



# Claim Case Studies & Legislation: Debra Barbeau v. City of Kitchener, 2017 ONSC 24

## Facts

On a clear and sunny day, at around 4:00 PM on July 20, 2012, the plaintiff, Debra Barbeau, tripped and fell on a sidewalk owned and maintained by the City of Kitchener. She was walking along Roy Street, near Queen Street on her way to the former Superior Court of Justice courthouse when this incident occurred. She had put some coins into a parking meter and then started walking along the sidewalk when her hiking boot caught a sidewalk edge and she landed on her face, hip and hand. Ms. Barbeau had been carrying a canvas bag on her arm and was wearing non-prescription sunglasses at the time. She was able to get up with the help of a passerby and was bleeding from her nose and mouth. Ms. Barbeau was 57 years old at the time of her fall.

The plaintiff brought an action against the City for damages for her injuries that she sustained. The plaintiff's damages were agreed upon before trial. They consisted of \$35,000 in general damages, excluding pre-judgment interest and \$1,000 for OHIP's subrogated interest. The Court only had to decide on the issue of liability in this matter.

## Issue

1. Was the sidewalk in a state of disrepair?
2. Was the City liable for the plaintiff's damages?

## Legislation

The Court looked at Section 44 of the *Municipal Act*, 2001, S.O. 2001, c.25 which governs the duties of a municipality with respect to sidewalks. It reads as follows:

### "Maintenance

44. (1) The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge. 2001. c. 25, s. 44(1)

### Liability

(2) A municipality that defaults in complying with subsection (1) is, subject to the *Negligence Act*, liable for all damages any person sustains because of the default. 2001 c. 25, s. 44(2)

## Defence

(3) Despite subsection (2), a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if:

(a) it did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge;

(b) it took reasonable steps to prevent the default from arising;

or

(c) at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway or bridge and to the alleged default and those standards have been met. 2001, c. 25, s. 44 (3).”

The parties in the trial agreed “that while s. 44 speaks of “highways and bridges”, sidewalks are included...”

## Findings

The plaintiff admitted that she was familiar with the sidewalk on this section of Roy Street. She also testified that she had been “...looking straight ahead towards Queen Street and did not notice the rise between the slabs before she fell”. The plaintiff had described the day as “clear and sunny”. She returned the day after her fall to take some photographs of the sidewalk. Ms. Barbeau also did some research and noted that a surface discontinuity on a sidewalk is present when it is over 20 mm in height. To show the trip ledge in her photos she rested a Canadian dollar coin (a “loonie”) at the joint between the two sidewalk slabs where she fell. She had testified that a loonie measured 26 mm in height and the sidewalk trip ledge “...was at least the same height as the loonie”. The photos that she took of the loonie were taken at an angle and not straight on level with the sidewalk. She did not use any other type of measuring device.

A claims investigator employed with Waterloo Region Municipalities Insurance Pool (an insurance group that handles the City’s insurance requirements) attended the scene of the incident on September 27, 2012. He attended again on October 25, 2012 after receiving the photographs provided by the plaintiff. The investigator used a carpenter’s square and a ruler at the same location where the loonie was placed by the plaintiff. The carpenter square was resting on its own on the upper slab with the ruler attached to it at a 90 degree angle. The photo showed a measurement of 16

mm. The investigator took two more measurements along the same ledge and the photographs provided showed measurements of 19 mm and 11 mm. None of these measurements showed a discontinuity of more than 20 mm.

The City of Kitchener had conducted annual inspections of the sidewalks since 2010. They had hired two civil engineering students from Conestoga College from 2010 to 2012 to inspect all of the City’s sidewalks. The inspections took place from May to August. The students were trained on the identification of the defects, the issues that they could cause and how the repairs are carried out prior to the commencement of the inspections. The students were then each given a computer tablet with GPS embedded in it mounted on top of an adult’s tricycle, a surveyor’s stake with a pre-measured line at 20 mm and an orange spray gun. The students were taught how to transfer the information that they inputted into the tablets when they got back to the office each day.

In 2010, the City adopted the standard whereby any trip ledge of 20 mm or over required treatment within 14 days after knowledge of it. In 2012, the defects that were recorded were considered either “trip minor” (between 20 and 38 mm) or “trip major” (over 38 mm). The student inspectors were trained to spray paint all of the defects and photograph them using their tablets. The City’s inspection records noted that there were no defects found in the area of this fall in 2004 and 2012. There was a trip ledge defect found in the area in May 2012 but it was ruled out as the location of the fall. Any defects less than 20 mm were not repaired according to the City’s evidence at trial. The sidewalk where the fall took place was repaired in 2014.

## The Court’s Ruling

The Court found no liability against the City.

The photographed measurements taken by the City’s adjuster, using a carpenter’s square and a scaled ruler were considered “more reliable” than that of the plaintiff using a loonie. The Court accepted the height discrepancy of the sidewalk ledge to be in a range from 11 to 19 mm and 16 mm at the point where the trip took place.

The Court determined that “...the standard of repair of a municipal sidewalk is not of perfection and that a municipality cannot be expected, nor it is required, to maintain perfectly even sidewalk surfaces...” The onus was on the plaintiff to prove that the City did not keep the sidewalk in a reasonable state of repair but failed to do so.

If there was liability on the City, the Court would have assessed 20% contributory negligence on the plaintiff because she was familiar with the area, and she was looking at Queen Street, not looking down at the sidewalk when she fell.

The Court dismissed the plaintiff's action.

## Lessons Learned

At the time of this loss, the Minimum Maintenance Standards (MMS) included minimum standards for sidewalk surface discontinuities (Section 16.1 Minimum Maintenance Standards, O. Reg. 239/2, s.10). It states that: "(2) If a surface discontinuity on a sidewalk exceeds two centimetres, the minimum standard is to treat the discontinuity within 14 days after becoming aware of the fact..." The frequency of inspections was once per year.

In January 2013, the MMS was amended to clarify the frequency of inspections to once per calendar year with each inspection not being more than 16 months from the previous inspection. It also deemed that the sidewalk was in a "state of repair" if the surface discontinuity is less than or equal to 2 cm.

Even though this was a very positive result for the City, this ruling reminds us of the importance of performing the following sidewalk inspection and maintenance tasks:

- Compile an inventory of all sidewalks and develop a checklist of their condition.
- Perform annual inspections of all sidewalks.
- If a trip ledge approaches the 2 cm mark, take a measurement and record it.

- Use a proper measuring device (e.g. ruler, tape measure).
- Photograph all trip ledges as close to the ground as possible to provide a true depiction.
- If the sidewalk appears to be sloped to one side then take measurements and record the highest measurement.
- Prioritize any maintenance to be done and warn the public of any areas of non-repair (e.g. spray paint the trip ledge).
- Make sure that the records identify the name of the inspector.
- Maintain contact information of the inspector(s) so they can be found later.
- Develop written maintenance schedules and procedures.
- Continue to monitor.
- Keep all records of inspections and maintenance activities.
- Review your Sidewalk Maintenance Policy and update any changes.
- Train staff and third party contractors on your sidewalk procedures and required documentation.