

# Potential Legal Liabilities for Salt Use Reduction

November, 2011

Brian Lessels<sup>1</sup>  
Dave Owen<sup>2</sup>

## INTRODUCTION

The Salt Management Task Force is exploring ways to reduce the environmental impacts of salt. One potential way to ameliorate those impacts is to reduce salt loads, partly by encouraging public and private actors to reduce their applications of salt to roads, parking lots, driveways, walkways and sidewalks. If salt use is reduced, however, and if a car accident occurs or a pedestrian slips and is injured, a lawsuit might ensue.

We initiated this study to examine how such reductions in salt use might affect the legal exposure of the state, public and private property owners, and contractors. To do so, we begin by outlining why reducing salt applications is an important issue, then review current Maine law on winter liability, and then review law from other states. Lastly, we look to possible avenues for reform.

Our review leads to several conclusions, each discussed in more detail below:

- Public entities are generally immune from tort liability for salt use (or non-use) on roadways;
- The Maine Supreme Court has tried to limit private property owners' and managers' liability for injuries associated with snow and ice. However, the limits are not absolute, and a landowner may be liable if that landowner unreasonably fails to abate risks to people entering the property;
- The contours of potential landowner/land manager liability are not fully defined and would be determined on a case-by-case basis. While a landowner that takes reasonable steps to reduce salt use should have a strong defense, the outcome of litigation would be fact-dependent and not completely predictable;
- The extent of contractor liability for salt management would be established by the contractor's contract with the landowner or land manager. That liability would not extend to third parties;
- If DEP, DOT, or some other entity develops guidance on salt best management practices, landowners could use their adoption of those best management practices as evidence that they adhered to a reasonable standard of care. However, compliance with those best management practices would not supply landowners with a categorical defense from liability.

## BACKGROUND

Maine's snowy, inclement winters create difficult conditions for the state's drivers. In response

---

<sup>1</sup> J.D. Candidate, Class of 2013, University of Maine School of Law.

<sup>2</sup> Associate Professor, University of Maine School of Law.

to those conditions, municipal governments and state agencies apply salt to roads to remove snow and ice, and private landowners use salt to clear parking lots, driveways, walkways and sidewalks. The total amount applied is large. Maine state and municipal users alone purchased approximately 490,000 tons of road salt in the winter of 2008-2009.<sup>3</sup>

Unfortunately, the use of salt as a de-icer causes numerous environmental problems. As salt melts ice and snow, the resulting brine solution leaches into the ground, flows off roads, and is deposited in snowbanks by passing plows. Road salt has detrimental effects on groundwater quality; Maine has experienced an increase in the number of wells contaminated by salt in recent years.<sup>4</sup> Salt also adversely affects vegetation along roadways. Salt-sensitive species are killed or weakened and, over time, are replaced by more salt-tolerant species.<sup>5</sup> Salt attracts birds and large mammals to the roadside, where the consumption of salt can have toxic effects. The increase in animals visiting roads is correlated with more frequent car strikes, resulting in animal deaths as well as injuries to drivers and passengers who collide with large mammals like moose and deer.<sup>6</sup> Elevated chloride concentrations appear in many of Maine's impaired urban streams, suggesting that salt may be an important contributing factor to those streams' biological impairment.<sup>7</sup>

Despite these dangers, salts play an important role in keeping Maine's roads and walkways safe for traffic in the winter months. Modern drivers and pedestrians increasingly expect clear, dry, safe roads, parking lots, and walkways during or soon after winter storms.<sup>8</sup> Alternative de-icers such as calcium chloride are significantly more expensive than sodium chloride. For these reasons, salt will likely continue to be applied to Maine's roads.

Even if some salt will likely continue to be used, the amount could change. The Salt Management Task Force is exploring ways to reduce salt applications, and any decrease in the amount of salt applied should reduce the severity of salt's environmental impacts. But while such reductions could lead to environmental improvements, they also might create liabilities. A driver or pedestrian might blame salt reductions for an accident and might even choose to file suit.

#### POTENTIAL CIVIL LIABILITY for REDUCED SALT USE under MAINE LAW

Lawsuits for injuries to persons and property are generally governed by the field of tort law. For a tort to exist, the defendant must have had a duty to the plaintiff that has been breached, causing damages to the plaintiff. Whether a duty exists depends on the nature of the relationship between the parties and is decided "as a matter of law": a judge makes a decision based on the circumstances of the case. Whether that duty was breached, however, is a question that is generally decided by a jury. Accordingly, tort cases tend to be fairly fact-specific.

