

2014 ONSC 1182
Ontario Superior Court of Justice

Elbaum v. York Condominium Corp. No. 67

2014 CarswellOnt 2208, 2014 ONSC 1182, 238 A.C.W.S. (3d) 1055

Sali Elbaum, Plaintiff and York Condominium Corporation No. 67, Nathalia Gauto and Miqueias de Oliveira Silva, Defendants

Perell, J.

Heard: February 18, 2014
Judgment: February 26, 2014
Docket: 13-CV-478191

Counsel: Spencer F. **Toole**, for Plaintiff
Dena Oberman, for Defendant, York Condominium Corporation No. 67

Subject: Civil Practice and Procedure; Property; Torts

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Torts

[XVI Negligence](#)

[XVI.8 Occupiers' liability](#)

[XVI.8.b Duties and obligations](#)

[XVI.8.b.i General principles](#)

Headnote

Torts --- Negligence — Occupiers' liability — Duties and obligations — General principles

Plaintiff was unit owner of defendant condominium corporation — In 2012, while she was walking on common elements of condominium, she was seriously injured when she was allegedly attacked by unleashed dog owned by individual defendants, who were also residents of condominium, causing her to fall — Plaintiff sued dog's owners pursuant to Dog Owners' Liability Act and sued condominium corporation for common law negligence or pursuant to Occupiers' Liability Act — Condominium corporation brought motion for order dismissing plaintiff's action on basis that Dog Owners' Liability Act applied exclusively in circumstances — Motion dismissed — If defendant was owner or harbourer of dog and plaintiff's damage was caused by being bitten or attacked by dog on premises of owner, liability of owner was determined under Dog Owners' Liability Act — However, under Dog Owners' Liability Act, if court determined that defendant was not owner or harbourer of dog, then there was no strict liability, but there was also no preclusion of common law negligence claim or claim under Occupiers' Liability Act — It was not plain and obvious that condominium corporation could not be found liable for common law negligence claim or claim under Occupiers' Liability Act.

Table of Authorities

Cases considered by *Perell, J.*:

Clement v. McGuinty (2001), 2001 CarswellOnt 1275, 18 C.P.C. (5th) 267, 143 O.A.C. 328 (Ont. C.A.) — referred to

Graham (Litigation Guardian of) v. 640847 Ontario Ltd. (2005), 2005 CarswellOnt 3866 (Ont. S.C.J.) — considered

Hudyma v. Martin (1991), 1991 CarswellOnt 1912 (Ont. Gen. Div.) — considered

Hunt v. T & N plc (1990), 1990 CarswellBC 216, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 4 C.C.L.T. (2d) 1 (S.C.C.) — referred to

Inuit Tapirisat of Canada v. Canada (Attorney General) (1980), 1980 CarswellNat 633, [1980] 2 F.C.R. 735, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304, 1980 CarswellNat 633F (S.C.C.) — referred to

Temelini v. Ontario Provincial Police Commissioner (1990), 73 O.R. (2d) 664, 38 O.A.C. 270, 1990 CarswellOnt 759 (Ont. C.A.) — referred to

Statutes considered:

Condominium Act, R.S.O. 1970, c. 77
Generally — referred to

Dog Owners' Liability Act, R.S.O. 1990, c. D.16
Generally — referred to

s. 1(1) “owner” — considered

s. 2 — considered

s. 3 — considered

s. 5.1 [en. 2005, c. 2, s. 1(15)] — considered

Occupiers' Liability Act, R.S.O. 1990, c. O.2
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 20 — considered

R. 21.01(1)(a) — considered

R. 21.01(2) — considered

MOTION by condominium corporation for order dismissing plaintiff's action against it for common law negligence or pursuant to Occupiers' Liability Act, on basis that Dog Owners' Liability Act applied exclusively in circumstances.

Perell, J.:

A. Introduction

1 The Plaintiff, Sali Elbaum, is a unit owner of the Defendant, York Condominium Corporation No. 67. In 2012, while she was walking on the common elements of the condominium, she was seriously injured when an unleashed dog, owned by the Defendants Nathalia Gauto and Miqueias de Oliveira Silva, other residents of the condominium, allegedly attacked her causing her to fall.

2 Ms. Elbaum has sued the dog's owners pursuant to the *Dog Owners' Liability Act*, R.S.O. 1990, c. D.16, and she sues the Condominium Corporation for common law negligence or pursuant to the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2.

3 The Condominium Corporation brings a motion pursuant to Rule 21 for an order dismissing Ms. Elbaum's action.

B. Factual Background

4 York Condominium Corporation No. 67 is a non-profit corporation under the *Condominium Act*, R.S.O. 1970, c. 77 located at 130 Neptune Dr. in Toronto, Ontario.

