before her the plaintiff likely made a conscious decision to drive through a stop sign because he perceived the way to be clear. With all respect to the trial judge, to suggest that the ordinary driver exercising reasonable care test is subject to modification based on local custom or that municipalities should be required to sign their roads based on the underlying assumption that a percentage of their drivers will consciously choose to disregard clearly visible stop signs takes the standard of care well beyond what the statutory duty of care intended. If that is what is expected of municipalities we might as well go to a no-fault system. Hopefully, the Court of Appeal will reverse this decision with reasons that follow the structured analysis contemplated by the leading cases.

Step 3 – If a situation of non-repair is proven was it a cause of the plaintiff's injuries

Unlike most motor vehicle accident cases where the negligence of individual parties can quickly be determined to have caused the resulting accident, the determination of causation in cases of non-repair often requires far more detailed analysis. In many cases a driver will insist that "if a sign was posted I would have driven differently" or, in the alternative, is not able to provide even this potentially self-serving evidence because of their injuries or death.

While detailed analysis of the nuances associated with the issue of causation is beyond the scope of this paper, the following basic rules apply:

a) the onus is on the plaintiff to prove causation on the balance of probabilities;

b) the proper test to be applied is the "but for" test;

c) the loss of chance doctrine has no place in the analysis.

It is at this location in the analysis that the actual conduct of the involved driver, as opposed to an objective ordinary driver exercising reasonable care, first becomes relevant to the determination of liability. Unless the court concludes that "but for" the state of non-repair found the accident would not have occurred such that it is a contributing cause of the Plaintiff's loss no liability on the part of the municipality should exist.

By way of example, if an individual is driving at high speeds on a hilly, curvy, country road "hill jumping" it is hard to see why the municipality should be liable to anyone in the car for failing to post signs warning that the road is extremely hilly. Similarly, the absence of a stop ahead or stop sign at a specific intersection should not lead to a finding of liability where the plaintiff's driving behavior indicates he had no intention to stop.

A recent example of a proper causation analysis leading to a finding of no liability is *Lancaster v. Santos*, 2011 ONSC 4864. It also is what Justice MacPherson may have been intending when in *Morsi* he described the deceased as driving in a reckless manner which "absolves York Region under the test enunciated in the leading decisions".

In Lancaster the trial judge found that the signage in place at a curve was not in accordance with what was recommended in the relevant signage manual. None the less, he determined that the existing signage had provided sufficient warning to the defendant truck driver that he slowed his truck to a speed that no accident would have occurred but for the shifting of his load. He also found that the shifting of the load was unrelated to the curvature of the road. As a result, any signage deficiency that may have existed was not causative of the accident.

Step 4 – If a situation of non-repair is proven determine whether a statutory defence applies

Assuming a plaintiff proves that a situation of non-repair existed at the accident location sections 44(3)(a),(b) and (c) of the Municipal Act provide alternate potential defences to a road authority. Those sections state:

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

It is beyond the scope of this paper to explore the proper application of these defences and the existing case law. It is important, however, to understand that with respect to these defences the onus of proving their application rests on the municipality. It is also important to understand that each of these defences is available in the alternative depending on the specific facts of the case and the evidence available with respect to what the municipality knew regarding the situation of non-repair complained of, how it arose and the nature of the municipality's response given the resources available to it.

Further, section 44(8) of the Municipal Act limits the plaintiff's right of recovery to situations of non-repair which are within the travelled portion of the roadway i.e. those sections of the road allowance set aside for or commonly used by the public.

Step 5 – Apportionment of Liability

Once again there is clearly established guidance provided for the analysis judges must undertake, however, possibly because they deal with it on a regular basis in more straightforward cases where comparative negligence is easy to assess, judges often appear to deal with this very important part of the analysis quickly at the end of their reasons leaving counsel scratching their heads regarding the apportionment they arrived at.

