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April 2014

ROAD Authorities

Winning the tale of two cities:
An introduction to
municipal liability experts

Road authority liability:
Some practical strategies

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Publication Agreement No. 40037155

[FEATURE]

Winning the tale of cities:

**An introduction
to municipal
liability experts**

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These cases can be won or lost based on
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most important investments a lawyer can make in a motor vehicle accident case involving municipal defendants are the expert liability witnesses. These cases can be won or lost based on how compelling the plaintiff's experts are in comparison to the defendant's. Unique considerations against municipal defendants often call for the involvement of one or more of these experts from the moment you are retained until the end of trial.

Immediately after the accident, it is imperative to accurately document the scene. Just how wide was that pothole? How deep was that edge drop

off? In light of *Ontario's Minimum Maintenance Standards*,¹ these are incredibly important questions that can be very difficult to accurately establish without the assistance of a good expert.

For example, road markings such as skid marks and pavement gouges from the accident and the final resting place of the vehicles involved would alert a properly trained expert to scrutinize the road well ahead of the location of impact. Perhaps a warning sign before the accident site was obscured by a bush or tree. Perhaps a storm drain clogged with leaves caused black ice to form along a busy stretch of road. Potholes or shoulder drop offs relatively far away from the location of impact may have played a major role in a vehicle losing control. Lay people may overlook

important elements to properly warn motorists of upcoming dangers and provide for relatively safe road conditions. Retaining a good expert early is crucial to ensuring that you have the photographs, measurements and other evidence you need to build your case.

There is a relatively small community in Ontario of qualified and experienced road authority experts, and a municipal defendant may retain your top choices shortly after receiving notice of the potential claim. It is important to retain your experts early to ensure that you hire the ones you want. Often you will retain the same types of experts as in any motor vehicle accident case. The following experts can be crucial to establishing liability against municipal defendants.

Accident reconstruction

Accident reconstruction experts take a hard look at the physical evidence left behind from a motor vehicle accident. They fully document the scene and the vehicles involved. This includes skid marks, gouge marks in the pavement, divots in the shoulders or surrounding landscaping near the scene, measurements of the road and its shoulders, locations of fragments of the vehicles or potentially accident-related debris, measurements of key aspects of the vehicles such as “crush depths” and tire tread depths and inspection of equipment such as seat belts, brakes and airbags.

These are the experts that are most important to be retained immediately after an accident as the physical evidence that they often collect may disappear shortly after the collision. Accident reconstruction experts provide accurate and relevant evidence to the court in addition to offering an opinion as to the likely cause of the accident and the factors that likely contributed to the cause. Based on the final resting places of the vehicles involved in an accident, skid marks at the scene, the gouge marks in the pavement, the weight of the vehicles and relevant damage, these experts document the path and speed of all the relevant actors involved and tell the story of the collision leading up to the moment of impact and the immediate aftermath.

Accident reconstruction experts often create demonstrative aids to assist a judge in understanding crucial elements of an accident. For example, they often create overhead diagrams of the scene so that the logistics of the accident are clear and easily understood. They can also create video models of the site under various conditions to rule out

potential factors such as speed or wet pavement as likely contributors that may otherwise cloud the liability issue.

Road design, traffic control devices and maintenance

An expert well-versed in the standards of road design and signage expected of municipalities is critical to establishing liability. Ontario’s *Minimum Maintenance Standards*² provides bright line tests for many common areas of alleged negligence, including snow and ice removal, road patrolling, weather monitoring and maximum pothole sizes. This regulation was significantly expanded effective January 25, 2013 following the Court of Appeal’s decision in *Giuliani v Halton (Municipality)*.³

Many elements of Ontario’s roadways are not described in the *Minimum Maintenance Standards*,⁴ including painted edge lines, lane lines, lane widths, road surface materials, warning signs, road alignments, sight lines, and speed limits. In these instances, experts typically refer to road design guidelines and the *Ontario Traffic Manual* to provide guidance. The *Ontario Traffic Manual* is a series of “books” covering traffic control devices that include distinct topics such as “Warning Signs,” “Pavement Markings” and “Traffic Signals”. Both the *Ontario Traffic Manual* and the *Minimum Maintenance Standards*⁵ take into account the use and purpose of a road. A rural side road is not held to the same standard as a main artery in an urban center. The guidelines and regulations attempt to maintain predictability so that drivers from Windsor to Sudbury will see the same warning signs depending on the typical traffic level and purpose of the roads. It is important to remember that

municipalities typically will have their own plans in addition to these, which may impose standards that are stricter than the provincial guidelines and regulations.

