

Claim Case Study:

Beardwood v. Hamilton (City)

This case provides a glimmer of hope to municipalities because it demonstrates, that if a municipality maintains their roads in compliance with the Minimum Maintenance Standards (MMS), Judges are capable of an analysis that can be rewarded with a complete defence to claims that municipal roads are in a state of disrepair.

Mr. Beardwood, who was an experienced driver, was seriously injured when he drove his motorcycle over a discontinuity in the road surface at an intersection in Hamilton which caused a single-vehicle motorcycle accident. Having left a stopped position, Mr. Beardwood was travelling at a very low speed when he hit the lip which he had seen prior to driving over it.

The City was responsible for the maintenance of the intersection and it had been monitoring the roads pursuant to the Regulations. There had been no previous incidents reported at this intersection.

The City's liability exposure stems from section 44 of the *Municipal Act*, 2001 which describes the City's responsibilities, 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,

(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.

Further, with regard to roadway surface discontinuities, section 16 of the MMS¹ state:

Roadway surface discontinuities

(1) If a surface discontinuity on a roadway, other than a surface discontinuity on a bridge deck, exceeds the height set out in the Table to this section, the standard is to repair

the surface discontinuity within the time set out in the Table after becoming aware of the fact.

(1.1) A surface discontinuity on a roadway, other than a surface discontinuity on a bridge deck, is deemed to be in a state of repair if its height is less than or equal to the height set out in the Table to this section.

(2) If a surface discontinuity on a bridge deck exceeds five centimetres, the standard is to deploy resources as soon as practicable after becoming aware of the fact to repair the surface discontinuity on the bridge deck.

(2.1) A surface discontinuity on a bridge deck is deemed to be in a state of repair if its height is less than or equal to five centimetres.

“Surface discontinuity” means a vertical discontinuity creating a step formation at joints or cracks in the paved surface of the roadway, including bridge deck joints, expansion joints and approach slabs to a bridge.

The Trial Judge considered the four-part test set out in *Fordham v. Dutton Dunwich (Municipality)* for determining if a municipality is liable for a state of non-repair pursuant to

¹ <https://www.canlii.org/en/on/laws/regu/o-reg-239-02/latest/o-reg-239-02.html?autocompleteStr=minimum%20maintenance%20standards&autocompletePos=1><https://www.canlii.org/en/on/laws/regu/o-reg-239-02/latest/o-reg-23902.html?autocompleteStr=minimum%20maintenance%20standards&autocompletePos=1>

section 44 of the *Municipal Act*. The four steps are:

1. Non-repair – Plaintiffs must prove, on a balance of probabilities, that the Municipality failed to keep the road in a state of repair.
2. Causation – Plaintiffs must prove the “non-repair” was the cause of the accident.
3. Statutory Defence – The Municipality can establish that one of the defences listed in s.44(3) of the *Municipal Act* applies.
4. Contributory Negligence – If a Municipality cannot establish the statutory defence, they will be liable, but they can attempt to prove the Plaintiff caused or contributed to their own injuries.

The Judge found that the existence of this discontinuity at an irregularly angled intersection did create an unreasonable risk of harm and, therefore, the road was not in a reasonable state of repair.² This means the first step of the test was met.

The Judge was also satisfied that the “non-repair” caused the accident which satisfies the criteria for the second step.

Statutory defences available to the City, pursuant to the *Municipal Act*, were then considered and the Judge decided that the height of the discontinuity was 4.5 cm which, because it is less than 5 cm, is deemed to be in a state of repair and the City was not liable.

This may sound confusing because the Judge previously indicated that the discontinuity created an unreasonable risk of harm and was not in a reasonable state of repair.

Some might argue that the Judge did not apply the Fordham test correctly because the deeming provisions of the MMS could have been applied in step 1 to find that there was no condition of disrepair and ended the analysis there, the result was the same as if the Judge had done so.

It was in step 3 of the Fordham analysis; statutory defences, that he cited the deeming provision in section 16(2) of the MMS, and concluded that a surface discrepancy with a mean height of 4.5 cm is deemed a state of reasonable repair, and that this provides the City with a complete defence.

The Judge concluded that the City faced no liability and dismissed the claim against it.

Appeal

On appeal in 2023, this decision in this case was overturned. The Plaintiff asserted that the City failed to discharge its burden of proving compliance with the MMS as required under s. 44(3)(c) of the *Municipal Act*.

The Court of Appeal observed that the only evidence regarding the height of the surface discontinuity originated from the Plaintiff's expert. At trial, the expert acknowledged that he had not taken on-site measurements and had instead relied on City supplied photographs, which he interpreted as showing a range between approximately 3.5 cm and 5.5 cm. The Court found these assessments to be speculative.

The Trial Judge ultimately accepted 4.5 cm as the height of the discontinuity, treating it as the average of the presented estimates. The Court of Appeal held that this conclusion amounted to conjecture layered onto speculative expert opinion, constituting a palpable and overriding error in finding that the evidence established compliance with the MMS threshold.

The Court further determined that although the Plaintiff had introduced photographic evidence through expert testimony, this did not absolve the City of its responsibility to present reliable, accurate evidence by either validating the photographs or providing its own measurements. Despite having sufficient notice under the Act, the City failed to produce any contemporaneous measurement evidence.

The Court of Appeal also overturned the finding of 50% contributory negligence, concluding that the Trial Judge erred by failing to consider evidence about the visibility of the discontinuity and the Plaintiff's testimony about how he perceived it. The City was found 100% liable.

Takeaway

The decision underscores the importance for municipalities to promptly investigate and properly measure the relevant areas when they receive notice of a potential claim.

² <https://www.canlii.org/en/on/onsc/doc/2022/2022onsc4030/2022onsc4030.html?autocompleteStr=beardwood%20hamilton&autocompletePos=1>