ALEXANDER HOLBURN

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1. *Ranger v. Triovest Realty Advisors*, 2024 ONSC 1782

On January 29, 2013, Carmen Ranger (the "Plaintiff"), slipped and fell in a marked pedestrian crosswalk near the entrance to a Walmart store located at the New Sudbury Centre (the "Mall").

The Plaintiff arrived at the Mall at approximately 3:00 pm. She admitted that she was aware that the roadway and parking lot could be slippery due to freezing rain that was falling (that fell from 11:00 am to 9:00 pm), and the snowstorm that occurred the day prior. After parking her vehicle in the parking lot she began to walking towards the Walmart in her winter boots. As she walked across the parking lot surface she noted that it was "a little slippery". Observing this, she proceeded to walk "carefully" while taking her time. As the Plaintiff approached the store, she was able to successfully traverse over a marked pedestrian crosswalk to enter the store. When she exited the store, she again traversed the crosswalk, but this time on the opposite side of the crosswalk from where she walked when she entered the store. While still upon the crosswalk surface, the Plaintiff's right foot slipped out from under her and she fell heavily to the ground, injuring her ankle.

As a result of the fall, the Plaintiff commenced a claim against the Mall owner, CPP Investment Real Estate Holding Inc. ("CPP"); the property manager Triovest Realty Advisors ("Triovest"); and the Mall winter maintenance contractor Pioneer Construction ("Pioneer"). The defendants all acknowledged that they were occupiers as defined in the *Occupiers' Liability Act,* R.S.O. 1990, c. O.2 ("OLA"*).*

The quantum of the Plaintiff's damages had been agreed upon. The trial proceeded on the issue of liability only.

At trial, the Plaintiff argued that the defendants breached the duty set out in the OLA on the basis that they failed to provide a winter maintenance system for the property that, in all the circumstances, was reasonable to see that persons entering on the property were reasonably safe.

Specific to Triovest, who had retained the services of Pioneer, the Plaintiff alleged that:

1. It did not provide for a reasonable inspection and monitoring system for adverse conditions caused by ice and snow;
2. The terms of its monitoring system between it and Pioneer were ambiguous;
3. Its winter maintenance system contained no provision to make the property reasonably safe in the event of freezing rain; and
4. The system should have allocated additional maintenance to pedestrian crosswalks beyond the maintenance provided to the parking lot surfaces.

In the alternative, the Plaintiff argued that both Triovest and Pioneer failed to reasonably inspect and monitor the condition of the crosswalk; and that Triovest failed to properly monitor Pioneer's services.

The defendants denied the allegations made against them by the Plaintiff, and further submitted that due to the weather conditions on January 29, 2013, there was nothing further the defendants could have reasonably have done to make the property safer; while relying on the argument that any further salting or sanding would have been ineffective given the freezing rain conditions.

As part of its analysis, the Court reviewed the Mall's winter maintenance system, which included a Services Agreement between Triovest and Pioneer. As per the agreement, Pioneer was responsible for the Mall's exterior maintenance, including the crosswalk. Pioneer was required to remove all snow

accumulation in excess of 3.5 cm by 7:00 am each morning, and in the event of a "major snowfall" it was required to dispatch an employee within 1 hour of being contacted to clear roadways, entrances, and exits, and to apply salt as required. While there was no specific provision dealing with freezing rain, the defendants relied on the portion of the agreement that required (in part) all roadways to be kept "ice free". The agreement contained no monitoring provisions. The Court also found that there was no separate agreement or understanding between Pioneer and Triovest that specified the responsibilities of each for inspecting and monitoring the condition of the property. However, the evidence supported that each conducted some "modest" inspection and monitoring which was described by the Court as "informal" and "casual".

Pioneer had a contractual duty to keep records of its work, including the amount of salt used and where it was spread. The Court found that it breached this duty by failing to keep the required records. Pioneer did produce employee time sheets and supervisor's diaries, however the records were described as "sparse, cryptic, and difficult to read".