The *Ontario Traffic Manual* is published by the Ministry of Transportation in an effort to ensure uniform safety standards throughout the Province. These books are very comprehensive and dense. They are not meant to impose strict legal standards intended to trigger statutory liability, but they do inform the court by providing standard professional guidance regarding what is required to keep a road in a state of reasonable repair.⁶ The courts have indicated that strong language in the *Ontario Traffic Manual* can place an onus on a defendant municipality to show why it acted or omitted to act in accordance with the guidelines. Howden, J. in *Deering v. Scugog (Township)*⁷ made the following comments regarding the *Ontario Traffic Manual*:

“Where a road manual is one respected within the road engineering community as the OTM is, and the guideline in question uses the word ‘must’ the Court should approach it in the sense that there should be some compelling reason not to follow it in the circumstances and context within which the transportation engineer is working. This approach would provide some distinction from a guideline reading ‘should’”

Often defendant municipalities will present arguments regarding the excessive cost of correcting particular deficiencies. There is compelling jurisprudence that significant capital

expenditures are issues of public policy and best left to elected officials unless the decisions were made in bad faith.⁸ It is important to have an expert who is prepared for these arguments and is prepared to present a series of relatively inexpensive ways a municipality could have avoided creating or maintaining unreasonably dangerous road conditions, for example by erecting relatively inexpensive warning signage or reducing the speed limit of an area prone to accidents.

Human factors

Human factors experts provide opinions regarding typical human perceptions and reactions to particular road conditions. They can highlight why certain factors such as warning signage or paint designed to illuminate in low light conditions are critical to keep motorists informed and, thus, safe while driving. Often they can be helpful where there are minor elements of contributory negligence, such as non-excessive speeding.

For example, in *Deering v. Scugog (Township)*,⁹ the court was heavily swayed by evidence provided by the defendant's human factors expert, Dr. Alison Smiley. In that case a car full of young people was travelling along an unfamiliar road that did not have a painted centreline. There was a fairly steep hill along the road. The road was aligned in such a way that when an oncoming car approached from the other side of the hill and reached the crest, its headlights would be angled to make it appear to any normal driver that the oncoming vehicle was actually in the wrong lane and a head-on collision was imminent. The driver of the plaintiff vehicle swerved into a ditch to avoid an accident and the vehicle rolled. Although

the driver was young, inexperienced, and speeding along an unfamiliar road, the compelling evidence of the human factors expert that the accident would likely have occurred in any event was a major factor in the successful outcome by the plaintiffs.

Accident reconstruction experts are those that are most important to be retained immediately after an accident as the physical evidence that they often collect may disappear shortly after the collision. Accident reconstruction experts provide accurate and relevant evidence to the court in addition to offering an opinion as to the likely cause of the accident and the factors that likely contributed to the cause.

Howden, J. in *Deering* found the human factors testimony particularly helpful in two regards. First, he gave "considerable weight" to Dr. Smiley's testimony regarding the scope of an

"ordinary driver".¹⁰ This included the tendency to speed, the tendency to drift away from the edge of a road, the tendency for inexperienced drivers to require additional reaction time and the foreseeability by municipalities that inexperienced drivers will be using public roads. Second, Howden, J. found the video produced by Dr. Smiley particularly helpful to the plaintiffs' case because he was able to appreciate the significance of the accident occurring at night. A police video had been produced, but it was filmed during the day and the confusion arising from the headlights of an oncoming vehicle as it crested the hill where the accident occurred was not obvious until he saw the same scene at night.¹¹

Biomechanical

Biomechanical experts are not typically crucial to establishing liability against a municipality. In rare cases they may be helpful where an individual's injuries are not clearly tied to the negligence of a municipality. More frequently in municipal liability cases they may be used to mitigate contributory negligence arguments, for example downplaying the failure to use a seat belt if the injuries would have likely occurred in any event.¹² Mitigating contributory negligence is a major factor in cases involving catastrophic injuries that are not capped by policy limits.

Police

Police records are crucial and if you intend to rely on any opinions provided by the police, including a Technical Traffic Collision Report, remember you must comply with Rule 53 following the decision in *Westerhof v. Gee (Estate)*.¹³

The police typically do a very good job of documenting a scene immediately

following an accident and before the scene can be tainted. A picture is worth a thousand words and may be worth millions to your client. While police records are a great resource, the officers trained in technical traffic collision investigations are police officers who take a course. They cannot be expected to know as much as civil road engineers with decades of experience designing roads, advising the Ministry of Transportation on safety standards, and analysing hundreds or thousands of severe crashes in detail.

