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Opportunities for Summary Judgment in Municipal Liability Cases

By Brant Grant and Nadia Marotta

In light of the decision in *Combined Air Mechanical Services v. Flesch,*[1] counsel in municipal cases must re-assess their opportunities for summary judgment. In *Combined Air,* the Ontario Court of Appeal identified a new category of cases amenable to summary judgment: cases where the trial process is not required "in the interests of justice."[2] The central question after *Combined Air* is whether a "full appreciation"[3] of the evidence and issues can be achieved on the record before the motions judge. This means that Rule 20[4] motions will turn largely on the volume of the evidentiary record and the number of factual issues to be decided. In sidewalk and road maintenance cases, the opportunities for summary judgment are almost exclusively with the defendant municipality. In particular, summary judgment may be achieved in the following municipal liability scenarios:

1. Injury caused by a defect outside the travelled portion[5] of the highway;
2. The plaintiff's failure to abide by the statutory ten-day notice[6] period;
3. Pedestrian injury on a roadway that is safe for vehicles;
4. The absence of gross negligence[7] in a sidewalk case; and
5. Fall caused by a low "trip ledge" on a sidewalk.

In these various circumstances, defence counsel may be able to satisfy the "full appreciation" test and successfully demonstrate that a trial is not required "in the interests of justice."

I. Section 44(8) – Untravelled Portion of the Highway

Summary judgment may be available where it is clear that the plaintiff's accident was caused by a defect outside the "travelled portion" of the highway. In such a case, the plaintiff's action should be statute-barred by s. 44(8) of the Ontario *Municipal Act*.[8] *Barrie ats. McHardy*[9]

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[1] 2011 ONCA 764 [*Combined Air*].
[2] *Ibid,* at para. 51; *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194*,* Rule 20.04.
[3] *Combined Air,* at para. 50.
[4] *Rules of Civil Procedure, supra* note 2, Rule 20.
[5] *Municipal Act, 2001*, S.O. 2001, ch. 25, as amended, s. 44(8) [*Municipal Act, 2001*].
[6] *Ibid,* ss. 44(10) and (12).
[7] *Ibid,* s. 44(9).
[8] *Municipal Act, 2001, supra* note 5.
[9] *McHardy (Litigation Guardian of) v. Ball,* 2012 ONSC 1095 [*McHardy* No. 1].

was a recent attempt at summary dismissal based on s. 44(8). In *McHardy,* the plaintiff's car struck a rigid pole on a traffic island.[10] The motions judge denied summary judgment because, in his view, it was unclear whether the island constituted the "untravelled portion" or an "integral part" of the highway.[11] The City of Barrie sought leave to appeal, which was granted on July 13, 2012.[12] In granting leave, Eberhard J. opined that the motions judge had confused the issue of negligence with the question of whether the pole, in its undisputed placement, fell within the "untravelled portion."[13] Therefore, implicit in *McHardy* is the suggestion that summary judgment will be appropriate where the location of the accident or alleged defect clearly falls outside the travelled portion of the roadway. Uncontroverted evidence of the accident location, including photographs and admissions by the plaintiff on discovery, will strengthen the defence position.

II. Section 44(10) – Notice Period

Summary dismissal may be achieved by invoking the limitation defence in s. 44(10) of the *Municipal Act*. However, in s. 44(10) cases, success is difficult to predict. This is illustrated by two recent and divergent decisions of the Ontario Superior Court: *Argue v. Tay (Township*)[14] and *Allen v. Prince Edward (County).*[15] In *Argue,* summary judgment was appropriate because the evidentiary record was small and easily appreciated (two affidavits and limited cross-examinations).[16] As a result, DiTomaso J. held that *Argue* was "exactly the type of case" that could satisfy the "full appreciation" test.[17] In *Allen,* on the other hand, summary judgment was denied because "multiple findings of fact were required on the basis of conflicting evidence."[18] Despite being confronted with similar facts, the two motions judges in *Argue* and *Allen* arrived at different results. Each decision hinged on the degree to which the respective motion records disclosed "contentious factual issues" requiring a trial.[19]

In s. 44(10) cases, the central issue is whether the plaintiff has discharged his or her onus of proving: (i) a reasonable excuse for the lack of timely notice; and (ii) the absence of prejudice to the municipality.[20] Where the plaintiff's motion materials provide no explanation for the lack of notice, summary judgment may be available to the municipality.[21] In *Argue,* for example, it was the plaintiff's own evidence that her injuries did not prevent her from providing

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[10] *Ibid,* at para. 1.
[11] *Ibid,* at para. 87.
[12] 2012 ONSC 4657 [*McHardy* No. 2].
[13] *McHardy No. 2*, at para. 10.
[14] 2012 ONSC 4622 [*Argue*].
[15] 2012 ONSC 3870 [*Allen*].
[16] *Argue,* at paras. 27-28.
[17] *Ibid*.
[18] *Allen,* at para. 23.
[19] *Argue,* at para. 28.
[20] *Municipal Act, 2001,* s. 44(12).
[21] *Argue,* at paras. 52 and 57; *Theiventhirampillai,* at para. 30.

