



Claim Case Studies & Legislation: Labanowicz v. Town of Fort Erie – Appeal

A cyclist was riding on a municipally-owned recreational trail when her bicycle came in contact with an empty bollard bracket. The bollard had been installed by the Municipality to prevent motorized vehicles from entering onto the trail. The cyclist fell to the ground and struck her head causing a brain injury. She was not wearing a helmet. The cyclist was diagnosed with post-concussion syndrome.

Contributory Negligence

The Town argued that the cyclist contributed to her injuries by not wearing a helmet or keeping a proper lookout. Also, because the cyclist and her friend had safely passed the missing bollard earlier in the day and the cyclist's friend testified that he noticed it was missing, the Town's position was that their failure to report the missing bollard constituted contributory negligence.

Trial Judge's Decision

When rendering his decision, the trial Judge stated:

"I am not persuaded on the evidence that a reasonably alert cyclist, acting reasonably, could have avoided coming into contact with the bollard housing, particularly since, as Ted testified, the housing almost blended into the asphalt."

It is not clear how the Judge came to that conclusion considering that the cyclist's friend had avoided the bollard

housing moments prior. Both the cyclist and her friend had also safely navigated past the missing bollard earlier in their trip.

The Judge found the Town to be 100% liable for the Plaintiff's injuries and assigned no contributory negligence to the Plaintiff despite the fact that she was not wearing a helmet and was aware of the hazard due to cycling past it earlier in the day. The judgment was for approximately \$995,000 plus \$921,508 for costs.

The Town's Appeal

The Town appealed the decision on the following grounds:

1. The trial Judge erred in his interpretation of section 4 of the *Occupiers' Liability Act*.

Section 4 of the *Occupiers' Liability Act* provides a lowered duty of care for occupiers when they are providing a recreational trail. In these circumstances occupiers are prohibited from intentionally creating hazards for the purpose of causing injury. Occupiers are also prohibited from acting with reckless disregard.

The trial Judge failed to apply the "but for" test.

In order to establish liability, the Plaintiff must demonstrate that the actions of the Town caused the Plaintiff's injuries.

The Town argued that the Plaintiff had not established that “but for” the actions of the Town, the Plaintiff would not have sustained her injuries. In his decision, the trial Judge stated that “this incident occurred as a result of the Town’s reckless disregard to the present of cyclists using the Trail.” The appellate Judge felt that this wording demonstrated application of the “but for” test.

2. The trial Judge erred in finding there was no contributory negligence.

The defence was required to prove that some action or inaction on the part of the Plaintiff contributed to her injuries or caused her injuries to be more severe. The appellate Judge found that the defence did not introduce any evidence that the Plaintiff’s failure to wear a helmet caused her injuries to be more severe.

3. The costs award was excessive.

The appellate Judge decided that the actions of the defence in failing to concede to any of the Plaintiff’s points and advancing many different defences, some of which had little chance of succeeding, had caused the case to be more complicated and, accordingly, the high cost award was justified.

All aspects of the appeal were dismissed and the judgment was upheld.

What can we take away from this decision?

Although this judgment seems unfair, there are lessons to be learned from this case.

When the Trail was built, the Town used the services of a consultant to design road crossing guidelines. The Consultant prepared a report recommending:

- Existing bollards should be painted with a bright colour such as safety yellow.
- A dashed line should be painted on the Trail surface at a distance of 40 metres from the intersecting road’s edge.

- Diamonds should be painted around existing bollards.
- Additional reflective bands were to be added to the existing bollards.

The Town did not paint the bollards or use reflective paint. Although some of the bollards had diamonds painted around them, the bollard in question did not.

The bollard was designed to hold a padlock but it was not locked when some of the other bollards were.

Town staff had done an inspection the day before the incident and found the bollard had been removed. This demonstrated that the Town was aware that the bollards were removable which would expose the metal housing that sits above grade. The Judge found the Town’s failure to follow the report or take corrective action when they became aware that bollards could be removed creating a dangerous situation, amounted to reckless disregard to the safety of users of the Trail.

The following actions on behalf of the Town resulted in a finding of reckless disregard:

- failure to follow the recommendations of a professional Consultant,
- inconsistent actions in locking and painting diamonds around some bollards and not others, and
- failure to act once the Town became aware of the possibility of a hazardous condition.

Risk Management Tips for Preventing a Similar Incident

1. Engage professionals to assist in planning and construction of recreational trails.
2. If you engage a professional, follow their advice unless there is a compelling reason not to.
3. Be consistent with the safety steps taken. Haphazard application of safety measures will result in liability.
4. Train staff to report conditions that could lead to injury.
5. Once a condition is reported, prioritize and act.