

I'VE FALLEN AND I CAN'T SUE THE MUNICIPALITY

Guidelines for preventing and defending against liability claims arising from icy sidewalks

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As winter approaches in Saskatchewan, citizens, businesses, and governments prepare to deal with the inevitable barrage of ice and snow. For municipalities, this means attempting to accurately budget for a complete unknown that wildly fluctuates from year to year. Preparing snow removal equipment for the winter season, and communicating municipal snow removal policies and practices to appropriate staff are probably on your municipality's to-do list. Business owners may prepare by purchasing shovels and stockpiling ice melt. Homeowners may undertake similar preparations and will also make certain everyone has proper, well-fitted winter footwear, warm jackets, and all the outdoor gear ready.

For personal injury lawyers, winter can be a busy time of year. Slips, trips, and falls can make up nearly one-quarter of their entire practice. An Italian proverb says "A lawsuit is a fruit tree planted in a lawyer's garden" and municipalities that have had to defend against slip, trip, and fall claims will likely agree. Slip, trip, and fall claims can be long and expensive to defend against for cash-strapped municipalities — not to mention personal and bitter in smaller centres where everyone knows everyone. Often, the determination by municipalities or their insurance companies is that it is cheaper to settle a claim rather than fight one.

While there is some statutory protection for municipalities from claims arising from slips, trips and falls on Saskatchewan sidewalks, municipalities are not completely immune from them. In Saskatchewan, the limitation period to file a claim is typically two years. However, this timeframe is reduced to one year if the claim is against a municipality. As well, for snow, ice, or slush on sidewalks, Section 305 (1) of *The Cities Act* and Section 342 (1) of *The Municipalities Act* require that the plaintiff notify the municipality of the event within 30 days after the occurrence of the event. Saskatchewan is more generous with the limitation period than Ontario, where citizens must notify a municipality of a slip, trip or fall occurrence within 10 days.

The time period for reporting an occurrence is not the only difference between Saskatchewan and the other provinces. Seven provinces have enacted occupier's liability acts, which codify the duty of care owed to both visitors and trespassers to municipal properties. In 1980, the Law Reform Commission of Saskatchewan proposed and recommended the enactment of The Occupier's Liability Act to then-Attorney General for Saskatchewan, the Honourable **Roy Romanow**. To date, the act has not become law and Saskatchewan continues to rely on the principles established by previous court decisions (common law).

Saskatchewan courts have weighed in on the issue with one of the more notable cases being *Metz v. Regina (City)* in 2006. The case involved the allegation of injuries sustained due to a slip and fall on an icy Regina sidewalk in March 1994. The action was dismissed with costs and is an important precedent-setting case for Saskatchewan's municipalities. The Law Society of Saskatchewan summarized the judgment as follows:

- Snow and ice are constantly present in Regina during the winter season. The duty to exercise reasonable care to keep the sidewalks safe for use does not oblige a municipal corporation to attempt to accomplish that which is practically impossible. It would be unreasonable to impose a duty on a municipality in Saskatchewan to keep sidewalks clear of snow and ice at all times during the winter season. It is a fact of life that pedestrians will encounter snow and ice on sidewalks. The City is not an insurer of safety for pedestrians using the sidewalk.

- The City did not ignore its duty. It took the necessary steps to remind owners and tenants of their obligations under the bylaw. Regular inspections were performed.
- The plaintiff has failed to prove the City was grossly negligent. While that case went decidedly in the municipality's favor, that is not always the case – especially with regard to the City of Hamilton, Ontario. A court recently awarded a \$192,000 settlement to 89-year old **Blanch Worthey**, who slipped on a 23.8 millimetre bump in the sidewalk, broke her wrist, and spent 42 days in hospital as a result of the 2012 fall. The CBC reported that the City of Hamilton paid out more than a million dollars for 'stumble' claims in 2012, and that figure does not include the 19 additional claims filed against the city as a result of icy sidewalks. The bombardment of lawsuits prompted Hamilton's city solicitor to request a change in the provincial law surrounding slips and falls.

Regardless, the Worthey decision on this case does provide some valuable lessons for all Canadian municipalities to consider. Notable portions of the decision include the fact that the city failed to follow its own policy. The city's policy states that all cracks, bumps, and gaps which are raised more than 19 millimetres are earmarked for repairs. However, in practice, the city only marked those in excess of 20 millimetres for repair. The city's own policy contributed greatly to its loss in this case because it did not play by its own rules.

