



**Tripped up: Policy defence  
overlooked in highway maintenance case**

***Plakholm v. Victoria (City), 2009 BCCA 466***

**Sonia Sahota, P.Eng**  
Valkyrie Law Group LLP  
604.461.4042  
ssahota@valkyrielaw.com

The plaintiff tripped on uneven pavement and injured herself as she was crossing a street mid-block late one evening along a section of road that had recently been excavated and repaved by the City. The plaintiff pleaded the *Occupiers Liability Act* (“Act”) and claimed she was an invitee of the City when the incident occurred. The City had in place a policy relating to road failure and pothole repairs that provided for routine road inspection and identified 40 mm as a threshold depth for determining whether road repairs were required; the decision to repair any road failures or potholes less than 40 mm was left to the discretion of the department manager. All indications are that the City carried out its inspection and repair functions in accordance with the policy.

The trial judge found in favour of the plaintiff, reasoning that the City knew the pavement would settle and that the elevation difference was sufficient to constitute an “unusual danger” to pedestrians. The City appealed on the basis, among others, that the trial judge failed to apply the policy defence available to municipalities.

In cases such as this – and as the trial judge correctly observed - the *Act* is not applicable. The *Act* expressly exempts municipalities from its application where the municipality is an occupier of roads and highways. While no statutory duty was found, the trial judge went on to find that the City owed the plaintiff a common law duty to avoid foreseeable risks of harm from *unusual danger* of which the City knew or ought to have known. Interestingly, the duty of care assigned by the trial judge is higher than that set out for occupiers under the *Act* - an outcome that formed another basis of the City’s appeal.

Having launched directly into a negligence analysis of the City’s operations the trial judge failed to consider the City’s policy defence argument. Where a municipality has a *bona fide* policy that has been followed, it may be immune from liability. In this case, for example, the City may have balanced the need to protect pedestrians with the fiscal ability to fund repairs by a *bona fide* policy that requires repairs only of those road failures and potholes greater than 40mm in depth and, provided that the City carried out its function in accordance with its policy, the municipality will not be liable.

The policy/operational analysis seems to be well suited in this case but was overlooked. The court of appeal has allowed the appeal and remitted the matter back for re-trial. Hopefully the City will have a more favourable outcome in the second round. Stay tuned...