# When is Negligence "Gross": A Commentary on *Costerus v. Kitchener (City)*

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In the recent trial decision of *Costerus v. Kitchener (City)*, 2017 ONSC 6030, the City of Kitchener was held to be grossly negligent for failing to clear its sidewalks of ice, upon which the plaintiff slipped and injured herself. This decision provides an interesting analysis of the law of gross negligence as it relates to a municipality.

Section 44 of the *Municipal Act, 2001*, S.O. 2001, c. 25, creates an obligation on a municipality to keep all highways under its jurisdiction (which includes city roads and sidewalks) in a reasonable state of repair, and imposes liability on the municipality for failing to meet this obligation.

However, section 44(3) of the *Act* creates a defence for municipalities against such liability, if the municipality can prove that either it did not and could not reasonably have been expected to know about the state of repair complained of, or that it took reasonable steps to prevent the default of its obligation under the *Act* from arising.

There is a further defence available under section 44(3) of the *Act* if minimum maintenance standards set out in the regulations under the *Act* applied to the highway in question at the time of the default and were met, but this issue did not arise in this case.

Section 44(9) of the *Act* creates an additional barrier to recovery against a municipality for claims for personal injury caused by snow or ice on a sidewalk. In such cases, the plaintiff

must prove not only negligence, but *gross* negligence, on the part of the municipality in order to establish liability.

In coming to his determination that the City of Kitchener met this increased level of negligence, Justice Nightingale placed a great deal of reliance on the following facts:

- The City had received weather reports to suggest that temperatures were going to fluctuate overnight the night prior to the plaintiff's fall, creating a thaw-freeze situation.
- The plaintiff's fall occurred in an area near a school with high pedestrian traffic.
- The City did not, in fact, inspect or spread sand or salt in the area that morning, despite knowing of the potential thaw-freeze situation.

However, Justice Nightingale seemed most compelled by the City's inconsistent policy with respect to overnight and early morning winter maintenance.

The evidence at trial was that City maintenance workers began their shifts at 7:00 a.m., and although the City had a policy that these workers could be called in to start their shifts earlier as needed if there was 8 cm of snow, there was no such policy in place to allow these workers to be called in early to combat freezing rain or thaw-freeze situations, which are arguably more dangerous. As a result, the City maintenance supervisors were unable to call in workers early to address this dangerous issue.

In deciding that the City was grossly negligent in this case, Justice Nightingale reviewed the applicable appellate authorities on the gross negligence standard, including the Supreme Court decision of *Holland v. Toronto (City).*

In *Holland,* the Supreme Court held that gross negligence means "very great negligence". The factors to be considered include the extent of the risk created by the dangerous condition, as well as the character and duration of the neglect by the municipality, including the comparative ease or difficulty of addressing the issue.

Justice Nightingale also relied on the Ontario Court of Appeal decision of *Crinson v. City of Toronto*, which held that gross negligence does not need to be wilful, wanton, or flagrant conduct, and that the determination of gross negligence is highly fact-specific.

The end result is that the City of Kitchener was found to be 50% liable. The plaintiff was also found to be 50% liable because she was wearing running shoes instead of winter boots and because she had the ability to reasonably avoid the icy sidewalk.

Municipalities might take caution from this decision. Plaintiffs injured on icy or snowy sidewalks have an increased burden of proof, in that they must prove not only negligence but gross negligence. However, the courts may be inclined to find gross negligence where there are absent or inconsistent policies for inspection and maintenance of sidewalks.

This may be particularly so where such policies of inspection and maintenance of sidewalks are needed to address situations where inclement weather likely to give rise to slippery conditions are predicted, and where areas with increased pedestrian traffic are not given special attention by municipal maintenance workers.