Municipal records also play a massive role in slip, trip, and fall cases against municipalities as plaintiffs usually subpoena

municipal records including logs, journals, and training records for grader and plow-drivers. The lesson learned is to make a policy and stick to it. Information gaps can also be low-hanging fruit for opposing counsel. In the Worthey decision, the court noted that the city maintained inspection records for 2009, 2010, 2011, and 2013, but that no records exist for 2012, the year Ms. Worthey fell.

At the 2015 convention for the Urban Municipal Administrators Association of Saskatchewan (UMAAS), the SUMAssure Insurance Reciprocal hosted an educational seminar on slips, trips, and falls. The seminar was chaired by **Robin Daddar**, Vice-President and Senior Consultant for Aon Risk Solutions. Daddar is a senior consultant for Fleet Safety, Health and Environment. At the UMAAS event, Daddar provided extensive information on all types of slips, trips and falls, and specifically discussed winter conditions on sidewalks. In addition to proper and timely clearing of ice, slush, and snow from sidewalks, Daddar recommends some simple preventative measures that can be done ahead of winter: repair gaps and cracks, level the sidewalks to ensure that there is no upheaval and trip hazards, and note and repair areas of water ponding or pooling on sidewalks which will lead to icy patches when temperatures fall. Another simple loss prevention measure was making certain that all roof drains are directed away from sidewalks.

Echoing the earlier point about documentation and records, Daddar asserts that due diligence with documentation is a municipality's best defense with regard to slip, trip, and fall claims. Some of Daddar's recommendations specific to sidewalks and documentation included:

- cleaning activities recorded in writing with forms and schedules that show who performed the job and when (snow logs, etc.);
- daily logging of weather conditions;
- maintenance log – activities performed, where, when, and by whom;
- written procedural guidelines which all staff use;
- develop a training manual and document all training;
- use specific-to-your-site inspection checklists; and
- managers must review logs for completeness, improper

recordings, trends analysis, etc.

Despite all the best efforts, slips, trips and falls do happen. When they do, Daddar provides the following advice:

- Help the victim – express concern for their wellbeing; provide medical attention; if needed, call 911.
- Keep crowds and onlookers away.
- Do not disturb the incident scene (unless for life-saving situations).
- Do not accept blame nor assign fault.
- Always take photographic evidence of the incident, even if there is no apparent cause.
- Get as much information from fallen person as possible (name, age, address, fall description, etc.).
- Note the condition of fallen person's footwear, physical impairments, glasses/vision, alcohol or drug intoxication, soiled clothing, whether they were carrying any objects, etc.
- Complete an accident investigation form.
- Develop and implement corrective actions or controls to prevent another incident.

The third to last bullet point – regarding the appropriateness of the victim's footwear – is an important note. Courts in Canada do consider "contributory negligence" in their decision-making process and the victim will be scrutinized in the process as well. Contributory negligence establishes how much the plaintiffs/claimants have, through their own negligence, contributed to the harm they suffered. Personal causes of injury could be caused not only by inappropriate footwear, but also by inattentiveness, gait, activity, vision impairment, medication, intoxication, and so on. Even the \$192,000 settlement in Hamilton was initially \$275,000 before the judge allocated 30 per cent of the fault to the victim herself based on her admission in court that she was not paying attention to the sidewalk as she walked.

Unless climate change completely eliminates snow, ice, and slush from Saskatchewan's sidewalks, slips, trips, and falls *will* occur – despite best efforts. Municipalities that proactively try to eliminate, reduce, and mitigate the impact of these occurrences (and record their efforts properly in the process) will always fare much better in the court system than those municipalities that choose to stick their heads in the snow. ■

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Preparing Communities for the Future

USING A FORMAL AND DOCUMENTED OCCUPATIONAL HEALTH AND SAFETY PROGRAM TO PROTECT EMPLOYEES

Brett Christie – Manager: Western Canada Safety, Health, Environment and Prairie Risk Control (Aon Winnipeg)

Over the past three years, SUMAssure has surveyed more than 150 facilities in subscriber communities to identify risk exposures to property and liability losses. From fire prevention to slip/trip/fall recommendations, SUMAssure's risk-control engineers have worked in partnership with urban administrators and councils to provide risk control reports.