It is possible that counsel, focussing on the all or nothing aspects of steps 1-4, often do not spend enough time in their argument setting forth the law that should guide the judge's analysis

and emphasizing the factors that should be considered by the trier of fact in arriving at an apportionment if liability is found. This is particularly important because, unlike errors of law, which are reviewable on a standard of correctness, "a very strong and exceptional case is required before an appellate court may interfere with a judge's apportionment".[15]

The two step process which is required with respect to apportionment is for the judge to first identify all of the individuals or entities whose conduct breached the standard of care required of them and contributed to the cause of the accident. The second step in the process is a principled analysis of each party's comparative fault. In undertaking this analysis the focus is on the comparative "moral blameworthiness" of the parties not on their comparative contribution to the resulting injuries.[16]

In guiding a judge undertaking this type of analysis it is important in road non-repair cases to remind judges of three basic principles which should impact on the analysis:

1) the standard of care applicable to someone operating an automobile is the same regardless of age or experience. As the Court of Appeal made clear in *McErlean v. Sarel*[17]:

> "Automobiles, snowmobiles, power boats, motor cycles, trail bikes, motorized mini-bikes and similar devices are, it is manifest, increasingly available to teenagers, and are equally as lethal in their hands as in the hands of an adult. Machines of this nature, capable as they are of high rates of speed, and demanding as they do the utmost caution and responsibility in conduct, present a grave danger to the teenage operator in particular, and to others in general if the care used in the course of the activity drops below the care which the reasonable and prudent adult would use. The potential risks of harm involved in such activities are apparent, and they must be recognized by parents who permit their teenagers the use of such powerful machines. While teenagers may in other instances be judged by standards commensurate with their age, intelligence and experience, it would be unfair and, indeed, dangerous to the public to permit them in the operation of these power-driven vehicles to observe any lesser standard than that required of all other drivers of such vehicles. The circumstances of contemporary life require a single standard of care with respect to such activities."

2) it is a privilege not a right to operate a motor vehicle. With privilege comes the responsibility to at all times operate that vehicle in a safe manner.

3) a driver of a vehicle who agrees to have passengers in their vehicle is in essence making a covenant with those individuals to drive responsibly and to the best of their ability deliver them safely to their destination. Those passengers have placed their personal safety in the driver's care. When a driver engages in behavior which represents a substantial departure from the conduct of the reasonable driver which results in an accident that conduct should normally be viewed as a major, if not the major, cause of the resulting accident.

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[15] *Sparks et al. v. Thompson*, [1975] 1 SCR 618 and *Jack v. Kirkrude*, 2002 CanLII 9922 (ONCA)
[16] *Snushall v. Fulsang*, 2005 CanLII 34561 (ONCA) and *Rizzi v. Marvos*, 2008 ONCA 172 (CanLII)
[17] *McErlean v. Sarel*, (1987), 61 O.R. (2d) 396 (C.A.)

In *Gauthier & Co. v. The King*, [1945] 2 D.L.R. 48 at page 59 (S.C.C.), Kellock J. stated:

> "If roads are in such a condition that a motor car cannot safely proceed at all, it is the duty of the driver to stop. If the roads are in such a condition that it is not safe to go at more than a foot pace, his duty is to proceed at a foot pace." [see also Rydzik et al. v. Edwards et al., (1983), 138 D.L.R. (3rd) 87]

While this observation was made in the context of a case where the road conditions the driver faced should have been visible to him, apportionment decisions which do not properly take in to account the serious responsibility anyone operating a motor vehicle in our society assumes and their obligation to at all times drive their vehicle in such a manner that it is under control, undermine municipalities' confidence in our courts. Significant allocations of liability to municipalities are particularly hard to accept in cases where liability is found based on road conditions that thousands of motorists have negotiated without any apparent difficulty or complaint. Hopefully, by reminding judges of these principles, the apportionments that occur when liability is found will be more reflective of them.

Conclusion

At present there is a serious disconnect between how some judges are analyzing cases of alleged non-repair and what the leading authorities direct should be done. This is extremely frustrating to municipalities and their insurers and is leading to a loss of confidence in our judicial system. Hopefully, by careful presentation of the law at trial, this problem can be corrected. In the alternative, if the courts feel that the traditional test for non-repair is out of date, that issue should be addressed head on by our appellate courts so municipalities know where they stand and, if appropriate, the legislature can intervene.