

Municipality defeats claim arising from “untravelled portion of a highway”

October 16, 2024

The Ontario Superior Court of Justice recently released its decision in *Bello v City of Hamilton*, [2024 ONSC 5457](#), granting summary judgment in favour of the defendant municipality based on a statutory provision in the Municipal Act addressing damages occurring on the “untravelled portion of a highway.” This decision reiterates the law on this provision, which can provide a complete defence to municipalities in certain situations.

Background

The plaintiff was cycling with a group on Aug. 4, 2019, when he rode into a culvert situated on an “off-road path” adjacent to Stone Church Road East in Hamilton. Tragically, he broke his neck and was rendered a tetraplegic. The Plaintiff subsequently commenced a claim in negligence as against the City of Hamilton, seeking \$22 million in damages.

The defendant did not dispute that the accident occurred on municipal property adjacent to a roadway but asserted that the plaintiff’s claim was statute-barred by virtue of s. 44(8) of the Municipal Act, which provides that no claim for damages shall be brought against a municipality in respect of an accident occurring on an “untravelled portion of a highway.” The Municipal Act does not define this term, so the central issue on the defendant’s summary judgment motion was whether s. 44(8) applied to the loss location.

The court’s decision includes the photograph below, which depicts the loss location as well as the adjacent roadway, which notably included a designated bicycle lane:



The summary judgment decision

The court began by disregarding the plaintiff’s expert’s evidence as to how the loss location should be characterized, and ultimately noted that the accident occurred on the untravelled portion of the highway.

The court then engaged in a detailed historical review of the jurisprudence interpreting **an “untravelled portion of a highway,” noting that the provision in question dated back over 80 years.** Though each case turned on its own facts, the court held that the overarching purpose of s. 44(8) was to insulate a municipality from liability for any accident occurring on a portion of the highway that was neither “provided and intended for ordinary and normal use for the purpose of travel” nor “commonly and habitually used by the public for that purpose.”

The court also held that the evidentiary record before it was full and complete, such that it would be appropriate to grant summary judgment. Notably, it distinguished certain older decisions in which summary judgment was not granted under s. 44(8) on the basis that they were decided before the Supreme Court of Canada lowered the bar for summary judgment in the seminal case of *Hryniak v Mauldin*.

Ultimately, the court held that the off-road path in this case was an untravelled portion of **a highway and that the plaintiff’s claim was statute-barred as a result.** The court relied heavily on the fact that the municipality had installed bicycle lanes on both sides of Stone Church Road, and thus could reasonably have expected cyclists to use those lanes rather than going off-road. It rejected the plaintiff’s argument that the loss location was commonly used by the public given that a “worn-down path” was visible, as the plaintiff led no evidence as to when that path was created, which may have been prior to the installation of the bicycle lanes. In the final analysis, the plaintiff was held to have knowingly pursued an unusual course that invited danger by declining to use the bicycle lanes provided by the municipality.

Commentary

This decision helpfully clarifies the law in respect of a statutory provision that has received relatively little judicial commentary. This decision reminds municipalities of the availability of a useful defence in defending claims arising out of accidents that occur beyond the traveled portion of the roadway.

By

[Jonathan Thoburn, Aidan Fishman](#)

Expertise

[Municipal Liability, Government & Public Sector](#)

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices**Calgary**

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.