



MUNICIPAL LIABILITY FOR FLOODING AND SEWER BACKUPS

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COMMON TYPES OF CLAIMS

- Overland flooding (overflowing creeks/watercourses/storm sewer systems)
- Storm sewer back ups into homes (stormwater exceeds capacity of system; sewer line blockages/breaks; mechanical breakdown at pumping stations/treatment facilities)
- Sanitary sewer back ups into homes (same potential causes as for storm sewer back ups)

MUNICIPAL RESPONSIBILITIES FOR WATER-RELATED SERVICES

Municipal Act, 2001, S.O. 2001, c. 25, s.11

Authorizes (but does not require) municipalities to provide the following services:

- Sanitary sewage collection and treatment
- Storm water collection and drainage from land
- Water production, treatment, storage and distribution
- Drainage and flood control

CAUSES OF ACTION FOR WATER ESCAPE OR BACK-UP

Nuisance

“an unreasonable interference with the use or enjoyment of land”

Defences:

- Statutory Authority
- Statutory Immunity
- Act of God

Defences

Statutory Authority

Test: The nuisance is the “inevitable consequence” of carrying out an undertaking pursuant to a statutory authority.

Cases:

- *Tock v. St. John's (Metropolitan Area Board)*, [1989] 2 S.C.R. 1181
- *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201

Statutory Defence

Municipal Act, 2001

Liability in nuisance re: water and sewage

449. (1) No proceeding based on nuisance, in connection with the escape of water or sewage from sewage works or water works, shall be commenced against,

- (a) a municipality or local board;
- (b) a member of a municipal council or of a local board; or
- (c) an officer, employee or agent of a municipality or local board. 2001, c.25, s. 449 (1).

Definitions

(2) In this section,

“sewage works” means all or any part of facilities for the collection, storage, transmission, treatment or disposal of sewage, including a sewage system to which the *Building Code Act, 1992* applies; (“station d’épuration des eaux d’égout”)

“water works” means facilities for the collection, production, treatment, storage, supply or distribution of water, or any part of the facilities (“station de purification de ;’eau”) 2001, c.25, s. 449 (2).

Rights Preserved

(3) Subsection (1) does not exempt a municipality or local board from liability arising from a cause of action that is created by a statute or from an obligation to pay compensation that is created by a statute. 2001, c. 25, s. 449 (3).

Transition

(4) Subsection (1) does not apply if the cause of action arose before December 19, 1996. 2001, c. 25, s. 449 (1)

Act of God

- Applies to events that could not reasonably be anticipated
- Defence has been narrowly circumscribed
- May not apply in case of rainstorm expected to occur once in every 100 years

Negligence

Duty of Care

- No common law duty on a municipality to operate a sanitary sewer, storm sewer, water or drainage system
- Liability for negligence in operation of sanitary sewer, storm sewer, water or drainage systems

Standard of Care

Relevant Factors:

- Budgetary restraints
- Compliance with standards and regulations
- The standards in place at the time at which the system was built
- Prior history of flooding and sewer backups

Defences

Policy Decisions

Municipal Act, 2001, S.O. 2001, c. 25

450. No proceeding based on negligence in connection with the exercise or non-exercise of a discretionary power or the performance or non-performance of a discretionary function, if the action or inaction results from a policy decision of a municipality or local board made in a good faith exercise of the discretion, shall be commenced against,

- (a) a municipality or local board;
- (b) a member of a municipal council or of a local board; or
- (c) an officer, employee or agent of a municipality or local board.

2001, c. 25, s. 450.

Brown v. British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420 at para. 38

Policy decisions

- Social, political and economic factors
- Attempt to strike a balance between efficiency and thrift
- Predetermining boundaries of undertakings

Operational decisions

- Practical implementation of formulated policies
- Made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness

Oosthoek v. Thunder Bay (City) (1996), 30 O.R. (3d) 323 (C.A.)

- Inaction for no reason cannot constitute a policy decision
- Municipality's failure to upgrade the sewer system due to financial constraints was accepted as a policy decision.

Scafe v. Halton (Regional Municipality), [1999] O.J. 5836 (S.C.J.) (Small Claims Court)

- Policy of not inspecting, replacing or clearing out blockages in its sewer system was immune from liability on the basis of s. 331.3 of the *Municipal Act* even though the policy was careless and irresponsible.
- The fact that the decision not to inspect or maintain was a policy decision was evidenced by cuts to the sewer maintenance budget.

Ackerman v. Mount Pearl (City), [2000] N.J. No. 346 (T.D.)

- “beyond question” that the design and operation of the sanitary and storm sewer systems were operational rather than policy matters.

Causation

- Balance of probabilities
- Negligent conduct caused or materially contributed to the Plaintiff's damages
- Negligent conduct materially increased the risk of harm
- Expert evidence

Contributory Negligence

In flooding and sewer backup claims, allegations of contributory negligence may include:

- The failure to take steps to protect the home from flooding
- The failure to take measures to prevent storm water from entering the sanitary sewer system

Strict Liability

Rylands v. Fletcher (1866), L.R. 1 Ex. 265

- Escape
- Non-natural use of land

Tock v. St. John's (Metropolitan Area Board), [1989] 2 S.C.R. 1181

- Doctrine in *Rylands v. Fletcher* is not applicable to sewer and storm drain systems

Interference with Riparian Rights

Groat v. Edmonton (City), [1928] S.C.R. 522

A riparian owner has the right to have a watercourse come to him in its natural state in terms of flow, quantity and quality.

Other cases:

- *Scarborough Golf & Country Club v. Scarborough*, [1988] O.J. No. 1981 (C.A)
- *McPhee et al. v. Township of Plymton et al.*, [1987] O.J. No 1623 (Dist. Ct.)
- *Krohnert et al. v. Regional Municipality of Halton*, [1989] O.J. No. 1795 (Dist. Ct.)

CLASS ACTIONS

Class Proceedings Act, 1992, S.O. 1992, C.6, s. 5

- Pleadings disclose a cause of action
 - Identifiable class of two or more persons
 - Common issues
 - Class proceeding would be preferable procedure for the resolution of the common issues
 - Representative plaintiff or defendant
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- (i) Fair and adequate representation of the class
 - (ii) Workable litigation plan
 - (iii) No conflict of interest

McLaren v. Stratford (City), [2005] O.J. No. 2288 (S.C.J.)

- Initial pleading and proposed class too broad
- Must be evidentiary basis for allegations of negligence
- Alleged deficiencies: lack of capacity under wet weather flow, cross connections between the storm and sanitary systems, connection of roof leaders and footing drains to sanitary services, lack of an overland flow route for storm water in excess of the minor storm sewer system
- The facts as pleaded disclosed a reasonable cause of action

CONCLUSION

- Primary cause of action: negligence
- Key issues are standard of care, negligence and application of policy defence
- Expert evidence may be required regarding standard of care and causation
- Evidentiary basis required for policy defence
- Failure to follow policies and by-laws may give rise to liability
- Likelihood of further class actions will likely depend on courts' approach to negligence actions and the application of the policy defence



QUESTIONS?

THANK YOU!

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