

## Cautioning Customers for Conditions of a Curb

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In May 2019, the Ontario Superior Court of Justice released its decision in [\*Ali v. Smart REIT\*](#), 2019 ONSC 2824 (“*Ali*”), granting the defendants’ request for summary judgment against the plaintiff who tripped on a curb leading to the entrance of a shopping plaza.

### ***The Incident***

The plaintiff was walking towards a shopping plaza owned by the defendants when she tripped and fell on a curb located between the parking lot and sidewalk. Next to or where the plaintiff fell, there was a curb-cut which sloped down to the parking lot surface to provide barrier-free access for people in wheelchairs or with walkers.

The exact location of where the plaintiff placed her footing on the curb before she fell was not captured on CCTV footage.

### ***The Lawsuit***

The plaintiff claimed that the defendants were negligent and breached their duty of care imposed by section 3 of the *Occupiers’ Liability Act*, R.S.O. 1990, c. O.2 (“*OLA*”), to take reasonable care in all of the circumstances to keep their premises reasonably safe for persons entering into the premises.

The main allegations against the defendants was that the curb was uneven and that the absence of yellow paint marking the curb breached the standard of care.

### ***The Summary Judgment Motion***

The two legal and factual issues on the summary judgment motion were: 1) whether the defendants failed to meet the standard of care; and 2) if the defendants breached the standard of care, whether that breach caused the plaintiff’s fall.

On the summary judgment motion, Justice Copeland considered photographs of the curb, the plaintiff’s evidence, a video of the fall, an opinion of a defence engineering expert, and the evidence of a manager of a store located near the curb.

She concluded that "...it was plain and obvious that the defendants met the standard of care imposed..." under the *OLA*.

In particular, Justice Copeland considered the following factors in reaching her conclusion that the curb, including the curb-cut, complied with the standard of care and did not pose an unreasonable risk to people attending the plaza:

- The curb appeared to be an ordinary sidewalk curb, which a pedestrian could encounter in a variety of locations in the greater Toronto area.
- According to the opinion of the defence engineering expert, which she accepted, the curb was neither unusually high nor unusually low. The curb did not contravene any municipal or provincial by-laws or building standards.
- The curb and the curb-cut were in a good state of repair.
- The curb and the curb-cut were clearly visible. The view of the curb was not obstructed for pedestrians approaching it.

Of interest, Justice Copeland agreed with the plaintiff that painting the curb a contrasting colour may make the curb more visible, and for that reason safer; however, the absence of a contrasting colour did not mean the defendants fell below the standard of care.

Justice Copeland considered her own experiences in the greater Toronto area where most curbs are not painted a contrasting colour, and that there is no code or regulation requiring that this particular curb be painted, according to the defence expert engineer.

Even though the curb was painted yellow sometime after the accident, Justice Copeland was not persuaded that the standard of care requires that sidewalk curbs be painted a contrasting colour.

Since Justice Copeland found that the defendants did not breach their duty of care, it was not necessary for her to deal with the issue of causation; however, she addressed this issue in the alternative.

The defendants argued that the plaintiff was unable to say exactly where she tripped or exactly how she tripped; therefore, the plaintiff's evidence was too uncertain to establish causation.

The plaintiff argued that she is not required to pinpoint the exact place of her fall and that causation is not required to be proven with scientific precision.

Justice Copeland concluded that had she found that the defendants breached the duty of care, she would have held that there was a triable issue in relation to causation.

### ***Conclusion***

*Ali* demonstrates the importance of determining the applicable standard of care for occupiers in various situations.

Just because a plaintiff may be able to point to something more that an occupier could have done to make their premises safer, this does not equate to a breach of a standard of care. Occupiers are held to a reasonableness standard.

As stated by Justice Copeland "...people fall in the absence of any wrongdoing on the part of another. It is unfortunate, but it happens...".