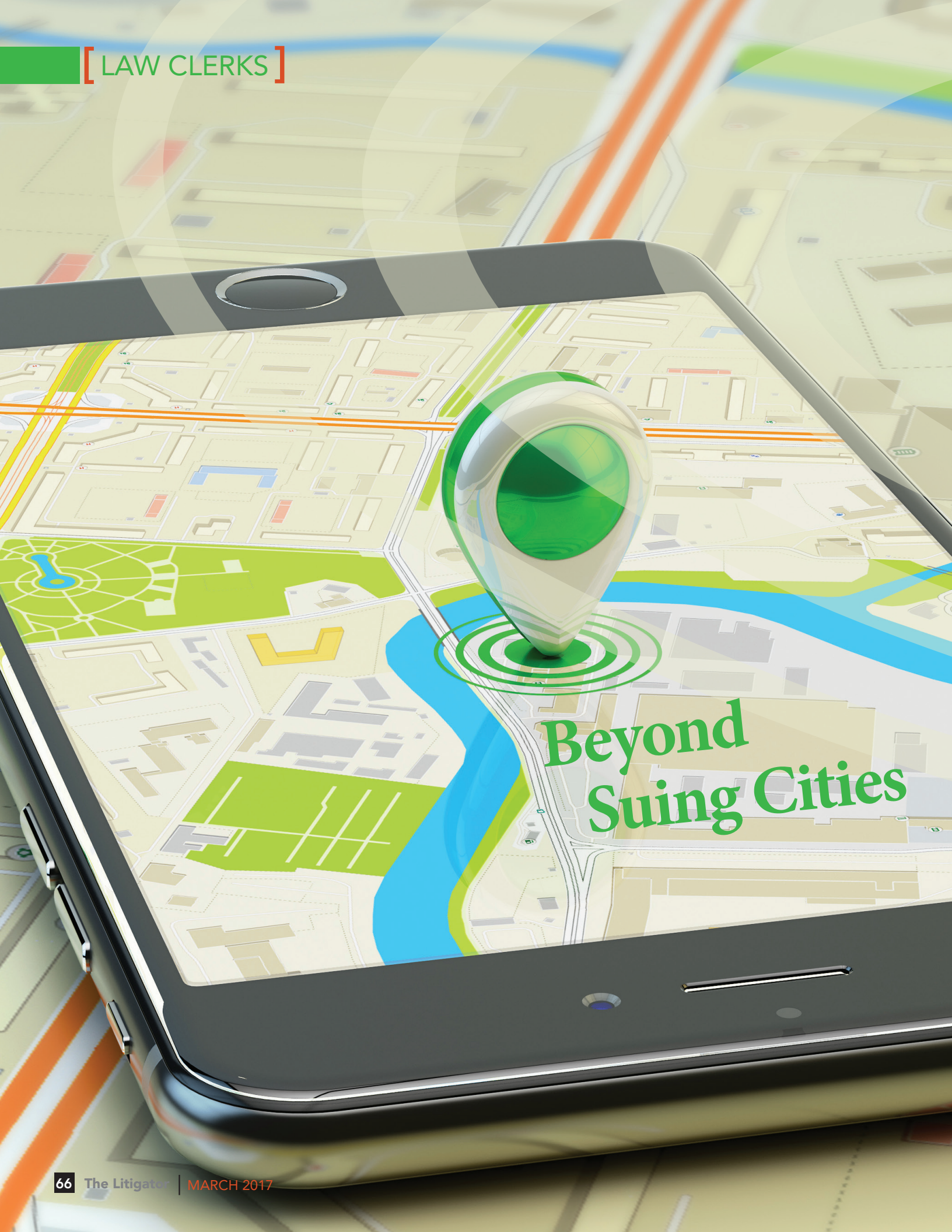

Beyond Suing Cities

BY JUSTIN FORSHAW

Preparing a Municipal Case

A municipality is often named as a defendant in negligence lawsuits because of issues related to items like road maintenance, lighting, signage, traffic controls & building code violations. Due to the wide range of municipal responsibilities they usually have substantial insurance coverage.

In a case involving joint and several liability, if some at-fault parties are unable to pay their proportional share of the damages, the plaintiff can recover his or her remaining damages from any other at-fault defendant with the means to pay. This is true even if other at-fault defendants are deemed to be only partially responsible for the plaintiff's loss.

While the legislation speaks to at least 1% at fault, there are few, if any, cases in Ontario where this is ever in fact found.

Therefore, in a case with very large damages and the possibility of insufficient insurance coverage on the major at-fault individual defendant, a municipality may end up paying a portion of the damages as long as it is found at least partially responsible. The municipality must pay the judgment and then pursue a claim against the underinsured at-fault defendant in an attempt to recover any money that the municipality paid to the plaintiff that exceeded its proportional share.

