

## **SIDEWALKS**

### **INTRODUCTION**

Slips, trips, and falls on sidewalks are not unusual and can lead to injuries and litigation against the community in which the fall occurred. Some injuries are minor. Others, unfortunately, are disabling and very costly in claim dollars, public relations, lost work or productivity, etc. Today's litigious environment increases the probability of a lawsuit. Television commercials, newspaper advertisements, and billboards solicit personal injury clients, many focusing specifically on injuries relating to falls on sidewalks.

Although the Michigan Supreme Court has applied the concept of governmental immunity broadly, it has excluded "highways" and "public buildings." The term "highway" in this context includes not only public roads and streets, but also bridges, sidewalks, crosswalks and culverts on the highway.

MCL 691.1402 states that:

Each governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. Any person sustaining bodily injury or damage to his property by reason of failure of the governmental agency to keep any highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel, may recover damages suffered by him from such governmental agency.

A governmental agency is presumed to have maintained the sidewalks within its jurisdiction, unless an injured party is able to demonstrate that his/her injuries were caused by a vertical discontinuity defect of two (2) inches or more in the sidewalk and/or a dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.

Historically, sidewalk liability claims have been the most frequent type of claim submitted to the MML Liability & Property Pool. During its first ten years of operation, the Pool received over 1,000 sidewalk liability claims with more than \$7,000,000 in total incurred costs.

Municipalities can take proactive steps to reduce the risk of incurring such costs. Like many accidents, most slips, trips, and falls are preventable.

### **ADAPTING TO CHANGES TO THE "OPEN & OBVIOUS" DOCTRINE**

The Michigan Supreme Court's July 28, 2023 decisions in *Kandil-Elsayed v. F & E Oil, Inc.* and *Pinsky v. Kroger Co. of Michigan* significantly changed how courts evaluate sidewalk and roadway slip, trip and fall liability claims. For decades, local governments often relied on the "open and obvious" doctrine to obtain dismissal of such claims involving visible hazards such as snow, ice, potholes, sidewalk defects, and uneven walking surfaces.

As a result of the above noted decisions, the Court has shifted the determination of whether a hazardous property condition, such as a sidewalk defect, is "open and obvious" from a question typically decided by the judge as a matter of law to one that may be resolved by a jury.

In addition, the Court has recognized a potential exception that juries may consider alongside the issue of whether the condition was open and obvious. Specifically, juries must now evaluate whether, despite the apparent nature of the defect, the public and/or private property owner should have reasonably anticipated that the condition could cause harm to the plaintiff. Because of this change, municipalities should expect increased scrutiny of their sidewalk maintenance practices, inspection programs, documentation, and response efforts when defending premise-related claims.

## **WHAT CHANGED?**

- Under the previous standard, a municipality generally owed no duty to protect individuals from hazards that were considered "open and obvious." If a reasonable person could see the condition upon casual inspection, courts frequently dismissed the claim before trial.
- Under the new standard, the liability analysis shifted from "Could the claimant see the hazard?" to: "Did the municipality act reasonably to identify, correct, or warn of the hazard?"

## **CRITICAL TIMELINE ELEMENTS ASSOCIATED WITH SLIP, TRIP, FALL CLAIMS**

Two critical timeline elements must be met by the plaintiff in a civil action against a municipality for a slip, trip, and fall claim. These are the 30-Day Rule and the 120-Day Rule. These rules are the two most common reasons for sidewalk slip, trip, fall injury claims against municipalities to be dismissed.

### 30-Day Rule

Under Michigan law, a municipality is generally not liable for a sidewalk defect unless a claimant can establish the following:

- a qualifying sidewalk defect existed;
- the municipality knew or should have known about it;
- the defect existed for at least 30 days before the incident.

As the 30-day rule is a legal burden that rests with the plaintiff, it is critical that the municipality takes proactive steps to document all potential slip, trip, and fall claims to include, at a minimum, the following:

- exact location of the incident
- weather conditions at the time of the incident.
- condition of the sidewalk and surrounding area.
- vertical deviation between the sections of sidewalk.
- photographs of the sidewalk and surrounding area from multiple angles and distances.
- witness information and statements.
- video from public CCTV cameras or residential camera systems that may have recorded the incident.

### 120-Day Rule

Michigan law requires that a plaintiff must serve written notice on the responsible municipality within 120 days of the date of the injury. The notice must specify:

- the exact location of the defect.
- the nature of the defect.
- the injuries you sustained.
- the names of any known witnesses.

Michigan courts strictly apply this notice requirement. Generic notices with missing required content, and notices served on the wrong entity are insufficient. Late notices, even by one day, bar the claim entirely.

