The Municipal
RISK MANAGER
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Stand Up to Winter

It's here again, WINTER – snow, sleet, ice, freezing rain and again this year, too many of us will fall and be injured. We don't have to; "stand up to winter" by following these suggestions:

- Take small careful steps. Be aware of changes in conditions or of walking surfaces.

- Use handrails and any solid, stationary object that will support you.

- Wear proper footwear for the conditions. Use ice cleats when possible. Carry "inside footwear" and change when you are inside.

- Stay on designated walkways and paths; don't take shortcuts across areas that are not cleared of snow and ice.

- Don't carry large items while on snow or ice. If you must - shovel, sand and salt first. Make sure you can see where you are going.

- Wear gloves; don't walk with your hands in your pockets. Keep your hands available to maintain balance and to protect yourself if you fall.

In addition to the precautions listed above that all of us can do, there are administrative controls that should be implemented:

- Establish a plan for removal of snow and for salting and sanding of driveways, parking lots and pedestrian travel ways. Identify high hazard areas, assign responsibility and monitor conditions.

- If all entrances cannot be cleared before employees arrive, designate an entrance to be cleared for use by first arriving employees and require employees to use it.

- Place containers of sand/salt near entrances and encourage employees to use it when they identify an area as unsafe.

- Protect entrances and lobbies with matting that absorbs water. Clean up water from snow melt and post caution signs to remind employees of wet floors.

- Train employees to recognize slip and fall hazards and how to prevent falls. Provide newsletters, posters and verbal reminders. Get employees involved in developing your "winter plan."

Preventative Steps for next Winter

- Make note now of areas that are high risk or habitual problems. Example – a section of walkway that gets slippery every time there is drainage followed by cold temperatures. Investigate ways to "engineer out" the hazard by rerouting drainage, relocating the travel path or by other means.

- Provide non-slip footwear to designated employees such as police, fire, public works and custodians. Consider submitting a MMA Safety Enhancement Grant for May.

Stand up to winter – Don't Fall!!

Liability for Sidewalk Defects

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Like liability for road defects, liability arising from defects in sidewalks is governed by several provisions of Maine law. On their face, some of these statutes appear entirely inconsistent with one another, with one imposing liability on a municipality for a defect while another provides a seemingly unlimited grant of immunity for defects. Despite the apparent contradiction, however, the Law Court has held them to be compatible, with each controlling in a specific set of circumstances. This article will try to delineate which laws apply to the different factual situations with which municipalities are commonly faced.

Our state courts often declare that the common law doctrine of sovereign immunity for governmental entities was entirely displaced by the enactment of the Maine Tort Claims Act in 1978. This is not entirely accurate, however, as the enacting legislation for the MTCA carved out an exception for those specific statutes that had

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previously been enacted over the years to abrogate sovereign immunity for specific government activities. In those particular situations, the MTCA did not supplant the previously enacted laws. *See* 14 M.R.S.A. § 8113(2). Examples include the sewer statute, the culvert statute, and, most germane to this discussion, the so-called highway defect, or pothole, statute. Statues governing liability for damages under the Local Highway Law, 23 M.R.S.A. § 3651, *et seq.*, pre-date the enactment of the Maine Tort Claims Act, and thus offer a remedy entirely outside the MTCA for injuries caused by defects in town ways.

The MTCA provides a general grant of immunity to municipalities. *See* 14 M.R.S.A. § 8103. This general grant of immunity is subject to specific exceptions, though those exceptions are narrowly construed by the courts. *See* § 8104-A, as modified by § 8104-B (the exceptions to the exceptions). § 8104-A provides an exception to governmental immunity for a governmental entity's "negligent acts or omissions arising out of and occurring during the performance of construction, street cleaning or repair operations on any highway, townway, sidewalk, parking area … including appurtenances necessary for the control of those ways …." This exception to immunity for construction, street cleaning, or repair operations has been interpreted by the Law Court a number of times in which roads have been at issue, but not sidewalks. These cases hold that a two-part test must be applied to any particular injury case to determine whether the exception to immunity applies. First, the injury must be caused by a condition or defect that stems from the construction, cleaning or repair operation. Second, the injury must arise during the course of those activities. At the Law Court, cases have more commonly involved disputes over whether or not the activity was still ongoing at the time of injury rather than whether the activity was the actual cause of the injury. *See, e.g., Dubail v. Maine Dep't of Transportation*, 711 A.2d 1301(Me. 1998); *Paschal v. City of Bangor*, 747 A.2d 1194 (Me. 2000). Because construction or repair activities, whether on a road or on a sidewalk, can take weeks or even months to complete, a municipality can be exposed to potential liability for a lengthy period of time during such projects.

The very same section of the MTCA that confers municipal liability for negligent conduct during construction, street cleaning or repair operations also provides immunity for any "defect, lack of repair or lack of sufficient railing in any highway, townway, sidewalk, parking area … or in any appurtenance thereto" when such activity is not taking place. *See* 14 M.R.S.A. § 8104-A(4). As a result, an injury caused by a defect in a sidewalk, such as a person injured by tripping over a misplaced brick, will not cause liability to be imposed on the municipality unless the injury occurs during the performance of construction, cleaning or repair operations on the sidewalk. This is only the case, however, for claims that are brought under the MTCA.