In cases where liability on the municipality is possible but not certain, it is better to add them as a defendant at the outset. If the municipality is not at fault, the plaintiff can always release them from the lawsuit once the evidence becomes clear. In general, this is a much easier path than trying to add a new defendant part way through a lawsuit.

Limitation for Bringing an Action Against a Municipality

With limited exceptions in Ontario, the claimant must commence a lawsuit against a defendant within 2 years of the day on which the claim was discovered, as stated in the *Limitations Act, 2002*. This includes any action brought against a municipality.

However, as per the *Municipal Act, 2001, S. 44 (10)*, prompt notice is required to be served on the municipality if you are suing a municipality for failure to keep a sidewalk, highway or bridge in a state of repair that is reasonable in the circumstances. Giving notice means you are letting the municipality know that your client suffered an injury and that they are being held responsible. This Notice must be served within 10 days of the occurrence or incident and must be served or sent, by registered mail, to the municipal clerk.

Exceptions

There are two circumstances under which the injured person is not required to give notice within the 10-day period for cases involving failure to keep highways and bridges under a state of good repair. As per the *Municipal Act,* notice after the 10 days is not a bar to an action against a municipality: (i) if the person dies as a result of the injuries suffered, or

(ii) if a judge finds that there is a reasonable excuse for the "want or the insufficiency of the notice and that the municipality is not prejudiced in its defence."[1]

The courts have determined that a reasonable excuse for failing to give notice of an injury within the 10-day period can include such things as not being physically or mentally fit to do so.

In the case of *John Derek Crinson v. City of Toronto,* the Court of Appeal reviewed a trial decision where the plaintiff had his claim dismissed, as the plaintiff served his notice well beyond the 10-day period. The Court of Appeal found that the plaintiff established a reasonable excuse for the purposes of *Section 44(12).*

How are the Municipalities Responsible?

Municipalities may be involved in many different types of claims. This is due to their wide ranging responsibilities. These include:

(i) Road maintenance, including: ice/snow removal, repairing damage such as potholes/cracks or even clearing debris;
(ii) Sufficient visual lighting or road signs, including: curve signs with appropriate speed limit;
(iii) Traffic control, including traffic lights or Stop/Yield signs at certain road junctions; and
(iv) Building Code violations, building permits and inspections.

These standards are governed by the *Minimum Maintenance Standards for Municipal Highways (MMS),* under the *Municipal Act,* as well as the *Ontario Building Code.*

Additional Parties

Once you have determined the municipality is a possible defendant and that it likely breached its standard of care under the *MMS* or the *Ontario Building Code,* you should also consider if there may be other parties involved.

Perhaps the road is jointly owned by two separate municipalities and the exact location of the collision is hazy. You therefore must serve notice on both municipalities, until the exact location of the accident can be determined. A similar scenario could be in a case with a slip and fall accident that may have taken place on either municipal or private property. You would want to include the owner of the private property as a defendant as well, as per the *Occupiers Liability Act.*

Additional potential defendants could be contractors employed by the municipality to maintain the roads or repair/renovate buildings. These contractors may also have used subcontractors to carry out this work for the municipality. With respect to any building code violations that arise from any substantial renovations, you may need to include an architect as a defendant. It is very important to perform a thorough investigation to be sure that all potential defendants are sued before the expiry of the limitation period.

In issues of joint and several liability it is always important to cover all possible bases. If the municipality was found 0% responsible and you failed to sue all potential defendants your firm and responsible lawyer would be facing a professional negligence lawsuit.

Furthermore, there may be cases where the municipality has indemnity clauses in their contracts with third parties that attempt to push liability off to third party companies with limited insurance. And in certain cases with very large damages or multiple-injured plaintiffs, the municipality's insurance limits may be exhausted. Therefore, having all possible at-fault defendants named in the lawsuit should ensure that your client is best compensated once a settlement is reached.

It is also helpful to learn what other potential defendants have to say during their examination for discovery. This may lead to further evidence against those defendants or the municipality itself. Naming all potential defendants in an action will preserve your rights to examine them at discovery.

Evidence

Now that you have the municipality and other potential defendants in your lawsuit, you must gather evidence to prove their negligence.

It is important to ensure that the right representatives of all defendants are called to give their evidence at the Examination for

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Discovery. These may include municipal building and planning representatives and those responsible to patrol highways for maintenance, or monitor weather conditions. The idea is to examine those individuals who have or should have the best knowledge regarding the issues at hand giving rise to the plaintiff's claim.

The evidence given by a municipal building official, or by a contractor, may help you prove that there was no procedure in place to confirm that a certain renovation or repair was in compliance with the *Ontario Building Code*. Alternatively, a defendant representative may confirm that certain priority roads, on which your client was involved in a collision, were not properly cleared of snow and ice as required under the *MMS*.

Evidence for a Clerk to Consider

Of course, the responsible lawyer(s) can obtain the above stated evidence during the Examinations for Discovery, but what can we do as their law clerks?