These reports give the municipality the information and tools they need to eliminate, reduce, or mitigate the potential impact of those exposures to risk. The reports have also proved to be vital budgeting tools for SUMAssure's municipalities who now have the ability to prioritize spending based on the likelihood of or possible severity of a potential incident.

SUMAssure's 'point in time' risk-control surveys are a great method of working in partnership with municipalities to help identify, evaluate and control risk exposures. They also supplement the risk-control efforts, including Occupational Health and Safety (OHS) risk control efforts, which municipalities need to make day in and day out. The key is day-to-day efforts, usually by implementing a formal OHS Management System.

So what about the health and safety of municipal employees and contractors on a day-to-day basis? Are municipalities in Saskatchewan complying with provincial OHS legislation?

Keeping an urban municipality running well is a big job. Keeping the snow cleaned, the grass cut, and infrastructure maintained and operating to provide the many services citizens enjoy, involves many people. There are countless job tasks performed by municipal workers each and every day and these job tasks have varying levels of risk of personal injury. From heavy equipment operation to entry into confined spaces in water treatment plants, to work at height changing lights, there is risk of injury – even fatal injury.

In addition to municipal workers, there are often many different contractors engaged to perform work for the municipality. These contractors may work on everything from high-pressure equipment, ammonia refrigerant at the arena, underground work on municipal infrastructure (sewer, gas, water line trenches) to above-ground work on telephone and power lines. There are many questions around ensuring safety for contractors. Are these contractors

SUMAssure uses this risk matrix to categorize exposures to its members.

RISK MATRIX

Qualitative Measure of Likelihood		
Level	Descriptor	Description
A	Almost Certain	The event is expected to occur in most circumstances
B	Likely	The event will probably to occur in most circumstances
C	Moderate	The event should occur at some time
D	Unlikely	The event could occur at some time
E	Rare	The event may occur only in exceptional circumstances

Qualitative Measures of Consequence or Impact		
Level	Descriptor	Description
1	Insignificant	No injuries, low financial loss
2	Minor	First aid treatment, on site release immediately contained, medium financial loss
3	Moderate	Medical treatment required, on site release contained with outside assistance, high financial loss
4	Major	Extensive injuries, loss of production capability, off site release with no detrimental effects, major financial loss
5	Catastrophic	Death, toxic release off site with detrimental effect, huge financial loss

Qualitative Risk Analysis Matrix Level of Risk					
Likelihood	Consequence				
	Insignificant 1	Minor 2	Moderate 3	Major 4	Catastrophic 5
A	S	S	H	H	H
B	M	S	S	H	H
C	L	M	S	H	H
D	L	L	M	S	H
E	L	L	M	S	S

- H** High Risk – detailed research and management planning required at senior levels
- S** Significant Risk – senior management attention needed
- M** Moderate Risk – management responsibility must be specified
- L** Low Risk – manage by routine procedures

working safely? What happens if they have an accident or fatality? What level of involvement does the municipality have when managing contractors? Is there liability to the municipality? Is there insurance coverage for fines, penalties, and legal fees? How do municipalities protect their workers and contractors? Is there personal liability to mayor and council?

The questions continue around OHS programs. What are the ramifications of an injured worker to a municipality if safety measures are done poorly or not at all? If the municipality has not started to put an OHS program in place, where do you start? What must be done to protect workers? How is this typically done? What resources are available to help improve OHS?

To answer the first question, the impact to a municipality in the event of worker injury can include the cost of:

- worker rehabilitation;
- WCB premium increases;
- rehiring; retraining a replacement; and/or
- hiring temporary workers.

But WCB costs are just the tip of the iceberg. Did you know that it is estimated that five to 53 times the costs of poor OHS programs are below the surface? You could be paying the price with things such as building damage, tool and equipment damage, product and material damage, and repair and replacement cost? There may also be miscellaneous uninsured costs such as accident investigation time, wages paid for time lost, the cost of hiring/training replacement workers, overtime, extra supervisory time, and decreased output of an injured worker upon return to work. On top of all that, there may be fines/penalties failure to comply with the OHS legislation. All these costs aside, the reason for a good safety program is to protect your workers and contractors and is, quite simply, the right thing to do. No one wants to get hurt at work and no one wants to explain to the family of an injured coworker that they are not coming home from work today.

