



Supreme Court of Canada Refuses Leave Application in Kennedy v. Waterloo County Board of Education

by [Jeanne E. Craig](#)

On March 23, 2000, the Supreme Court of Canada dismissed without reasons the application for leave to appeal the decision of the Ontario Court of Appeal in *Kennedy v. Waterloo County Board of Education*. The finding that an occupier cannot make a policy decision which would allow it to avoid compliance with its statutory obligation is therefore the current state of the law in Ontario.

The facts of the case are as follows: the plaintiff was a student who lost control of his motorcycle while driving at an excessive speed as he exited the school parking lot. He was thrown from the motorcycle and struck his head against a concrete bollard separating the parking lot from the school's sports field. Many years before, the board had placed along the edge of the sports field 22 large bollards connected by chains in order to prevent vehicles from driving onto the field. After the board learned of several accidents involving chains at other schools, the chains were removed but the bollards were left in place because the board could not afford the cost of digging them up and removing them.

At trial, the board's decision not to remove the bollards was found to be a policy decision not reviewable by the court. On appeal, however, the Court of Appeal unanimously held that since the Ontario Occupiers' Liability Act imposes a statutory duty to keep premises in a reasonable state of repair, an occupier cannot make a policy decision which would allow it to avoid compliance with its statutory obligation. It also held that even if the policy decision immunity had been applicable, the trial judge erred in failing to consider the bona fides of the Board's decision to leave the bollards in place: there was no evidence to suggest the person who made the decision had compared the potential risks of leaving the bollards in place against the cost of removing them and there was no document evidencing any such decision having been made. The board was found 75% liable for the catastrophic injuries sustained by the plaintiff.

The report of the decision of the Court of Appeal can be found at (1999), 175 D.L.R. (4th) 106; 45 O.R. (3d) 1.

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