5 Ms. Elbaum is a unit owner at the Condominium Corporation.

6 On September 23, 2012, Ms. Elbaum, who was then 89 years old, was walking on the common elements of the Condominium Corporation when she was attacked by the dog (a puppy) owned by the Defendants Gauto and de Oliveira Silva, who were also unit owners at the condominium. The dog was unleashed and left to run free.

7 Under the *Condominium Act*, the Condominium Corporation is an occupier of its common elements.

8 Ms. Elbaum alleges that the Condominium Corporation was negligent because: (a) it failed to take reasonable or any steps to ensure that persons are reasonably safe while on the common elements; (b) it failed to take reasonable or any steps to ensure that dogs are kept on a leash; (c) it failed to take reasonable or any steps to ensure that unit owners control their pets at all times while on the common elements; (d) it failed to create and or adequately enforce rules that would require that dogs are always kept on a leash; (e) it failed to create and or adequately enforce rules that would require unit owners to control their pets at all times when on the common elements; and (f) it failed to monitor, supervise, and maintain the premises in such a manner to keep aware of dogs on the common elements that may pose a danger to persons on the common elements.

9 At the time of the accident, the Condominium Corporation had posted signs that dogs are to be leashed under its by-law 31356. The Condominium Corporation's rules provide that no pet shall be kept on any part of the common elements.

10 Ms. Elbaum alleges that she suffered serious injuries as a result of the dog attack. She sues the dog's owners pursuant

to the *Dog Owners' Liability Act*, and she sues the Condominium Corporation for common law negligence or pursuant to the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2.

11 The Condominium Corporation argues that the *Dog Owners' Liability Act* applies exclusively in the circumstances of this case and that it is plain and obvious that it is not liable under that *Act* and, therefore, Ms. Elbaum's action should be dismissed. Alternatively, the Condominium Corporation submits that it is plain and obvious that it cannot be liable at common law or under the *Occupiers' Liability Act*.

C. Discussion and Analysis

12 The Condominium Corporation's motion is brought pursuant to rule 21.01 (1)(a), which states:

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or ...

13 Under rule 21.01 (2), no evidence is admissible on a motion under rule 21.01 (1)(a) except with leave of a judge or on consent of the parties. In the case at bar, the parties consented to the admission of evidence.

14 The admission of evidence does not change a motion under rule 21.01 (1)(a) into a summary judgment motion under Rule 20. To succeed in having the plaintiff's action dismissed under rule 21.01 (1)(a), the defendant must show that it is plain, obvious and beyond doubt that the plaintiff could not succeed in the claim: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.); *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.); *Temelini v. Ontario Provincial Police Commissioner (1990)*, 73 O.R. (2d) 664 (Ont. C.A.); *Clement v. McGuinty*, [2001] O.J. No. 1400 (Ont. C.A.).

15 The Condominium's argument turns on the interpretation of the liability provisions of the *Dog Owners' Liability Act* which are found in sections 1, 2, 3 and 5.1 of the *Act*, which state:

Definitions

1. (1) In this Act,

"owner", when used in relation to a dog, includes a person who possesses or harbours the dog and, where the owner is a minor, the person responsible for the custody of the minor;

Civil Liability

Liability of owner

2. (1) The owner of a dog is liable for damages resulting from a bite or attack by the dog on another person or domestic animal.

Where more than one owner

(2) Where there is more than one owner of a dog, they are jointly and severally liable under this section.

Extent of liability

(3) The liability of the owner does not depend upon knowledge of the propensity of the dog or fault or negligence on the part of the owner, but the court shall reduce the damages awarded in proportion to the degree, if any, to which the fault or negligence of the plaintiff caused or contributed to the damages.

Contribution by person at fault

(4) An owner who is liable to pay damages under this section is entitled to recover contribution and indemnity from any other person in proportion to the degree to which the other person's fault or negligence caused or contributed to the damages.

Application of Occupiers' Liability Act

3. (1) Where damage is caused by being bitten or attacked by a dog on the premises of the owner, the liability of the owner is determined under this Act and not under the *Occupiers' Liability Act*.

Protection of persons or property

(2) Where a person is on premises with the intention of committing, or in the commission of, a criminal act on the premises and incurs damage caused by being bitten or attacked by a dog, the owner is not liable under section 2 unless the keeping of the dog on the premises was unreasonable for the purpose of the protection of persons or property.

