CRACKS IN THE DEFENCE

Sidewalk Maintenance and Municipal Liability

A thumb is about an inch wide which makes a handy rule when it comes to sidewalk deflections. As a rule of thumb, if a sidewalk has a crack or deflection of more than a thumb width, a municipality may well be liable for any injuries resulting from a trip or fall.

When Judy Lind* tripped in a church parking lot it was not, the courts ruled, an Act of God. The church had not maintained the pavement and was therefore liable for damages, which in this particular case were substantial. The nature of her injury was not unusual. Most slips result in head and back injuries. Most trips result in wrist and arm injuries as the person tries to break the fall. But Judy's injury had far more serious implications than it would have been for most people. Because she injured her wrist Judy lost not one but two jobs: her primary job as a records transcriber in a local hospital and a part-time job as a professional musician in an orchestra. The court awarded her $300,000 for loss of income.

According to The Municipal Act, a municipality will be held liable for damages and injuries if it does not keep its sidewalks in a reasonable state of repair. But what is a "reasonable state of repair"? That is often left up to the courts to decide.

The courts recognize that a municipality would soon go bankrupt if it had to repair every sidewalk imperfection, however small. On the other hand, excessively large cracks would be a prima facie case of negligence. So while there is no absolute standard defining what constitutes a trip hazard in a sidewalk there is a handy rule of thumb. The magic number for deflections, developed over years of case law, is about two centimetres or three-quarters of an inch.

If you think that is a rather arbitrary number, you would be right. It is. A small crack can lead to a large injury and a large crack may lead to nothing more than a stubbed toe.

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not her real name. Some details have been changed for anonymity.

By Van Krkachovski

INSIGHT

Sidewalk Trip and Falls

Key points:

- A municipality must keep its sidewalks in a reasonable state of repair.
- A person making a claim for injuries must do so within 10 days.
- A reasonable state of repair includes regular inspections and prompt repair work.
- A reasonable state of repair does not mean that every crack must be repaired.
- Municipalities must document their sidewalk maintenance procedures.

Decision points:

- Are there sidewalk deflections larger than ¾-inch?
- Are inspections frequent enough to identify new problems?
- Are inspections thorough and effective?
- Are problems addressed promptly?
- Are utility cuts checked for good repair?
- Are early warning signs (tree root growth, severe winters) followed up with inspections and action?
- Are sidewalk maintenance records properly maintained?

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And, in the same vein, a municipality is not necessarily liable if a deflection is larger than three-quarters of an inch nor does it necessarily escape responsibility just because a crack is small.

In order to determine what is reasonable, a judge will look at not only the size of the deflection but also why there was a deflection in the first place. Did the municipality inspect its sidewalks with reasonable frequency? Were the inspections carried out properly? (One judge quite rightly pointed out that it is difficult to spot cracks in a sidewalk when driving along in a truck). Were problems identified in the inspection addressed promptly? Did the municipality respond to early warning signs, a severe winter for example, that would indicate an increased likelihood of damaged sidewalks? Answer "no" to any of the above and the judge may rule that the cracks in the municipality's defence outweigh the size of the cracks in the sidewalk.

All this is not quite as one-sided as it may seem. The injured party can and often does bear some responsibility for the accident and again, it is up to the judge to decide in his or her wisdom what is reasonable. Was the injured party familiar with the area and if so was he or she aware that the sidewalk was uneven? Was he or she distracted, perhaps jogging rather than walking or talking on a cell phone or listening to music on his or her earphones? Was the injured party inebriated ("falling down drunk" may be the appropriate phrase)? If the judge finds that the claimant contributed to the injury by his or her own negligence, damages will be reduced.

Timing in these cases is critical and the onus is on the injured party to proceed as quickly as possible. The Municipal Act requires that the plaintiff give the municipality notice within 10 days of the incident and the action must start within two years.

Why such a short time frame? The answer is that a municipality needs to be able to investigate the cause of the injury in order to prepare its defence and since most slip and fall claims are a result of winter conditions, there is a good chance that any snow and ice would have long since disappeared if the time frame was any longer. Delays in filing a claim are not, however, a bar to an action if the judge finds that there was a reasonable excuse for not giving notice (the injured party may be incapacitated, for example) and that the municipality has not been prejudiced by lack of notice.

Trip and fall claims can be an expensive proposition. Damages for pain and suffering for an injury from a trip and fall can range from $5,000 to as much as $70,000 when the injured party suffers chronic pain and suffering for the rest of his or her life. Add in claims, such as those of Judy Lind, for income loss and all the associated legal fees and court costs and the bill can rise astronomically.

There are times when going to court is necessary, when an injured party is making an outrageous claim or when the municipality is convinced that it has done everything reasonable to maintain its sidewalks in good condition. But there are other options. Even if the sidewalk condition is within acceptable standards, a goodwill gesture of a small payment for a minor injury (along with a signed release form) can stop a dispute from escalating.

So what can a municipality do to protect itself? The obvious answer is to keep its sidewalks in good repair but that is not practical under all circumstances. It must therefore do what is "reasonable": establish a procedure for keeping sidewalks in good repair, inspect its sidewalks regularly, make the obvious and necessary repairs, and keep records showing what was done. The judge does not want to hear that the municipality has done the best it can. He wants to see it in black and white.

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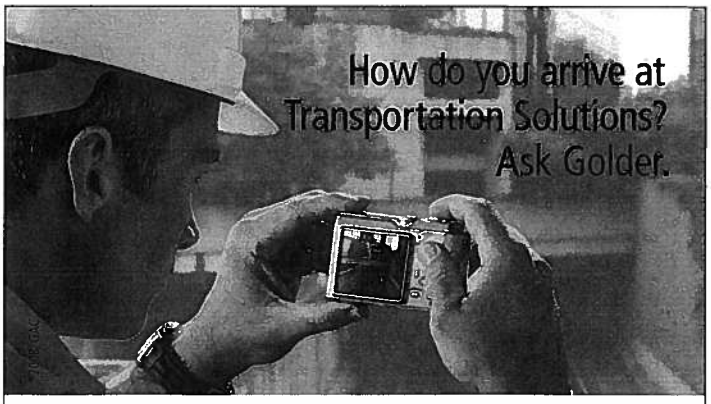

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