Although Triovest did not have a contractual duty to maintain records, the Court found that its "attempt" at record keeping fell below the standard expected of a "responsible" property manager. The Court cautioned that "if an occupier wishes to rely on its inspection logs to establish that it conducted reasonable inspections, it is incumbent upon that occupier to maintain inspection records that are legible and understandable". There were two deficiencies noted by the Court with the Triovest logs. First, the areas of the Mall were not well defined and therefore made it difficult to determine whether any of them included the crosswalk; and second the limited notations in them were difficult to comprehend. Further detrimental to the defence of Triovest is that the representative that it produced at trial knew very little about how the property was managed.

Turning to the work actually completed, and based on its review of the Pioneer timesheets and supervisor diaries, the Court found that Pioneer sent several employees to the Mall to perform snow removal and sanding the day prior to the loss between 6:00 pm on January 28, and concluding at 6:00 am January 29th. A total of 44 employee hours were spent on snow removal and 14 hours on sanding. Between 6:00 am on the date of loss and the time that the Plaintiff fell, 3 Pioneer employees attended at the Mall, for a total of 8 total employee hours. A supervisor diary indicated that snow was hauled about on the property using a loader. No other snow removal or plowing was performed. The sheets did indicate that a Pioneer employee spent 2.5 hours spreading a sand-salt mixture over the entire parking lot, including the crosswalk. Based on the timesheets, the Court found that all work at the mall on the date of loss was completed by 10:00 am. The last recorded inspection of the crosswalk area by Triovest was at 6:00 am From 10:00 a.m. to the time of the Plaintiff's fall, there was no snow removal or salt application at the property; and no inspection of the crosswalk.

As of 10:00 am on the date of loss, the Court found that the crosswalk was in an acceptable condition. It also found that between 11:00 am and the time of the Plaintiff's fall (save for a brief break at 12:00 pm), freezing rain and drizzle fell. Based on the weather and the testimony of the witnesses, at the time of the fall, there was an accumulation of wet slush on the crosswalk, causing it to be slippery.

In considering the defendant expert's position that the conditions were "too cold" and "too wet" to apply salt, while the Court accepted that salt may not be effective during a freezing rain event as it could be washed away, it did find that a sand-salt mixture was an appropriate treatment for a freezing rain event.

Ultimately the Court found the defendants, collectively, 100% liable for the Plaintiff's loss.

Triovest's winter maintenance system was deficient. While an occupier is not required to have a "perfect" winter maintenance system, and while "occupiers of shopping malls with exterior parking lots and walkways are not expected to continuously inspect and monitor exterior areas and keep them snow and ice free at all times", the Court stated that they are expected to have a reasonable system that includes:

- Clear provisions for monitoring and inspection of the property at reasonable intervals;
- Logs that identify the conditions that are being monitored, and that define the parts of the property that are being monitored and inspected;
- A system that sets out a reasonable plan to respond to any adverse conditions;
- A winter maintenance plan that clearly sets out who is responsible for inspection and monitoring the property, the nature of the monitoring and inspection, and the frequency of same;
- A winter maintenance plan that includes reasonable provisions that address freezing rain (inspection, monitoring, events to trigger a response, treatment or services to be provided, and response time); and
- A winter maintenance plan that prioritizes heavily used pedestrian traffic areas, such as a crosswalk (*on the basis that pedestrian crosswalk areas, which are designed to funnel customers from the parking lot and into a store, should be given more attention than outlying areas of a parking lot).

Additionally, Triovest failed to regularly monitor and inspect the work performed by Pioneer to ensure that it had been done properly.

Pioneer was in breach of the Services Agreement for failing to keep the property as close as reasonably possible to "ice free". It further failed to inspect and monitor the property, and unreasonably failed to respond to icy conditions caused by the freezing rain.

The Court rejected the defendants' position that the Plaintiff was contributorily liable, noting that she was wearing winter boots, was not in a hurry or moving quickly, and was being careful while she walked. The suggestion that she should have been looking at the crosswalk surface while traversing it was rejected on the basis that a reasonable person, crossing a travelled portion of a roadway, would keep their eyes on vehicular traffic rather than their feet, to ensure their safety while on the roadway. The Court found that there was nothing more the Plaintiff could have reasonably done for her own safety.