Most Maine law in this area has been formed by decisions of the Maine Supreme Court. When the court makes a decision on a point of law, it creates a binding precedent for future cases that are

---

<sup>3</sup> JONATHAN RUBIN ET. AL., MAINE WINTER ROADS: SALT, SAFETY ENVIRONMENT AND COST 7 (2010), *available at* <http://mcspolicycenter.umaine.edu/files/pdf/Winter%20Road%20Maint%20Final.pdf>. Although not all salt bought in a year is applied the same year, total salt purchases serve as a rough proxy for total salt applications by public users.

<sup>4</sup>*Id.* at 26.

<sup>5</sup>CANADIAN ENVIRONMENTAL PROTECTION AGENCY, PRIORITY SUBSTANCES LIST ASSESSMENT REPORT: ROAD SALTS 114 (2001).

<sup>6</sup>*Id.* at 116.

<sup>7</sup> Thomas Parr (University of Maine), unpublished data.

<sup>8</sup> Rubin et. al., *supra* note 1, at 3.

substantially similar.

In Maine, there have been no published cases in which a landowner or manager was sued after deciding to reduce salt applications. However, several cases have addressed the liability of landowners and land managers when pedestrians were injured because of wintry conditions.<sup>9</sup> These cases provide general guidance on potential liabilities associated with changes in salt use.

As the cases make clear, the potential liabilities for municipalities and other governmental entities, private landowners, and contractors are different. We discuss each in turn.

## **A. Public entities**

In Maine, the simplest liability rules apply to public entities. Maine law exempts the state and municipalities from liability for accidents “while the road surface is covered with snow or ice.”<sup>10</sup> This immunity also extends to state agencies such as the Maine Turnpike Authority and the Department of Transportation.<sup>11</sup>

However, the state and municipalities may be liable for injuries sustained due to negligence in the “operation or maintenance of any public building or the appurtenances to any public building.”<sup>12</sup> This exception to state and municipal immunity is narrow. For instance, a staircase attached to a public building is appurtenant for purposes of the exception.<sup>13</sup> Parking lots and sidewalks leading to public buildings, however, are not appurtenances, so the state and municipalities maintain their immunity for accidents occurring there.<sup>14</sup>

## **B. Private landowners and land managers**

Private landowners and land managers in Maine do not have the same sweeping liability shield as public landowners. A private defendant could be liable for reductions in salt use if (a) the defendant possesses the land where the accident occurred; and (b) the defendant acted unreasonably and that unreasonable conduct was at least partially responsible for causing the accident. We discuss each requirement in turn.

---

<sup>9</sup>See, e.g., *Budzko v. One City Center Asscs.*, 767 A.2d 310, 315 (2001) (holding that a jury could reasonably have found a defendant guilty when the facts showed that no salt or sand was applied, the snow was not shoveled, and no warning was given); *Ouelette v. Miller*, 183 A. 341 (1936) (holding that despite a municipal statute requiring landowners abutting sidewalks to clear snow, no duty existed to spread salt or cinders).

<sup>10</sup>23 M.R.S. § 1005-A (1).

<sup>11</sup>*Nelson v. Maine Turnpike Authority*, 170 A.2d 687, 690 (1961).

<sup>12</sup> 23 M.R.S. § 8104-A (2).

<sup>13</sup> *Rodriguez v. Town of Moose River*, 922 A.2d 484 (2007) (holding that a town was not immune from suit when a person was injured falling on a staircase leading into the town clerk’s home, which was used to conduct official town business).

<sup>14</sup> See *Kitchen v. City of Calais*, 666 A.2d 77 (1995) (holding that a town was immune from suit when a mother and daughter fell in a poorly-lit parking lot near a public building because the parking lot was not appurtenant to the building.) The court reasoned that if 23 M.R.S. section 8104-A(2) applied to parking lots, section 8104-A(4) (immunizing governmental entities for negligent acts or omissions arising from construction, cleaning or repair of sidewalks, parking lots and other public ways) would be redundant. The Court would therefore likely find that sidewalks are also not appurtenant to public buildings for purposes of section 8104-A(2).

