

Legality of Minimum Maintenance Standards (MMS) To Be Addressed At Trial in the Fall of 2010

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In 2002 the Ontario government adopted Regulation 239/02 entitled Minimum Maintenance Standards for Municipal Highways. This set of rules discussed issues such as a frequency of road patrols, snow and ice removal, roadway/roadside deficiencies, luminaire repair, regulatory/warning sign replacement, traffic signal repair and bridge repairs. The rules were developed by a task force organized by the Ontario Good Roads Association (OGRA) made up principally of those agencies who are defendants in law suits brought upon them by plaintiffs. The Standards were found wanting in an earlier trial (Thornhill v. Shadid, 2008) wherein Justice J. Howden had concerns over the issue of notice versus constructive notice, as well as other matters. Consequently the OGRA reconvened a meeting of the task force and made changes to the Standards that became revised and adopted by the Ontario government as Regulations 22/2010 and 23/2010 on February 18, 2010.

These are legal proceedings and matters for discussion by lawyers. I do not profess to be a lawyer nor am I concerned that my comments are, legally speaking, incorrect or lacking legalese. But the matters being discussed are of particular relevance to my line of work, being involved in the assessment of motor vehicle collisions and how roadway conditions may have been a factor in their causation.

The legality of the Standards has been challenged by a law suit brought on against the Municipality of York (City of Vaughan) as a result of a traffic accident that occurred on Dufferin Street in Vaughan on December 12, 2004. In that collision Amelia Silveira reportedly lost control of her vehicle on the slippery winter road and collided with another oncoming vehicle. From what I can decipher, I would term "procedural or legal interpretation issues" were brought to the court by the defendants. These were heard at the Ontario Superior Court of Justice on February 4, 2010 and Justice Lauwers' decision was released on March 5, 2010.

Lauwers essentially decided to launch a separate trial to deal specifically with the legality of the Standards to be heard sometime in the fall of 2010. I have reviewed the decision, the relevant regulations, the OGRA revisions and applied them to my own observations and experience which I will cover in this article.

Firstly, I am not surprised that the Ontario Ministry of Transportation asked a group representing defendants in civil litigation to draw up the Minimum Maintenance Standards since the Ontario Ministry of Transportation itself is a defendant in these civil suits. In fact, Justice Lauwers instructed the plaintiffs in the Silveira case to name the Ministry of Transportation, along with the Municipality of York as defendants. It would appear to any independent, outside observer that there is a conflict of interest when the

defendant makes up the rules for how that defendant will be judged in a court of law and this is exactly what is taking place. To suggest that the Task Force that made up the MMS and then revised them are somehow independent members of society is certainly a big stretch of reality. Never-the-less, the status quo is what it is and I am in no position to make it otherwise.

Some of the major shortcomings of the MMS were noted in the OGRA-suggested revisions. For example, the original MMS required that defendants have actual knowledge of a deficiency rather than constructive knowledge. Constructive knowledge is a situation where the defendant ought to have known of the deficiency but failed in some way to gain that knowledge through their own negligence. Again, fair-minded persons should find such an omission in a government law offensive. Actual knowledge was being used by defendants to prevent plaintiffs from proceeding with a trial because the law appeared to prevent such plaintiffs from proceeding unless there was actual knowledge of a deficiency by the defendant. The fact that such a situation existed for several years in Ontario is deplorable.

In another section of the MMS it states that the duty to repair deficiencies only applies with respect to motor vehicles using the highway. Again, simply deplorable. If a cyclist fell over and became quadriplegic as a result of striking a pothole the claim could have been disallowed because it did not involve a motor vehicle. What right-minded person would believe that this was fair treatment? Was the Task Force that developed these Standards unaware of this omission? How naive could one be to believe so?

The original MMS failed to separate conditions of routine patrolling from those where deteriorating environmental conditions required more frequent assessment and action. Apparently this error has been corrected in the revised MMS although I have yet to review that regulation to satisfy myself.

For snow removal the revised MMS continue to discuss snow removal to something less than the width of the highway. It would seem bazaar that roadway engineers believe safe road widths in the range of 7.0 metres are required in good weather yet, when weather conditions deteriorate and maintaining control of a vehicle is more difficult then it is acceptable to reduce the safe travel width of the road to 5.0 metres. This is the recommendation that the revised MMS continue to allow.