notice within the statutory period.[22] Further, where the record clearly demonstrates that the municipality has been prejudiced by the plaintiff's late notice, the defence can succeed on a Rule 20 motion. Prejudice has been found where the municipality lost the opportunity to: investigate the accident, inspect the accident location, take contemporaneous photographs or measurements, and interview witnesses when they had a fresh recollection of the conditions.[23] Therefore, summary judgment can be achieved in s. 44(10) cases where, on a modest record, the motions judge can find that the municipality has been prejudiced, there is no reasonable excuse for the lack of timely notice, and there is a dearth of contentious factual issues.[24]

III. Roadway Safe for Vehicles

If a pedestrian chooses to cross the roadway outside the crosswalk, she takes the road as she finds it; the municipality need only maintain the roadway to be safe for vehicular traffic.[25] Therefore, where the plaintiff suffers an injury as a result of a defect in the roadway, there may be an opportunity for summary judgment in favour of the defence. This was the case in *Owens v. Brantford,* where the accident occurred in an area that was not designated for pedestrians.[26] Success in a case like *Owens* requires clear evidence as to the location of the alleged surface defect.[27] If the defect is located on the road outside of a designated pedestrian crossing, the issue on summary judgment will be whether the road was otherwise safe for vehicles. If it was, the plaintiff cannot raise a "genuine issue" with respect to disrepair. As in *Owens,* photographs and admissions on discovery can provide the foundation for a successful Rule 20 motion.

IV. Section 44(9) – Gross Negligence in Sidewalk Ice and Snow Cases

Summary judgment may be available in slip and fall cases involving snow or ice on municipal sidewalks. In such cases, section 44(9) of the *Municipal Act* limits the liability of the municipality to "gross negligence." If there is reliable evidence of timely winter maintenance by the municipality (i.e. the absence of gross negligence), a sidewalk case may be amenable to summary judgment. A recent example is *Toronto ats. Theiventhirampillai.*[28] Edwards J. held that the plaintiff who slipped on the sidewalk in front of his home had "completely failed in [his] evidentiary record to establish that the City was grossly negligent."[29] Further, on discovery, the plaintiff admitted that he did not notice anything dangerous about the condition of the sidewalk.[30]

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[22] *Argue,* at para. 34.
[23] *Argue,* at paras. 64-68; *Langille v. Toronto,* 2010 ONSC 443, at paras. 32-33.
[24] *Argue,* at para. 27-28.
[25] *Holmes v. Kingston,* 2009 CanLII 225556 (Ont. S.C.J.), at paras. 19-20.
[26] 2004 CanLII 13994 (Ont. S.C.J.), aff'd [2004] O.J. No. 6113 (C.A.), at para. 23.
[27] *Ibid,* at para. 4.
[28] *Theiventhirampillai v. Balakrishnan,* 2012 ONSC 215 [*Theiventhirampillai*].
[29] *Ibid,* at paras.1, 24 and 33.
[30] *Ibid,* at para. 2.

By contrast, the City of Toronto tendered "unchallenged" documentary records: winter maintenance logs, weather reports, and evidence showing that no complaints had been made about snow or ice in the accident area.[31] Summary dismissal was granted[32] in favour of the City. Therefore, where the motion materials clearly show timely maintenance of the sidewalk, both s. 44(9) and the "full appreciation" test can be satisfied.

V. "Trip Ledges" and the "Judicial Rule of Thumb"

There is "judicial rule of thumb" which provides that a "trip ledge" measuring less than ¾ of an inch does not constitute non-repair of a sidewalk.[33] Where there is uncontroverted evidence that the plaintiff fell on a "trip ledge" measuring below this benchmark, summary judgment may be available to the defence. The height differential can be plainly demonstrated by contemporaneous photographs and measurements tendered by the municipality. Ultimately, if the plaintiff cannot show a "significant variance"[34] in the elevation of the sidewalk, he or she may fail to raise a "genuine issue"[35] with respect to liability.

VI. Conclusion

While success on summary judgment remains unpredictable after *Combined Air,* a general guideline can be applied to municipal liability cases: a complete but modest documentary record, coupled with proper admissions on discovery, can form the basis of a successful Rule 20 motion. As discussed above, the "full appreciation" test can be satisfied by invoking sections 44(8), 44(9), and 44(10) of the Ontario *Municipal Act*. It can also be satisfied where the plaintiff trips and falls on a roadway that is safe for vehicles or on a "trip ledge" measuring less than ¾ of an inch. In all cases, defence counsel should be wary of the volume of documents and number of witnesses[36] required to show there is "no genuine issue requiring a trial." After *Combined Air,* less paper and fewer issues will lead to increased success for municipal counsel.

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[31] *Ibid,* at paras. 7-9 and 16.
[32] *Ibid,* at para. 33.
[33] *Vicari v. Toronto,* 2009 CanLII 15662 (Ont. S.C.J.), at para. 28; *Slater v. Toronto,* 2004 CanLII 45455 (Ont. S.C.J.), at para. 8 [*Slater*].
[34] *Slater,* at para. 45.
[35] *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, Rule 20.04.
[36] *Combined Air,* at para. 51.