As noted above, the MTCA is not the only provision in Maine law that can provide a basis for municipal liability for injuries caused by defective sidewalks. Despite the MTCA's blanket immunity for latent defects, 23 M.R.S.A. § 3655 provides: "Whoever receives any bodily injury or suffers damage in his property through any defect or want of repair or sufficient railing in any highway, townway, … may recover for the same in a civil action …." Because the enactment of the MTCA did not affect the continued viability of this previously enacted provision of the Local Highway Law, § 3655 presents entirely independent authority for the recovery for injuries caused by latent defects in sidewalks. Liability under § 3655, however, has its own pre-conditions and damages limitations that are also totally unrelated to those found in the MTCA. Any claim brought under § 3655 must be brought within a one-year statute of limitations, compared with the two-year statute of limitations that governs claims brought under the MTCA. In the case of a town, damages recovered under § 3655 cannot exceed $6,000. In the case of fatalities, that damage limitation under § 3655 is raised to $25,000 per individual claim, and $300,000 in total for a single occurrence. While multiple fatalities are obviously more likely to be encountered in a road defect case rather than a sidewalk defect case, a serious fall caused by a defect in a sidewalk certainly has the potential to cause someone's death. This damage limitation of §3655 contrasts with the MTCA's limitation of $10,000 in recoverable

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The Municipal Risk Manager

The Municipal Risk Manager is published seasonally to inform you of developments in municipal risk management which may be of interest to you in your daily business activities. The information in these articles is general in nature and should not be considered advice for any specific risk management or legal question; you should consult with legal counsel or other qualified professional of your own choice.

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Sidewalks *(cont'd)*

damages against any individual government employee and $400,000 against the governmental entity as a combined single limit for one occurrence.

Finally, § 3655 may only be used to impose liability where the municipality had 24 hours' actual notice of the defect or want of repair, and failed to correct it. There is no such specific advance notice requirement for sidewalk cases brought under the MTCA, presumably because the fact that the defect was caused by the entity's own construction, cleaning or repair activities should provide such notice to the one performing the activities. The notice required by § 3655 in the case of a municipality requires that the notice be given municipal officials or the road commissioner of the town, or any person authorized to act as a substitute for either the municipal officials or road commissioner. If the injured person had notice of the defective condition prior to the time of the injury, however, that person cannot recover against the municipality unless he/she has personally notified one of the municipal officials of the defective condition in the town way. Any person seeking to use § 3655 as a means to recovery must also provide the municipality with notice of their claim within 180 days of the injury, just as in a MTCA case.

The scant case law that addresses sidewalk claims brought under § 3655 sheds almost no light on what comprises an actionable "defect" in a sidewalk. Slippery conditions caused by snow and ice, a commonly encountered condition, cannot be the basis of an action against a municipality. *See* 23 M.R.S.A. § 3658. Poor lighting has been raised in a few cases where people have fallen at night on sidewalks outside public buildings. Such cases have been argued both as defects of the sidewalk itself or as defects of the municipal building where the outdoor lighting was affixed to the building. Neither approach has been successful. For purposes of the MTCA, the courts have held that insufficient lighting is not going to be considered beyond that needed to illuminate external stairs, porches, etc., which qualify as appurtenances to the municipal building itself, and have refused to extend liability for defective lighting beyond the appurtenance to the adjacent sidewalk areas. *See Swallow v. City of Lewiston*, 534 A.2d 975 (Me. 1987). They have also held that a defect in lighting over a sidewalk is not a defect in the sidewalk itself, presumably dooming any effort to use § 3655 to avoid the limitation of MTCA-based claims. *See Donovan v. City of Portland*, 850 A.2d 319 (Me. 2004).

In the most notable case for § 3655 before the Law Court, the majority of the case is concerned with the determination of the type of evidence that may be used to circumstantially prove that a defect existed. In *Simon v. Town of Kennebunkport*, 417 A.2d 982 (Me. 1980), plaintiff alleged that he fell on a sidewalk that was uneven and inclined. Plaintiff also contended this location had been the scene of approximately 100 prior falls in the three years from the date of construction of the sidewalk to the date of plaintiff's fall. The plaintiff sought to introduce evidence from two merchants, in front of whose store the sidewalk passed, who were prepared to testify that they observed a person fall on that area of the sidewalk nearly every single day. The trial court refused to allow that testimony, saying it was irrelevant because it was not probative of the condition of the sidewalk at the time of plaintiff's fall. That ruling is hard to understand, given that the court was not concerned with something transient like a patch of ice that would not have been the same at the time of two different falls, but was based instead on the unevenness and steep incline which presumably did not change from the time of one fall to the next.