## **SIDEWALK LIABILITY IMPROVEMENT PROGRAMS**

Developing and implementing a sidewalk liability improvement program can reduce the huge financial burden sidewalk liability claims may inflict on your municipal budget.

Elements involved in an effective sidewalk liability improvement program are:

- *Develop and enforce a sidewalk repair ordinance.* The ordinance should give the municipality the legal authorization to require homeowners and companies to comply and indicate who is financially responsible for maintenance and repair. Some communities hold the homeowner responsible for the cost of the repairs and charge an administrative fee.

Sample ordinances are available for review on the Michigan Municipal League website at:

[https://mml.org/resources-research/sample-documents/ordinances/street\\_sidewalk\\_ordinances/](https://mml.org/resources-research/sample-documents/ordinances/street_sidewalk_ordinances/).

- *Establish guidelines or criteria for sidewalk repair or replacement including homeowner repairs.* Develop guidelines for your specific municipality and review them annually.
  - Because of the statutory presumption that a sidewalk has been maintained in reasonable repair unless it can be shown that a vertical discontinuity of 2 inches or more exists, focus on this criteria in setting maintenance guidelines.
- *Perform an annual sidewalk assessment,* noting any sections of sidewalk with vertical discontinuities of 2 inches or more or any sections of sidewalk with defects other than vertical discontinuities that might reasonably be expected to cause an injury.
- *Repair or replace identified non-compliant sections of sidewalk as soon as possible,* as funds are made available by the elected officials and administration of the municipality.
- *Develop and follow a long-term replacement plan that identifies the completion cycle for inspection and repairs.* Divide the community into yearly regions. Some communities target two years as a completion cycle. As you determine your community's cycle:
  - Consider your available resources and the number of sidewalks that you can inspect. Estimate the number of sidewalks that are likely to need repair.

- Review your loss history, which can be a good indicator of the overall condition of your sidewalks. Identify areas that have generated more frequent claims.
- Give priority to areas that generate more frequent claims or where the condition of the sidewalk is degenerating more quickly than in other areas.
- Give priority to areas where vertical discontinuities of 2 inches or more and/or areas where defects exist that might reasonably be expected to cause injuries.
- Review the plan yearly, adjusting it as necessary.
- *Develop the implementation plan early in the year and promptly seek approval from your municipality's governing body.*
  - Approval early in the year will help to keep the project on schedule so you finish work before the winter season.
  - The governing body should approve the funds to be available for the plan, the targeted geographic area, the start and completion dates, and the bidding process. Additionally the body should approve the prioritization of repairs, all reporting and follow-up procedures, as well as the identification of necessary resources and staff time.
- *Assign a responsible individual to be in charge of the project.* The individual should be able to make decisions, solve day-to-day problems, and oversee the inspectors, the contractors and the notification process. This individual should lead the entire project until it is complete.
- *Make sure inspectors have the qualifications to perform their job.* Inspectors should be responsible and know your sidewalk inspection guidelines. They should be familiar with the implementation plan and have good written and oral communication skills. Some communities use their meter readers or hire outside contractors to perform this function.
  - If there is a litigated sidewalk claim, inspectors may need to testify.
- *Bid out the cement replacement estimate.* Require the following information to be included in the bid document:
  - estimated expenditures based on past years' experience;
  - options for different bids if the quantities change;
  - scheduled start and completion dates;
  - the contractor's responsibility for barricading repair areas to prevent injuries and for insurance coverage if such injuries occur; and
  - other contractor responsibilities.

- *Inspect sidewalks in the target area as soon as possible in the spring.* This provides adequate time for homeowners to make repairs themselves and to complete the bidding process on work that remains.
  - Monitor inspectors to make sure they are consistent in their evaluations.
  - Have inspectors look at and order work on municipal property early in the season.
- *Inspect sidewalks after the deadline for homeowner replacement passes* to determine whether the repair is complete and, if it is complete, that it is satisfactory.
  - If the repair is complete and satisfactory, document this on the master list of targeted repairs.
  - If the repair is complete but unsatisfactory, re-mark the sidewalk and give the necessary information to the contractor.
  - If the contractor's repair is not complete, re-mark the sidewalk and give the necessary information to the contractor.
- *Maintain good records of the inspection and replacement process.* Inspectors should document inspections daily.
  - Reports should give the address and condition of any location on which the contractor has worked.
  - Reports should indicate the municipality's verification that the homeowners' or contractors' work meets guidelines. If it does not, the project leader should immediately act.
  - Inspection reports are beneficial both for billing purposes and because, if litigation should occur, they can provide documented proof of the community's good faith efforts to reduce sidewalk hazards.
  - Maintain inspection records for at least four years. Some communities use computerized meter reading equipment to create their inspection records.
- *Make sure surrounding areas are in good repair once the contractor completes work in the target area.* This is usually the contractor's responsibility, but the community may wish to inspect the work to make sure the contractor completed it properly.
- *Solve individual problems as they arise.* Problems include homeowner disputes, poor quality work from contractors, and any hazards identified that are outside the target area.
- *Evaluate the successes and failures at the end of the year.* Identify changes you need to improve the effectiveness of your program in the upcoming year.