On the second question, all municipalities are employers and

all employers must comply with Saskatchewan's OHS legislation. A great starting point to meeting your obligations is to fully review the actual legislation. You may also want training sessions from a consultant.

After reviewing legislation, it becomes clear that every employer has the

responsibility to protect the health and safety of its workers. A good way to do that is to have a safety program to follow. Although legislation sets out the places of employment and employee count that trigger requirement for an OHS program, the mindset we're taking here is that the program is a good idea



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in all cases to guide safety efforts and ensure management of safety. As the saying goes, “*If we fail to plan, we plan to fail.*” So if your municipality has no safety and health program that it can hold in its hands, or if that program is not functioning properly, there may be increased risk of eventual employee or contractor injury. There is also potential for fines and penalties that follow from prosecutions for offence under the OHS legislation without a documented program.

Once you understand the legislation, you can move on to creating a customized program for your municipality. A written OHS program will provide an internal responsibility framework for the safety program to be properly structured and to function effectively. Traditionally, that framework often involves a safety committee or safety representative and various volunteer members, working together to identify, assess, and control risk exposures to workers.

SUMAssure has engaged Aon Risk Solutions for a great deal of its risk-control efforts and Aon’s consultants work with their clients in both the public and private sectors every day to help develop a structure and risk assessment grounded approach to safety program development. Often, when building what Aon calls an Occupational Health and Safety Management System (OHSMS), Aon follows a process known as **Plan – Do – Check – Act**. Municipalities will first need to plan out what will go into their OHSMS to control risk exposures, and will need to implement the many aspects of the OHSMS to control the identified risks. Municipalities will next need to check and monitor what they have implemented, and determine if it is effective at reducing/eliminating risk of injury. Lastly, municipalities will need to act or take corrective action to improve

the OHSMS and its many elements.

There are many considerations when planning out the OHSMS scope – from reviewing asset lists to equipment inventories to categorizing the areas where work is performed and the many job tasks done by the municipality to reviewing and understanding the incidents/accidents that have occurred in the past.

One key area that is often missed in the planning/input stage is conducting good risk assessment, or taking a deep dive into the job tasks that are done by municipal workers, and listing out the contracted work done for the municipality. Using a process known as a Critical Job Inventory allows a municipality to dissect its many areas of operation down in to individual job tasks.

The next step is ranking those job tasks by likelihood of injury, severity of injury and exposure time and determining a job hazard analysis for each job task. Once this process is conducted it becomes much easier to know the scope of your OHSMS. The job hazard analysis can then follow for each priority/high-risk task identified, and safe work procedures and safe work practices will result from the development process.

Another aspect of the OHSMS is building policies and procedures that will help guide the organization in managing OHS risk. Typical policies may include, at minimum:

- Municipality OHS policy statement
- Risk assessment (identification of risk to health and safety of workers) and procedures for control of that risk
- Roles/responsibilities/accountability (town administrator, town foreman, supervisors, managers, workers, safety committee, contractors, suppliers, etc.)

- Emergency roles and responsibilities
- Safety committee terms of reference
- General safety rules
- Hazard assessment and control
- Disciplinary action
- Personal protective equipment
- Preventative maintenance
- Hazardous materials (biological or chemical substances)
- Training and communication
- Workplace inspection
- Workplace incident/accident and hazardous occurrence investigation and reporting
- Working alone
- Violence in the workplace
- Harassment prevention
- Mobile equipment
- Energy isolation/lock out
- Confined space entry safety
- Fleet safety management policies
- Public safety (slip/trip/fall prevention).
- A procedure to review and revise (where necessary) the safety and health program at set intervals (not less than every three years)

No doubt within the space of this article, it is not possible to delve deep into individual policies and procedures but we can ask two important questions:

1. Is your municipality relying on good luck, or are you actively managing safety?
2. Where do you begin?

Regardless of your municipality’s answer to question one, you can always improve existing programs. Those that have yet to start formalizing and documenting a safety program have access to information and templates as starting points for a program specific to their municipality. SUMAssure subscribers can contact their representative for turnkey templates specific to urban municipalities. If your municipality isn’t a SUMAssure subscriber, contact your insurance broker to see what they have at their disposal.

The old saying goes that “*the best time to start was yesterday and the next best time to start is now,*” but failing to start at all could prove very harmful to a municipality and/or one of its valued workers. ■