In *Simon* the Law Court found that the trial court had committed error by excluding that evidence, finding that testimony about the other accidents would have shown that they occurred under circumstances that were "substantially similar" to those of the case at hand, and should have been admitted. It appears from the decision that the town filed its own cross-appeal regarding the sufficiency of the notice it had under § 3655, but it dismissed that appeal without explanation prior to the Law Court's decision. As a result, it is not possible to determine what the town had initially raised as a lack of notice issue, which it later abandoned. But one might speculate that if there truly were more than 100 prior falls at that same location, the odds are pretty good that the town received at least one prior complaint about the alleged defect and thus was on notice of it.

In summary, a municipality is immune for any claim arising out of defects in a sidewalk under the Maine Tort Claims Act, unless the injury was caused by, and arose during, construction, cleaning or repair operations on the sidewalk. A municipality is not immune for claims brought under 23 M.R.S.A § 3655 for injuries caused by defects in sidewalks, but a recovery under that statute requires that a municipality have 24 hours' advance notice of the defect, a notice of claim within 180 days of injury, a suit commenced within one year, and is then still subject to the damages limitation discussed above. While the Maine Tort Claims Act did entirely replace the common law doctrine of sovereign immunity *as it existed at the time of its enactment in 1978*, it is important to recognize that the legislature had for over 100 years prior to that time already abrogated sovereign immunity on an ad hoc basis with statutes targeting very specific government activities, such as defects in town ways, including sidewalks. Such statutes still control in their discrete areas, and operate totally outside of the immunity/liability scheme found in the Maine Tort Claims Act.

Welcome New Members

Property & Casualty Pool

Bangor Water District

Workers Compensation Fund

Town of Cumberland
Town of Sebec

Workers Compensation Payroll Audits

Once a year, payroll audits are performed on the members of the Workers Compensation Fund. The auditors will work with you to analyze, review and compare the *estimated* annual payroll projections (which you report to us in October for the following Fund year as part of the renewal application) to the *actual* payroll totals at the end of the Fund year. You may be contacted by Risk Management Services who handles some audits in-house, or by one of our contracted auditors at GEM Associates who will gather the data and forward it to us to process. It is always appreciated when all the necessary paperwork is available for the auditor to review, or if requested, is mailed promptly to them for review. The State of Maine mandates that all MMA Workers Compensation Fund audits be completed by May 1st of each year.

If the audit reveals that a member's estimated payroll exceeds the actual payroll, the member will receive a refund. The converse of this is also true. If the auditor finds that payroll estimations are lower than actual totals for the year, the organization will receive an invoice for the difference.

We understand it is difficult to predict the future when completing the application; however, there are several factors that members can consider to help ensure a positive audit experience. For example:

1. Proper classification of employees

Each workers compensation classification code has its own rate for the purpose of calculating estimated contributions. Be sure to classify all employees in the correct payroll classifications. If you are not sure about where an employee should be classified, contact your underwriter here at the MMA Workers Compensation Fund or your local agent.

2. Payroll separation — keep detailed payroll records

Many times, an employee can be classified under two or more classification codes, depending on the nature of the job. This allows for payroll separation among the different classifications. Proper documentation to support payroll separation is required. This includes detailed payroll records documenting the number of hours each employee spends in each separately classified activity. Failure to provide adequate payroll records will result in the total payroll being placed in the higher rated classification.

3. Plan for temporary/seasonal help

Staffing requirements, such as the need for hourly employees or the number of personnel needed, can increase/decrease during certain seasons for some departments. Parks and Recreation may find a need to increase staff and/or hours in the summer months, while winter months may require additional help for street cleaning in Public Works. Remember to plan for these fluctuations in seasonal staff needs when filling out your application.

4. Certificates of insurance for contract workers

As a reminder, should your entity employ subcontractors during the year, it is imperative to obtain a certificate of insurance to show coverage for workers compensation-related incidents or an approved "Predetermination of Independent Contractor Status" (WCB 266). If your entity does not obtain and keep records of certificates of insurance from all subcontractors, the auditor will presume theses workers are your employees and will include them in your payroll totals and you will be charged for them.

5. Plan for the Future

Whenever possible, plan for any upcoming needs, promotions or expansions. Adding employees due to increased labor demands or promoting an employee from part-time to full-time status are examples of factors that can affect your workers' compensation contribution/premium.

6. A Helpful Tool for Renewal

It is a good practice to review audits from prior years when filling out a renewal application. By reviewing the prior audits you can see how your employees have been categorized in previous years which can help you ensure they are categorized correctly for the upcoming audit.

If you have questions about audit details, proper classification codes for employees or for any other area where we can be of assistance, please contact the MMA Risk Management Services Underwriting Department. We are here to help.

Cyber Liability Coverage Is Available

MMA's Risk Management Services is pleased to offer Cyber Liability & Data Breach Expense coverage to members of the Property & Casualty Pool. Today's technology makes it easier to store, steal or lose personal information, make sure your entity is protected. **The coverage can be Added at No Additional Cost** (with completion of a new simplified application and subject to Underwriting review).

Coverage Highlights:

- Cyber Liability - $1,000,000 limit per wrongful act
- Data Breach Expenses - $50,000 aggregate limit
- $1,000,000 Aggregate limit per member
- $1,000 minimum Deductible

Please contact a member of Risk Management Services Underwriting staff at 1-800-590-5583 for questions or additional information.