

LEGAL OPINION

—BY KEVIN O'SHEA—

Re: *Surveyor's Liability in Planting a Standard Iron Survey Bar*

An accident occurred in the Niagara Falls area involving a pedestrian who tripped over a standard iron survey bar and broke his arm. The bar in question had been originally planted flush with the ground level but over a period of time had heaved due to frost to the extent that it pushed its way through a public sidewalk.

If a cause of action could be maintained against the surveyor in the preceding fact situation, the action would be brought as a result of the surveyor's negligence. Negligence is defined as conduct that falls below the standard regarded as normal or desirable in a given community. A gauge or criterion used by the Courts in determining if one's conduct is or is not below this somewhat artificial standard is the "reasonable man test"; that is, the Court's attempt to assess how a reasonable man would have performed in a given situation before it makes its determination of negligence. In the case of surveyors or other skilled or professional people acting within the scope of their profession, the test is modified so that the standard of conduct required is that of the ordinary surveyor or professional acting reasonably.

Based on this test it would seem, *prima facie*, that a surveyor who leaves a survey bar protruding out of the ground, particularly in an area of pedestrian or vehicular traffic, could be accused of negligent conduct. Applying the foregoing test to a hypothetical fact situation, a jury would be asked if a reasonable man or, more appropriately in our case, an ordinary surveyor acting reasonably, would leave an iron bar protruding in a children's playground or in a sidewalk, and escape liability for any damage or injury caused as a result of the protruding bar. It could be safely assumed that a jury would find liability in such a case.

However, as with most professions, the conduct of surveyors is governed, in part at least, by statute, and conduct that complies with the statute cannot, in most cases, be considered negligent by a jury. In fact, if a surveyor did not comply with the governing statute, he may render himself absolutely or strictly liable for damage or injury resulting from his non-compliance. Strict, or absolute, liability is fault occasioned by such overt negligence that the defendant is precluded from offering a defence or even an excuse

to mitigate damages. In the above situation, therefore, the surveyor who recognizes the impending danger to a pedestrian caused by his protruding iron bar and accordingly plants the bar in a safer location in contravention of customary practice or government regulation, may avert liability for property damage or personal injury, but invite disciplinary action from the Association of Ontario Land Surveyors or a negligence action in respect of boundaries.

The relevant statute for our purposes is **The Surveys Act**, R.S.O. 1970, chapter 453, as amended. The Regulations under this Act, among other things, stipulate the prescribed dimensions and method of planting the various types of survey bars. The type of survey bar and the method of planting it varies in accordance with the requirements of the survey.

A surveyor, then, has an obligation or duty of care to the public in respect of planting iron bars. He also has a statutory obligation to plant the bars in a prescribed manner. The question, therefore becomes; "How does a surveyor comply with the statute and fulfill his duty of care in situations where compliance with the statute creates a potential hazard?" The answer, logically enough, is for the surveyor, after he has set his bars in accordance with the statute, to take the necessary precautionary steps so that a "foreseeable plaintiff" is made aware of the risk. In other words, the surveyor must couple statutory compliance with common law duty of care. The precautionary methods may take the form of notice to a land owner of the bar's existence and location, painting the bar a bright colour or, adhering to the safety methods generally followed by fellow surveyors in similar circumstances. As stated, the standard of care required is that of an ordinary surveyor acting reasonably and, to conform to the standard, the surveyor must tailor his conduct to meet the situation.

Based on the foregoing, a surveyor is not liable for any damage or injury resulting from a survey bar planted according to regulation when there is no foreseeable risk arising as a result of the bar's protrusion. Liability arises when there is reasonable anticipation of harm resulting from the survey bar being planted. Liability could also arise when the **probability** of the bar causing damage or injury is minimal but the **consequences** of an accident are severe. Simply stated, it is not only the greater risk of injury

that imposes the duty but the risk of greater injury.

In the case of a survey bar that heaves as a result of frost or some external force, the same principles as above apply. That is to say, a surveyor who, in compliance with **The Surveys Act**, plants a survey bar flush with the ground may owe a further duty of care if statutory compliance does not eliminate the risk. For example, if the surveyor who plants a bar according to regulation, knowing it will probably heave with frost and therefore present a hazard is compelled by law to take the necessary measures to minimize the hazard. On the other hand, the surveyor who plants a bar that he reasonably expects to remain flush and the consequences of heaving, in any event, would not pose a danger, owes no further duty of care. However, the surveyor who plants a bar flush with the ground and there is no reasonable anticipation of heaving, might still be liable if the consequences of the bar heaving are serious and the surveyor is aware of the consequences.

To summarize, assuming a surveyor has complied with statutory regulation governing the planting of the survey bar, he owes a further duty of care if the bar creates a hazard or potential hazard. The hazard must be reasonably foreseeable or if not foreseeable extremely dangerous for liability to follow and the duty of care required is dictated by common sense or customary practice.

Using the fact situation, the surveyor who planted the bars that are now protruding through a public sidewalk is not liable if the bars were planted in compliance with **The Surveys Act** and the surveyor had no reason to believe that the bars would heave with frost or that if they did no serious harm would result. In addition, section 427 (1) of **The Municipal Act**, R.S.O. 284, as amended, provides that:

"Every highway and every bridge shall be kept in repair by the corporation, a council of which has jurisdiction over it or upon which the duty of repairing it is imposed by this Act, and, in case of default, the corporation, subject to **The Negligence Act**, is liable for all damages sustained by any person by reason of such default."

For the purposes of **The Municipal Act** case law has determined that the term "highway" includes sidewalk. Accordingly, the *prima facie* responsibility to maintain public sidewalks in a state of good repair rests with the Municipality. Nonetheless **The Negligence Act** imposes joint and several liability on two or more persons in respect of the same

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accident if it can be proven that both or all were negligent. Again, the question for the Court is to determine what standard of care is required on the part of a surveyor in order to meet a charge of negligence.

If the surveyor in question knew that a sidewalk was to be laid over the survey bar he may owe a duty to inform the Municipality of the location of the bar. However, given the rather minimal risk created by a protruding iron bar, albeit on a public sidewalk, the statutory duty of care imposed on the Municipality by **The Municipal Act**, and no reasonable expectation of heaving the better view still appears to be that the surveyor is exonerated from liability. **The Municipal Act** notwithstanding, liability might very well follow if the surveyor planted the bar in accordance with the statute knowing that in all probability the bar would heave and knowing that the site of his bar was the proposed location for a public sidewalk but neglected to inform the Municipality of the facts.

The most prudent approach would be for the surveyor to advise the client or owner if there is any reasonable risk presented by a protruding or potentially protruding iron bar. As stated, precautionary steps can take the form of simply providing information (which should be available for future reference) as to the existence and location of the iron bar to the person responsible for the land; painting the iron bar a bright colour or following the accepted safety procedures of fellow surveyors in the area. ●