Admission of prior motor vehicle accident reports or statistical accident data is often a contentious issue. Prior accidents are not in and of themselves relevant to future accidents; however, the failure to properly document, investigate and correct borderline deficiencies in “problem areas” is relevant and can contribute to a finding of negligence.¹⁴ Police witnesses may be required to establish problem areas, but the road design expert described above ought to be the witness who provides an opinion regarding appropriate standards in relation to the documentation and investigation of sites with unusually high accident rates.

Weather

A weather expert may be required if the parties cannot agree on important elements of an accident where weather is a factor. Ice formation and snow accumulation are listed in Ontario’s *Minimum Maintenance Standards*,¹⁵ and other factors such as ambient light levels or regular flooding may require an expert to provide an opinion in order to strengthen liability arguments.

In *Giuliani v. Halton (Municipality)*¹⁶ weather monitoring standards were a critical issue – although many of the

weather issues giving rise to liability in that case have been amended or newly included in Ontario’s *Minimum Maintenance Standards*¹⁷ following the Court of Appeal’s decision. These amendments to the regulation were effective as of January 25, 2013.

Preparation and examinations for discovery

In large or complex cases, it may be prudent to have an expert help prepare a lawyer for examinations for discovery and perhaps even attend with the lawyer. Permission to have the expert attend should be obtained ahead of time, and the lawyer should be cautious to avoid allowing the expert to ask any questions himself unless this has been approved by opposing counsel in advance.

Prior to recent reforms to the *Rules of Civil Procedure* involving expert impartiality, it was held that an expert attending discoveries should not be the expert at trial.¹⁸ While there has not been a reported case revisiting this issue since the amendment was made in relation to experts, a conversation with opposing counsel in advance of the discovery can help avoid unnecessary motions pertaining to admissibility further down the road.

Three expert rule and duplicity

Section 12 of the *Evidence Act* limits the number of experts a party may call to three unless leave is granted. Obtaining leave to call additional experts in municipal liability cases is not particularly onerous, but it is important to remember that a judge is highly unlikely to permit you to call more than one expert witness who is qualified in the same area. While

the expert reports may contain some overlap (i.e. accident reconstruction, road design, and human factors may all be present in various forms in a single report), it is important to have a plan about who is going to be qualified to provide an opinion in these distinct areas. Each of the aforementioned experts has particular skills and experience in their areas of practice. Be careful to not confuse one expert with another – an accident reconstruction expert is not a road design expert although the former’s findings may indicate that a missing traffic sign or poor road maintenance may be a factor in accident occurrence.

Fortune favours the prepared

Municipal liability cases are not for the faint of heart. If you are considering suing a municipality, your strongest asset will be your liability experts. More likely than not, your largest hurdle will be the defendant’s liability experts. Get your experts involved early, lean on them to make sure you are asking all the right questions and have all the right evidence, and get their feedback on the problems with the municipality’s defence. They can make or break your case.



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NOTES

- ¹ O Reg 239/02 [MMS]
- ² Ibid
- ³ 2011 ONCA 812 (CanLII)
- ⁴ MMS supra note 1
- ⁵ Ibid

- ⁶ *Johnson v. Milton* [2006] Carswell Ont 4859; *Deering v. Scugog (Township)*, [2010] OJ No 4229 (OntSCJ) aff'd: 2012 ONCA 386 (CanLII) [*Deering*]
- ⁷ *Deering* supra note 6 at para 243
- ⁸ *Oosthoek v. Thunder Bay (City)*, [1994] OJ No 2619 (Ont Ct J [Gen Div]), aff'd: (1996) 30 OR (3d) 323 (Ont CA); *Gobin (Guardian ad litem of) v. British Columbia*, [2002] BCJ No 1353 at paras 11-57; *Cooper v. Hobart*, [2001] 3 SCR 537; *Kamloops (City of) v. Nielsen*, [1984] 2 SCR 2; Section 450 of the *Municipal Act*, 2001, SO 2001, c 25 further provides an explicit defence for policy or discretionary decisions

- ⁹ *Deering*, supra note 5 at paras 157 – 183
- ¹⁰ Ibid at para 179
- ¹¹ Ibid at paras 183 - 184
- ¹² *Snushall v. Fulsang*, [2005] OJ No 4069
- ¹³ 2013 ONSC 2093
- ¹⁴ *Housen v. Nikolaisen*, [2002] 2 SCR 235
- ¹⁵ MMS, supra at note 1
- ¹⁶ 2011 ONCA 812 (CanLII)
- ¹⁷ MMS, supra at note 1
- ¹⁸ *Al's Steak House and Tavern Inc. v. Deloitte & Touche*, [1998] OJ No 6545



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