



Claim Case Studies & Legislation

Worthey vs. City of Hamilton, 2015

ONSC 3690

Facts

On the morning of September 13, 2012, the plaintiff tripped and fell on a sidewalk owned and maintained by the City. She had been dropped off by a taxi just a couple of houses past her house; she crossed a narrow grass boulevard and then started walking on the sidewalk. She tripped and fell on a sidewalk ledge in front of her neighbour's house. She fractured her left wrist and left hip, requiring a total hip replacement. She was 86 years old at the time of her fall but she was in good health with very good eyesight and had no difficulty with walking. She reported no dizziness or balance issues. The sidewalk is located along a busy road with a public park and a school in the area.

The plaintiff brought an action against the City claiming that the sidewalk was in a state of disrepair and the City failed to regularly inspect and maintain the sidewalk.

Issues

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

Legislation

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

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

- It did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge;
- It took reasonable steps to prevent the default from arising; or
- 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."

During the trial, counsel for the plaintiff and defendant agreed to use the following four step analysis:

"(1) Non-Repair: The plaintiff must prove the existence of a "condition of non-repair": a sidewalk-based hazard that poses an unreasonable risk of harm to an ordinary, non-negligent users of the sidewalk.

(2) Causation: The plaintiff must prove that the condition of non-repair caused the loss in question.

(3) Statutory Defences: If the plaintiff has proven both non-repair and causation, a prima facie case is made out against the municipality, which then bears the onus of proving that one of the three independently sufficient defences in s.44(3) applies.

(4) Contributory Negligence: If the municipality cannot establish any of the statutory defences, it will be found liable. However, the municipality can still demonstrate that the plaintiff caused or contributed to his/her injuries.”

Findings

The plaintiff's son worked in the forensic pathology department of a local hospital and learned how to take accurate measurements and how to photograph them. He went to the scene of his mother's fall after being contacted by a concerned citizen. He did see a portion of the sidewalk nearby that was sticking up and could not see any other cause for the fall. He returned to the scene 5 days later and took measurements using a carpenter square and a tape measure. He measured the highest point of the sidewalk lip where he understood his mother tripped over. It measured 15/16 of an inch or 23.8 mm. He photographed the scene of the accident as well as his measurements.

The City's sidewalk inspection system at the time was to inspect once a year. This sidewalk was inspected on August 31, 2011 and not again until January 13, 2013. The City did not adhere to its inspection program because there were no inspections performed in 2012. Also the City relied on an independent contractor to inspect the sidewalks and did not perform any quality control audits or supervise their work to ensure the quality of inspections. Any trip ledges found that are 20 mm or higher are reported and then repaired to make them safe. The City had no report of complaints of this section of the sidewalk from the public.

An adjuster hired by the City to investigate attended the scene on October 23, 2012 and took photographs of the sidewalk ledge that measured less than 20 mm. However he did not measure the ledge at the highest point and the bottom end of his ruler did not appear to touch the lower concrete slab.

An employee from the City also attended the scene on November 6, 2012 and used a metal tool and a chipped

wooden ruler to measure the joint between the sidewalk slabs. He photographed and measured the ledge at 5/8 of an inch or 15.9 mm which would not be considered a trip hazard. The ruler was not shown sitting flush against the lower slab of sidewalk. His evidence at trial was that he did not look at the photos taken by the plaintiff's son rather he “eyeballed” the sidewalk while standing and measured where he thought was the highest point. He did not measure anywhere else and made no notes of his inspections at the scene.

The Court's Ruling

The Court found liability against the City. The evidence provided by the plaintiff's son was the most credible based on his training and that he did not make any extra comments to favour his mother's case. The Court found the measuring methods employed by the City's employee and the adjuster failed to show the true measurement of the trip ledge.

The Court's reasons while using the 4 Step analyses were:

1. **Non-Repair:** The height discrepancy of 15/16 of an inch “was not reasonable at that location and accordingly constituted a hazard and a condition of non-repair at that location”.
2. **Causation:** The plaintiff was found to be a sensible and responsible person and the cause of the fall was “her foot hitting the raised edge of the higher sidewalk.”
3. **Statutory Defences:** The City adopted a policy requiring that their sidewalks be inspected annually. However, they failed to inspect the sidewalk in 2012. The Court determined that the City failed to ensure that the frequency of inspections was complied with and that the training and qualifications of those independent contractors doing the inspections were reasonable.
4. **Contributory Negligence:** The Court decided that the plaintiff “must share some of the fault in the circumstances of this case”. The plaintiff candidly admitted that she was not paying particular attention to the sidewalk at the time of her fall. The Court assessed that the plaintiff was 30% contributorily negligent.

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.9). The standard states that if a surface discontinuity exceeds 2 cm (20 mm) it must be treated within 14 days. 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 of 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.

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 then take a measurement and record it
- 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 inspectors 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 in your sidewalk procedures and required documentation.