

Court Of Appeal Upholds Finding That Storefront Was Occupier Of Municipal Sidewalk

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MacKay v. Starbucks Corporation, 2017 ONCA 350

In the recent decision of [MacKay v. Starbucks Corporation, 2017 ONCA 350](#), the Court of Appeal considered circumstances under which an adjacent property owner may be found to be an occupier of a municipal sidewalk.

The defendant Starbucks had an outdoor patio which abutted the municipal sidewalk. The patio was enclosed by a fence which had a 3-4 foot opening onto the sidewalk. At trial ([2015 ONSC 4718](#)), the jury found that the plaintiff had fallen on the sidewalk directly adjacent to the patio entrance.

The parties agreed to allow the trial judge to determine the question of whether or not Starbucks was an "occupier" of the sidewalk, within the meaning of the Occupiers' Liability Act, R.S.O. 1990, c. O.2 (the "Act").

The trial judge found that Starbucks had the "requisite responsibility and exerted the requisite amount of control over the sidewalk entrance to its patio and over its customers who used that area to access its store to be an occupier within the meaning of the Act." This was based on a number of factual findings, including:

- Starbucks expected that many customers would cross over the sidewalk, enter the store through the patio and exit using the same path.
- Starbucks created a pathway through the patio and out over the sidewalk, for its commercial benefit, which was only used by its customers.
- Starbucks customers only used the sidewalk to access this entrance and would have not been there otherwise.
- "By its actions, Starbucks effectively directed all of its customers entering and exiting its store on the Hammersmith side to use that area of the sidewalk. It effectively controlled their access route and ensured that they would walk on the pathway it had designated, including on that portion of the sidewalk."
- Customers had almost exclusive use of the sidewalk in the area.

The jury then found that Starbucks had breached its duty as an occupier of the sidewalk and was liable to the plaintiff. The plaintiff was found 30% contributorily negligent.

Starbucks appealed the trial judge's finding that it was an occupier within the meaning of the Act. The appeal was based on two grounds. First, Starbucks argued that the trial judge's finding undermines the principle from [Bongiardina v. York \(Regional Municipality, 2000 CanLII 5408 \(ON CA\)\)](#) that sanding and salting a municipal sidewalk does not make an adjacent property owner liable to a person who slips and falls on that sidewalk.

The Court of Appeal rejected this argument, stating that the trial judge's finding that Starbucks was an occupier was not based solely on the fact that it took steps to clear ice and snow from the sidewalk. Rather, the Court held that the trial judge's ruling was **based on the "combined effect" of the factual findings set out above and was "in no way inconsistent with Bongiardina."**

Starbucks' second ground of appeal was that it did no more than any other storefront owner and suggested that the trial judge's ruling improperly shifts the responsibility for accidents occurring on icy sidewalks from the municipality to storefront owners.

The Court of Appeal rejected this argument as well, holding that determining whether a party is an occupier is a very fact-specific determination, to be conducted on a case-by-case basis. Furthermore, where storefront owners are found to be occupiers of a municipal sidewalk, such findings are consistent with the purposes and objectives of the Act:

"That purpose and policy is to impose liability on those who, by their conduct, assume control over and responsibility for a portion of the immediately adjacent sidewalk and the safety of those who use it. That conduct must, as in this case, amount to much more than merely clearing adjacent public sidewalks of snow and ice, whether in compliance with municipal by-laws or otherwise."

Overall, the Court of Appeal's decision reinforces the fact specific application of established principles as to when an adjacent property owner or tenant may be found to be an occupier of a municipal sidewalk. As stated by the Court of Appeal, this case, and those which preceded it, do not create a "blanket rule" for the determination of whether an adjacent property owner is an occupier.

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