2. *Hamilton-Dawkins* v. *Town of Ajax*, 2024 ONSC 2152

On May 9, 2011, the plaintiff, Dorothy Hamilton-Dawkins (the "Plaintiff") was walking eastbound on a sidewalk in a residential area on Clements Road East in the Town of Ajax (the "Town"). While in the vicinity of 38 Clements Road, at approximately 12:00 pm, the Plaintiff tripped and fell, resulting in her sustaining injuries. The alleged cause of the fall - a surface discontinuity in the sidewalk - was not contested. Photos taken of the area captured one week after the fall, depicted that the area of the fall had been remediated with new concrete and asphalt.

Damages in the claim, along with OHIP's subrogated claim, and interest, had been settled between the parties. The trial proceeded on the issue of liability, only. The fact that the discontinuity constituted a state of non-repair within the meaning of section 44(1) of the *Municipal Act, 2001* ("the Act"), was not contested. At issue was whether any of the defences under section 44(3) of the Act applied.

Evidence was provided on behalf of the Town that as of the time of the loss, it had a procedure in place to inspect sidewalks once a year, which accorded with its responsibility under legislation. The inspections took place between May and August annually, and were done on foot by summer students. The students were instructed to mark on a GPS device any areas that showed cracked panels, surface discontinuity, and areas that were not flush. Where any surface discontinuity was greater than 19mm, the students were instructed to mark the area with orange paint and the area would be mandated for repair. Surface discontinuities with safety issues were repaired within 14 days of identification.

The subject sidewalk was last inspected a year prior to the loss on May 27, 2010. At that time a cracked bay and hairline crack were identified. The issues observed were not substantial enough to trigger a surface repair.

The Town received report of the loss, by way of an Incident Report dated May 13, 2012.

In light of the facts, the Court was asked to consider:

a. What the extent of the Town's liability was; and

b. Whether the defences in section 44(3) of the Act avail the Town with a complete statutory defence on liability.

On the issue of the Town's liability, the Court applied the four-step test established in the Ontario Court of Appeal case in *Fordham* v. *Dutton Dunwich*, [2014] O.J. No. 5938, 2014 ONCA 891. Namely, it considered the following factors:

1. Non-repair: The plaintiff must prove on a balance of probabilities that the municipality failed to keep the road in question in a reasonable state of repair.
2. Causation: The plaintiff must prove the "non-repair" caused the accident.
3. Statutory Defences: Proof of "non-repair" and causation establish a prima facie case of liability against a municipality. The municipality then has the onus of establishing that at least one of the three defences in s. 44(3) applies.

4. Contributory Negligence: A municipality that cannot establish any of the three defences in s. 44(3) will be found liable. The municipality can, however, show the plaintiff's driving caused or contributed to the plaintiff's injuries.

In the opinion of the Court, the Plaintiff had proven the first two steps of non-repair and causation, which were in fact conceded by the Town. The Court then moved on to consider the availability of the statutory defences.

Under section 44(3), the Town has three available defences:

a. The reasonable knowledge defence - s. 43(a)
b. The reasonable steps defence - s. 43(b)
c. The minimum standards defence - s. 43(c)

A municipality does not have to establish all three defences to be able to avail itself of the provision. It need only establish one of the defences, on the balance of probabilities, to defeat a plaintiff's claim.

On the issue of the reasonable knowledge defence, the Town argued that there was no evidence that it knew of the discontinuity, nor was there any evidence that it could have known. It relied on the fact that there was no presented evidence that a single issue of discontinuity was known prior to the Incident Report of May 13, 2012. In its consideration of the defence, the Court noted that the Town did know, at the time of the loss, of a crack in the sidewalk and that based on its evidence at trial, a crack can lead to surface discontinuity where there is water penetration, and the normal freeze/thaw cycle. However, there was no evidence here that (1) the Town knew or could have known of the surface discontinuity; (2) it did not follow its own policy of inspection and repair; (3) it did not comply with the regulation concerning surface discontinuity; or (4) the last inspection carried out prior to the fall was done so negligently.

Consequently, there was no evidentiary basis that supported a finding by the Court that on the balance of probabilities the Town knew or could have reasonably known the state of repair of the sidewalk before May 9, 2011.

Of note, the Court did state its discomfort with the fact that (1) the Town had a lack of written policy (at the time) for inspections, (2) it lacked written training for inspections, and (3) that after the discontinuity was reported, and prior to the repairs carried out, the Town took no steps to document or measure the discontinuity. Nonetheless, the Town had established the statutory defence per section 43(a) of the Act.