## 1. Possession

To be held liable in Maine, a defendant must possess the land on which the accident occurred.<sup>15</sup> Possession does not refer only to holding legal title to the property. Instead, it means that the possessor has shown intent to control the property.<sup>16</sup> A possessor thus can be the owner, renter or manager of a property, depending on the degree of control manifested by that party.<sup>17</sup>

An exception to the general possession requirement also exists. Businesses or other parties can be liable for injuries that occur off of the land they actually possess and control if the injured person was legally on the premises and it could be reasonably be expected that the person would use the uncontrolled area.<sup>18</sup> For instance, a man sued a volunteer organization after he fell on a staircase when leaving a building the organization had rented for a party.<sup>19</sup> The Maine Supreme Court held that, although the organization had only rented the building and not the surrounding grounds, the organization still owed a duty of care to party-goers. According to the court, the volunteer organization reasonably should have expected that party-goers would use the parking lot, walkway, and stairs to get to the party, so the organization could be held liable if it failed to keep that area in a reasonably safe condition.<sup>20</sup>

## 2. Reasonable Conduct

Snow and ice are naturally occurring phenomena in Maine, and property owners have historically faced limited liability for injuries sustained due to slips and falls caused by snow and ice on their property.<sup>21</sup> In several decisions, the Maine Supreme Court has emphasized the importance of these limits. For example, in *Rosenberg v. Chapman National Bank*, the court held that a landlord could not be held liable when a tenant fell on icy stairs because the ice was apparent and formed naturally.<sup>22</sup> More recently, in *Alexander v. Mitchell*, the court noted that “[b]ecause the volume and frequency of snowfall in Maine is so pervasive, the common law in this state has not assigned open-ended responsibility for snow-related accidents. . . . Our common law reflects the widely held public acceptance of heavy snowfall and difficult driving as facts of life in Maine.”<sup>23</sup>

Those limits on liability are not absolute, however. Recently, in a case involving One City Center in Portland, the Maine Supreme Court held that “[t]he mere fact that snow and ice conditions are prevalent during the course of our severe Maine winters is not in and of itself sufficient rationale for the insulation of the possessor of land from liability . . . .”<sup>24</sup> Instead, the court held that “a business owner who anticipates that 500 to 1000 invitees may enter and leave its premises during a snow or ice storm has a duty to reasonably respond to a foreseeable danger posed to the invitees by a continuing snow or ice storm.”<sup>25</sup> The court did not state whether this same duty would extend to a business that

---

<sup>15</sup> *Quadrino v. Bar Harbor Banking & Trust Co.*, 588 A.2d 303, 305 (1991).

<sup>16</sup> *See Hankard v. Beal*, 543 A.2d 1376, 1378 (1988).

<sup>17</sup> *See id.* (holding that renting a property but reserving the right to enter to plow the parking lot may create possessor status).

<sup>18</sup> *Libby v. Perry*, 311 A.2d 527, 535-536 (1973). Maine’s liability rules once distinguished between licensees and invitees.

However, Maine has abandoned this distinction. *Inkle v. Livingston*, 869 A.2d 745, 747 (2005).

<sup>19</sup> *Libby*, 311 A.2d at 535.

<sup>20</sup> *Id.* at 535-536.

<sup>21</sup> *See Rosenberg v. Chapman National Bank*, 139 A. 82 (1927); *see also Ouelette v. Miller*, 183 A. 341 (1936).

<sup>22</sup> *Rosenberg*, *supra* note 16.

<sup>23</sup> 930 A.2d 1016, 1021 (Me. 2007).

<sup>24</sup> 297 A.2d 98, 103 (Me. 1972).