It is important to utilize all tools available when gathering evidence to support your client's claim. These include:

(i) Engineers – engineering reports can be extremely helpful when determining any liability issue. Engineers may attend at the scene of a motor vehicle collision. By investigating the intersection or any curvature or incline in the road, they can determine whether this road had adequate signage or lighting. They may also find the existence of a treacherous pothole. Engineers can also determine the speed of your client's vehicle, based on data recorded on the vehicle's Event Data Recorder.

This type of evidence can prove that the client was not speeding and can help speak to the treacherous conditions of the road. It is important to retain an engineer early to obtain this information from the vehicle(s) before it is lost.

Engineers can also create reports in regard to any building code violations. This can include any stairwells, ramps or any other renovation made that do not comply with the code. They can assist in determining whether the municipality had a duty to inspect any such construction or improvement made that was not done in accordance with the Ontario Building Code.

(ii) Surveillance – Cameras seem to be everywhere, on a city bus, city streets or parking lots and, in this day and age, people also have cameras on their vehicle dashboards. The surveillance footage captured on these cameras can help paint the picture as to how the accident occurred, such as weather affecting road conditions or even traffic on the road. Many slip and fall accidents seem to be captured on store surveillance or parking lot cameras. If your client's accident occurred on city property, this surveillance footage can help confirm that evidence.

(iii) Witness Statements – Gathering statements from individuals that witnessed the collision or fall is paramount. They can also confirm details of how the accident occurred, such as weather affecting road conditions or traffic on the road.

Another good type of witness to speak to would be residents local to where the collision occurred. These types of witnesses can speak to a particular curve in the road or intersection. This curve or intersection may have been reported to the municipality many times, and may have in fact regularly caused accidents. Therefore, the municipality may have known about this hazard and failed to introduce proper traffic control.

(iv) Weather Reports – Use the Weather Network website and track the weather history and warnings over a certain period of time, including the date of loss. This evidence can also speak to the treacherous conditions of the road. This evidence leads to other questions such as: did the municipality or its contractors pay attention to the weather forecasts, or did they use adequate ice or snow removal techniques prior to your client's collision or slip & fall? Under the requirements of the *Minimum Maintenance Standards for Municipal Highways (MMS),* under the *Municipal Act,* municipalities are required to monitor the current weather as well as that forecast over the next 24 hours between the months of October to April the following year, at intervals as frequent as 3 times per day.

(v) Global Positioning Systems (GPS) – Thinking outside of the box, most snow plows or salt/sand trucks used to clear the roadways of ice or snow use GPS devices,

to track their given route out in the field of duty. The creation of a simple animation, based on the GPS information, can show the route taken on the day of your client's collision. It can be used to confirm the time the plow or truck was dispatched and what route it took regarding any priority roads. Sometimes this information can show that the proper route was not taken or that the plow was dispatched too late. If not for this negligence, your client's collision may not have occurred. Under the requirements of the *MMS,* snow is to be cleared from Class 1 Highways within 4 hours when snow is at a depth of 2.5 cm. Ice is to be removed within 3 hours.

(vi) Google Street View – This can be a fascinating tool. According to the *MMS,* potholes on a Class 1 Highway, that have a surface area of 600 cm^2 and a depth of 8 cm, are to be repaired within 4 days. Even on a Class 5 Highway, potholes with a surface area of 1000 cm^2, with a depth of 8 cm, must be repaired within 30 days. Using Google Street View you can view the accident scene up to several months, maybe even years before the date of loss. If you are lucky you may be able to see that the existence of a treacherous pothole clearly outdated the required repair time under the *MMS.*

This evidence can also show another level of negligence. Under the *MMS,* the municipality has a duty to patrol highways to check for any need of repair. Even on a Class 5 Highway the *MMS* sets out that the required patrolling frequency is once every 30 days. For a Class 1 Highway the patrolling frequency is 3 times every 7 days. Therefore this evidence not only shows that the pothole was not repaired within the time frame set out by the *MMS,* but it may also prove that the municipality failed to patrol that road in accordance with the *MMS.*

Conclusion

As demonstrated above, naming a municipality as a possible defendant in your client's action is a good idea if there is a chance that one is liable. This is true for many reasons, including the fact that most municipalities have the available insurance to pay a large damage claim, even if only joint and several liability applies.

However, these types of claims must be handled with care and the proper notice must be given. You must then gather your evidence to prove that at least partial liability rests with the municipality. There are a variety of sources out there that you can use to gather this evidence and sometimes it may require thinking outside the box. Look at the claim and consult your principal lawyer as to the best way to provide the evidence needed to prove liability against the municipality and its affiliated potential defendants.

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NOTES

[1] Sections 44(11) and 44(12) of the *Municipal Act, 2001,* S.O. 2001, c. 25, as amended.