Precautions by Dog Owners

Owner to prevent dog from attacking

5.1 The owner of a dog shall exercise reasonable precautions to prevent it from,

- (a) biting or attacking a person or domestic animal; or
- (b) behaving in a manner that poses a menace to the safety of persons or domestic animals.

16 The Condominium Corporation's argument is that: (a) damage was caused to Ms. Elbaum by being attacked by a dog on its premises (the common elements); (b) thus, the Condominium Corporation's liability is determined under the *Dog Owners' Liability Act*; but (c) it is not the owner or harbourer of the dog under the *Act*; and, therefore, (d) the Condominium Corporation is not liable under the *Dog Owner's Liability Act*; and (e) it is not liable under the *Occupiers' Liability Act*, which liability is precluded by the *Dog Owner's Liability Act*.

17 There, however, is a logical fallacy in this argument, because it depends on the Condominium Corporation simultaneously being a dog owner and also not being a dog owner under the *Dog Owners' Liability Act*. A proposition and its negation, however, cannot be both true at the same time. The fallacy is conflating the ownership of the premises with the ownership of the dog, which is the ownership that actually matters under the *Dog Owners' Liability Act*. The Condominium Corporation's argument does not work.

18 As I interpret the civil liability provisions of the *Dog Owners' Liability Act*, the court first determines whether the defendant is the owner or harbourer of the dog that bit or attacked a person or domestic owner. If the defendant is the owner or harbourer then there is strict liability; the *Act* negates the *scienter* defence; i.e., liability does not depend upon knowledge of the propensity of the dog or fault or negligence of the owner.

19 As I interpret the civil liability provisions of the *Dog Owners' Liability Act*, if the defendant is the owner or harbourer of the dog and the plaintiff's damage was caused by being bitten or attacked by a dog on the premises of the owner, the liability of the owner is determined under the *Dog Owners' Liability Act* and not under the *Occupiers' Liability Act*.

20 However, as I interpret the civil liability provisions of the *Dog Owners' Liability Act*, if the court determines that the

defendant is not the owner or harbourer of the dog, then there is no strict liability, but there is also no preclusion of a common law negligence claim or a claim under the *Occupiers' Liability Act*.

21 In *Graham (Litigation Guardian of) v. 640847 Ontario Ltd.*, [2005] O.J. No. 3685 (Ont. S.C.J.), a motel owner who permitted a dog on its premises was found not to be an owner under the *Dog Owners' Liability Act*, and it was unsuccessfully argued that the motel owner should be liable as an occupier. This argument failed because it was not established that the owner of the motel violated the duty of care imposed by the *Occupiers' Liability Act*. A similar argument also failed in *Hudyma v. Martin*, [1991] O.J. No. 1184 (Ont. Gen. Div.) against a landlord who knew that his tenant was keeping large dogs on the rented property.

22 Put shortly, in the case at bar, it is not plain and obvious that the Condominium Corporation could not be found liable for a common law negligence claim or a claim under the *Occupiers' Liability Act*.

23 In the case at bar, a trial or a summary judgment motion is required to determine whether: (a) the Condominium Corporation is a harbourer of the dog, which at this point is doubtful but not plainly and obviously not the case; or (b) not the owner of the dog but nevertheless liable for common law negligence or under the *Occupiers' Liability Act*, which liability at this point is not plainly and obviously not the case.

D. Conclusion

24 For the above reasons, I dismiss the Condominium Corporation's motion.

25 If the parties cannot agree about costs, they may make submissions in writing beginning with Ms. Elbaum's submissions within twenty days of the release of these Reasons for Decision followed by the Condominium Corporation's submissions within a further twenty days.

Motion dismissed.

Citing References (1)

Treatment	Title	Date	Type	Depth
—	1. Legal Memoranda 1647, What is the liability of a dog owner for dog bite incidents?	2015	Secondary Sources	—

Legal Memos (1)

Title	Date/Jurisdiction	Author	Classification
<p>1. What is the liability of a dog owner for dog bite incidents? MemoPoLSumm 1647 Fact Scenario : You represent the plaintiff in an action for damages arising from a dog bite. The plaintiff was walking his Jack Russell terrier, Jane, along a residential road when they encountered the defendant's German Shepherd which was ...</p>	<p>October 1, 2015 Ontario</p>	<p>TVA The Legal Outsourcing Network Memo Size : Small</p>	<p>Torts—Negligence—Liability of owner or possessor of animals—Injury by domestic animals—Injury by dog—Injury to other animals</p> <p>Torts—Negligence—Liability of owner or possessor of animals—Injury by domestic animals—Injury by dog—Under by-law or statute</p> <p>Torts—Negligence—Liability of owner or possessor of animals—Injury by domestic animals—Injury by dog—At common law</p>