<sup>25</sup> *Budzko v. One City Center Assocs.*, 767 A.2d 310, 314 (2001).

anticipated less extensive visitation.<sup>26</sup>

Similarly, in *Isaacson v. Husson College*, the court held that Husson College, a private educational institution, had a duty to keep its premises reasonably safe for its students.<sup>27</sup> A Husson student was returning to his dorm from the dining hall the day after a large snowstorm when he slipped on an icy patch and was injured. Because the plaintiff was a student in good standing at the school, the Court treated him as a “business invitee,” so the school owed him a duty to use reasonable care to keep the premises safe.<sup>28</sup> However, the Supreme Court did not rule that Husson breached that duty and was liable for the plaintiff’s injuries, only that a duty existed. In overturning the trial court’s decision, the Supreme Court made clear that in the circumstances, it should have been up to a jury to decide whether the conduct of the college was a breach of its duty to use reasonable care to keep the premises safe.<sup>29</sup>

The steps required to keep a location “reasonably safe” are not clear, but the cases do provide some general guidance. In the *One City Center* case, an employee was injured on a staircase. The property management company admitted that it had a policy of keeping steps clear, but “several witnesses testified that no one had shoveled any of the snow, and that neither salt nor sand had been spread on the icy, snow-packed surfaces.”<sup>30</sup> Under these relatively extreme circumstances, the court held that a jury could reasonably find a breach of duty and upheld a jury verdict in the employee’s favor. On the other hand, the court’s repeated acknowledgment of the challenges posed by Maine’s wintry conditions indicates that it would not expect landowners to ensure conditions of perfect safety.

Some additional uncertainty arises because the question of whether a business took reasonable precautions is generally for a jury to decide during a trial.<sup>31</sup> Because spreading salt is a very common and accepted practice in Maine winters, a jury might view some level of salt application as a necessary part of a reasonable set of procedures for a business to employ. However, a prospective defendant could succeed in arguing that reduced salt applications are reasonable, particularly given the environmental and financial costs of excessive salt use and the reality, often acknowledged by the Maine Supreme Court, that winters cannot be made perfectly safe.

### C. Contractors

Along with property owners, plowing companies could be affected by the decision to apply less salt to roads, parking lots and driveways. When an individual or plowing company signs a plowing contract, the contractor undertakes a duty to the other party to the contract to clear the roads or lots in question. However, the contract does not create a duty to third parties. For instance, a husband recently sued a plowing company after his wife died in a car crash on a snowy road.<sup>32</sup> The plowing company had signed a contract with the town to keep the town’s roads clear. The trial court dismissed the suit, and the Maine Supreme Court upheld that decision because the plowing company owed no

---

<sup>26</sup> Courts often try to limit their holdings to the facts before them, and the court’s unwillingness to articulate a more general rule is typical of common-law judicial decision-making.

<sup>27</sup> *Isaacson v. Husson College*, 297 A.2d 98 (1972).

<sup>28</sup> *Id.* at 103.

<sup>29</sup> *Id.* at 103-104 (1972).

<sup>30</sup> 767 A.2d at 313.

<sup>31</sup> We attempted to find statistics on jury verdicts in slip-and-fall cases, but were only able to find somewhat dated statistics on premises liability. We did find some evidence, primarily on plaintiffs’ lawyers’ web pages and blogs, that plaintiffs’ lawyers believe slip-and-fall cases are very difficult to win, but that evidence is limited and anecdotal,

<sup>32</sup> *Alexander v. Mitchell*, 930 A.2d 1016, 1017-1018 (2007).

duty to the driver.<sup>33</sup>

This holding limits but does not eliminate the possibility of contractor liability. If a private landowner was held liable for an injury on the grounds that she unreasonably failed to maintain her premises safely, she might then cross-claim against her contractor. Her likely claim would be that the contractor breached its contract by failing to adequately salt the property. Whether such a claim would succeed would depend upon the facts of the case and the specific language of the contract.

## OTHER STATES

The potential liability of Maine businesses and governmental entities for reduced salt application would be a function of Maine law. Because the Maine courts have decided few cases involving salt application, however, a Maine court might look to the law of other states for guidance. In addition, other states can provide examples of possible alternative approaches to winter conditions liability, some of which Maine might choose to adopt. This section therefore provides a brief overview of salt liability law from other states.

Other states' approaches to liability for injuries caused by winter conditions can be split into four groups: (1) states that follow the storm-in-progress doctrine; (2) states that follow the natural accumulation rule; (3) states that establish a requirement of actual or constructive notice; and (4) states that apply "normal" premises liability to winter conditions.