I can imagine the scenario of two vehicles approaching each other on a curve, each travelling in the 5.0 metres of cleared road surface. In this zone of limited visibility, a low-class roadway already may have a deficient quality of smoothness on its tar and chip surface. I know this as a fact from my own testing. Now you ask the driver to change his/her position in the lane so that the right side wheels travel onto the unplowed section of roadway because there is no other alternative to pass by the oncoming vehicle. That un-plowed section might contain a snow depth of unknown levels but would likely be even greater than normal because the plow would heap the plowed snow from the middle of the road onto this right section of the lane. These engineers would see nothing wrong with the right side wheels of a vehicle penetrating

this deep "snowbank" just before reaching the on-coming vehicle. Yet they will warn you that it is unsafe for vehicles to enter an edge drop-off of 8 cm or more as is clearly indicated in the section of the MMS regarding acceptable edge drop-offs. I cannot believe the illogical reasoning. I am simply shaking my head since the courts will know nothing of this issue.

A really sly proposal by the Task Force is to suggest to municipalities that they can gain constructive knowledge of road conditions by only patrolling "representative" roads in their area. By patrolling these representative roads they can estimate what conditions exist on the other nearby roadway. It means that if locally blown snow is thrown onto a roadway to a depth of 1 metre then the municipality is not at fault because the representative roadway that they patrolled did not have that 1 metre of snow cover. And if an obstacle or unusual event blocked the road and made it impassable or if a warning sign became missing or if visibility was reduced by the presence of an object then again, no fault by the municipality because their patrol of the adjacent roadway indicated there was no problem.

I am presently aware of numerous roadways in my area that contain significant deficiencies that have not been addressed and are simply waiting for the next accident to occur. Part of the problem is that the courts believe that so long as a road inspector has driven through a road segment then that constitutes sufficient diligence by the municipality. What the courts do not understand is that you cannot perform a proper roadway inspection from a moving vehicle alone. For example a roadway with major deficiencies in its cross-slope cannot be detected by a road patroller whose vehicle travels parallel to the wheel depressions in the lane because that patrol vehicle is not changing lateral position in the lane like someone might prior to a collision. Again, visibility obstructions cannot be detected from a road patrol pick-up truck when the driver might have an eye height that is 50 centimetres higher than the 105 centimetres assumed in most safety standards in North America. Even if the road patroller was in a position to make a determination I know for a fact that it does not occur. I am presently monitoring a number of roadway deficiencies in southwestern Ontario and have done so for several months. In that time period roadway patrollers should have travelled past the deficiencies numerous times yet nothing has been done to correct the problems. Either the patrollers are not recognizing the problems, they are simply ignoring the problems or they are not conducting the inspections that they say they are.

The OGRA discussion of luminaire inspection is equally deficient. They recommend inspection of luminaires once per year because "most outages are reported by the public and repairs are completed in a timely fashion". This is similar to saying most roadway deficiencies are reported by the public so we do not have to inspect roadways.

This is the same recommendation for inspection of warning signs: once per year. Yet the Task Force confirms that "Signs are often obscured by vegetation and motorists are unable to see the sign. Just in my previous article of a couple of days ago describing my observations at the site of a fatal collision on Wilmot Line west of Waterloo I showed you some photos of some chevron signs that were likely obscured by vegetation. It is

frightening to think that it is deemed acceptable for a road patrol to examine those signs in July and then not re-examine them until the following July. Yet not a word was mentioned in any public media about any investigations that found a problem with the signage. The newspapers and television reporters are simply clued out. This is what we are faced with in the revised MMS future.

Similar recommendations of 1 year inspections for bridges and sidewalk problems are discussed. If a municipality is notified of a problem then it has 14 days to fix it. So, a problem could exist for 1 year and 13 days and the municipality could not be found responsible for its existence.

The general problem with all these rules is that they are laid before a court that is not familiar with the specific problems and requirements to make a roadway safe. The court is simply provided with evidence that a defendant has following the guidelines set forth in the MMS and they are scott free. It leaves an excuse for courts to make unjust decisions regardless of the facts of the case which do not have to be heard. That is not how our complicated world works. The full range of possibilities through which a municipality can act improperly cannot be covered by these general rules. It must continue to be the case that liability must be evaluated by the specific facts of each case.

Let me conclude that this discussion is not being made by a plaintiff-biased expert who is being paid by the plaintiff bar. I have equally represented defense and plaintiff clients when asked. In fact, I have equal concerns regarding the procedures and tactics applied by plaintiff counsel and I am privy to all their tactics. I have nothing to gain from these comments and much to lose from clients on both sides of the issue. Our society needs none of this, from one side or the other. We need safe roads, accountability for our actions, restitution only for reasonable matters and above all, freedom from special interest groups.