## INVESTIGATION OF COMPLAINTS

If a slip, trip or fall complaint is received it is important to complete a thorough investigation. The investigation will play a vital role in municipality's defense if a claim is filed. Immediately locate where the incident happened and document the following information:

- weather conditions at the time of the incident;
- condition of the sidewalk and surrounding area;
- note how much deviation there is between the pieces of sidewalk;
- take photographs of the sidewalk and surrounding area from multiple angles and distances
- take photographs with a measurement device in the image in order to document any deviation(s) that exist;
- if there were witnesses to the slip, trip, or fall, gather witness information and statements.

## SUMMARY

A sound program for sidewalk liability improvement can benefit your community's residents, its budget, and every member of the Pool.

***Contact MML Risk Management Services Staff  
or your Loss Control Consultant for more information.***



### Important Phone Numbers

|                              |              |
|------------------------------|--------------|
| MML Risk Management Services | 800.653.2483 |
| Loss Control Services        | 800.482.2726 |

### ***Note:***

***This document is not intended to be legal advice.  
It only identifies some of the issues surrounding this topic.  
Public agencies are encouraged to review their procedures with an expert  
or a competent attorney who is knowledgeable about the subject.***

## SIDEWALKS

Slips, trips, and falls on sidewalks frequently lead to litigation against the communities in which the falls occurred, typically based on claims of failure to inspect and repair a defect. In order to reduce your municipality's exposure to such claims, it is a good idea to review your sidewalk maintenance practices on a regular and ongoing basis.

This self-assessment guide presents key elements of related laws, regulations, and standards. Evaluate your operations against best practices by asking the questions below. A response of "No" to any question indicates an area that may require further evaluation and an action plan for improvement or correction.

| Organization Name |    |     | Completed by                                                                                  | Date |
|-------------------|----|-----|-----------------------------------------------------------------------------------------------|------|
| Yes               | No | n/a | Does Your Organization:                                                                       |      |
|                   |    |     | <b>1. Have and enforce a sidewalk repair ordinance that:</b>                                  |      |
|                   |    |     | gives the municipality authority to make repairs?                                             |      |
|                   |    |     | assigns financial responsibility?                                                             |      |
|                   |    |     | has been reviewed by an attorney?                                                             |      |
|                   |    |     | <b>2. Have established sidewalk repair criteria that:</b>                                     |      |
|                   |    |     | are reviewed annually?                                                                        |      |
|                   |    |     | are reasonable and don't exceed the community's budget?                                       |      |
|                   |    |     | designate which repairs homeowners may make?                                                  |      |
|                   |    |     | result in making only those repairs that your municipality can complete within the same year? |      |
|                   |    |     | <b>3. Have a long-term replacement plan that:</b>                                             |      |
|                   |    |     | identifies the required approval process?                                                     |      |
|                   |    |     | assigns responsibility for overseeing the project?                                            |      |
|                   |    |     | specifies how many years are needed to complete the entire community?                         |      |
|                   |    |     | is reviewed yearly and adjusted when needed?                                                  |      |
|                   |    |     | <b>4. Inspect and repair defective sidewalks in a timely manner by:</b>                       |      |
|                   |    |     | hiring only qualified inspectors?                                                             |      |
|                   |    |     | inspecting and marking sidewalks early in the year?                                           |      |
|                   |    |     | allowing time to meet the notification requirements as specified in the ordinance?            |      |
|                   |    |     | inspecting all repairs to ensure quality?                                                     |      |

## CONCLUSIONS



If you can honestly answer "yes" to all applicable questions, your risk management program for sidewalks is on solid footing (pun only slightly intended) – congratulations! Following the recommended practices reduces your organization's exposure to future claims in this area. Remain vigilant for new or changing risks and address them promptly.



If you answered “no” to one or more questions, your organization faces increased exposure to liability related to sidewalk monitoring and maintenance. Each “no” response indicates a possible deficiency in your risk management program. You should consider these carefully and take one or more of the actions below:

- Correct any deficiency that may exist;
- Contact your attorney for advice;
- Contact MML Risk Management Services (see number below);
- Contact MML Loss Control Services (see number below);

***Contact MML Risk Management Services Staff  
or your Loss Control Consultant for more information.***



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