### A. The Storm-in-Progress Rule

Connecticut applies the storm-in-progress rule. This rule fully exempts a landowner from liability while a storm is in progress and for a reasonable period after it is complete. For example, in *Kraus v. Newton*, the Connecticut Supreme Court considered a claim brought by a meter reader who fell while descending a defendant's icy staircase during a storm.<sup>34</sup> The court held that the defendant homeowner was not liable; she owed no duty to the plaintiff because Connecticut law allows a possessor of land to wait until the end of a storm and a reasonable time after to clear her steps and walkways of ice and snow.<sup>35</sup>

### B. The Natural Accumulation Rule

Some states use an even more limited rule: the natural accumulation rule. For instance, in Illinois a woman sued a municipal transit authority after she fell on snow and water while exiting a train.<sup>36</sup> The court held that the transit authority owed no duty to clear snow and ice that had accumulated naturally.<sup>37</sup> The court added that the transit authority likewise had no duty to warn travelers of the existence of dangerous conditions.<sup>38</sup>

---

<sup>33</sup> *Id.* at 1025 (2007); see also *Denman v. People's Heritage Bank*, 704 A.2d 411 (1998) (holding that a plowing company did not owe a duty to a third party despite the company's contract with a bank to keep the sidewalk clear of ice and snow.)

<sup>34</sup> *Kraus v. Newton*, 558 A.2d 240, 241 (1989).

<sup>35</sup> *Id.* at 243.

<sup>36</sup> *Krywin v. Chi. Transit Auth.*, 938 N.E.2d 440 (2010).

<sup>37</sup> *Id.* at 450.

<sup>38</sup> *Id.*

### C. Constructive Notice

In Colorado, a defendant must know or have reason to know of a dangerous condition in order to be held liable for injuries resulting from that dangerous condition.<sup>39</sup> In one representative case, a man fell in a shopping plaza parking lot and sued the property management company that controlled it. The Court of Appeals of Colorado noted that the proper inquiry is whether the defendant acted reasonably in light of the foreseeability of injuries to guests on the property.<sup>40</sup> In Colorado law, foreseeability is predicated on knowledge of the dangerous condition.<sup>41</sup> However, the property owner is deemed to be on “constructive notice” if the dangerous condition occurs frequently.<sup>42</sup>

### D. Normal Premises Liability

Massachusetts recently abandoned the natural accumulation rule in favor of applying normal premises liability standards to winter slip and fall cases. A man sued a business after he fell in its parking lot.<sup>43</sup> However, it was unclear if he had fallen on a chunk of ice or if a nearby snowbank had melted and then refrozen, forming a slippery patch of ice.<sup>44</sup> To address the confusion arising from the need to determine whether a dangerous condition is the result of a natural or unnatural condition, the Massachusetts Supreme Court decided to apply general rules of premises liability: the landowner owes a duty to all lawful visitors “to use reasonable care to maintain its property in a reasonably safe condition in view of all the circumstances.”<sup>45</sup>

While Maine does not use the terms “normal premises liability,” this approach is similar to Maine’s.

## ADDITIONAL STEPS

A core conclusion of our study is that Maine law, while accommodating the realities of winter, does not provide landowners with clear limits on liability and therefore leaves some uncertainty. We close by identifying two possibilities for reducing that uncertainty.

First, the Maine Legislature could enact legislation protecting landowners from liability. The legislature has broad authority to shift common law liability schemes. If it chooses, it could enact sweeping limitations on liability, create more narrow liability protections for landowners that comply with salt management standards, or shift the state to a liability regime similar to that used in a natural accumulation or storm-in-progress state.

Second, administrative agencies like the Maine Department of Environmental Protection or the Maine Department of Transportation could provide guidance on salt application. Similarly, a private-public partnership like the Salt Management Task Force could produce such guidance. Unlike a statutory shield against liability, that guidance would not provide landowners with a categorical

---

<sup>39</sup> *Anderson v. Dunton Mgmt. Co.*, 865 P.2d 887, 889 (1993).

<sup>40</sup> *Id.* at 889.

<sup>41</sup> *Id.* at 890.

<sup>42</sup> *Id.*

<sup>43</sup> *Papadopolous v. Target Corp.*, 930 N.E.2d. 142, 144 (2010).

<sup>44</sup> *Id.* at 144.

<sup>45</sup> *Id.* at 150.

defense. In tort suits, compliance with a regulatory standard can be evidence of reasonable conduct, but it generally is not dispositive. But such guidelines could at least inform courts determining the scope of a landowner's duty and juries assessing whether that duty was breached, and therefore could provide some additional security to landowners.