The Plaintiff's claim was dismissed.

3. *Kidane* v. *City of Toronto*, 2024 ONSC 2484

The plaintiff, Ruth Kidane (the "Plaintiff"), slipped and fell on a sidewalk on College Street, in the City of Toronto (the "City"), on January 2, 2014. Liability for the fall was admitted by the City. The only issues at trial were causation and damages.

Pre-fall, the Plaintiff presented with significant health issues, including chronic pain, fibromyalgia, and depression. She was unemployed and was receiving disability benefits. At trial, she did not adduce any expert evidence on the issue of causation, whereas the City did.

In presenting her case, the Plaintiff relied on the evidence of friends, her treating dentist, family doctor, physiotherapist, and her landlord. The City presented the evidence of an expert in physiatry and a representative of the Ontario Disability Support Program ("ODSP").

With respect to her pre-accident health, the Court heard evidence that the Plaintiff:

- Experienced a prior motorcycle accident that created issues with her lumbar spine and stress;
- On the basis of her major depression and anxiety, was deemed a "permanently unemployable person" by a medical adjudicator on February 3, 1998 - further to an application to the Ministry of Community and Social Services that had the support of her psychiatrist and family doctor;
- Presented with pre-existing very mild osteoarthritis;
- In 2001, was diagnosed with chronic pain secondary to fibromyalgia, degenerative disc disease, and early osteoarthritis of the hips and sacroiliac joints; and
- Experienced chronic fatigue and body pain.

Regarding her pre-accident employment, the Plaintiff provided evidence that she had long-standing plans to open a daycare business in her home, but had not been able to do so prior to the fall. She was also engaged in doll making.

As a result of the fall, the Plaintiff alleged that she sustained injury to her tailbone, back, right shoulder, and head. She was diagnosed with a minor head injury and contusion, and subsequent post-concussion headache. Diagnostic testing did not reveal and significant findings, other than a mild borderline anterior displacement of the TM joints. She attended for five courses of physiotherapy, each lasting two months at a time, with the first session commencing in May 2014; and the last session concluding in November 2015. In August 2014, following a psychiatric consult, a diagnosis of Somatic Symptom Disorder with Predominant Pain was made. Functionally, she reported an inability to perform her housework. A 75% improvement in symptoms was reported as of July 2016.

In considering her economic pursuits post-accident, the Court noted that the Plaintiff was able to host a doll making session over two days at the end of January 2014. When considering her home daycare plans, the Court noted that the Plaintiff had not prepared a budget or business plan prior to the fall, and that she had no completed registrations. Moreover, she had not made modifications to her rented apartment to make it safe for children, nor had she obtained a commitment from any of a pool of "supply teachers" that she intended to use as relief in the event that she was sick. Despite this, the Court went on to note that, given that Plaintiff's allegation that she would have earned income from a daycare business is a hypothetical possibility, at trial she was only required to establish a real and substantial risk of future pecuniary loss: see *Graham* v. *Rourke*, 1990 CanLII 7005 (Ont. C.A.)

The defence expert Physiatrist, Dr. Muhlstock, provided opinion that as result of the fall, the Plaintiff

likely sustained a possible concussion without loss of consciousness, as well as multiple soft tissue injuries to the cervical spine (WAD II), the upper back and shoulder girdles, the thoracic and lumbosacral spines, the pelvis and hip girdle/coccyx, and the right upper extremity. However, given the length of time that had elapsed since the fall, it was his view that any soft tissue or musculoskeletal injuries sustained would have since healed or resolved from a physiologic perspective. There were no objective clinical findings of any incident-related physical impairment that continued to exist. In fact, the Plaintiff's current complaints and physical condition were much more likely related to her pre-incident conditions as opposed to any minor soft tissue injuries sustained in the subject incident.

As part of its analysis, the Court considered the legal principles applicable to causation, which include:

- In order to make a defendant liable for a loss, the plaintiff must establish that the defendant's negligence caused the loss in question, i.e., causation must be established. See *Clements* v. *Clements*, 2012 SCC 32.

- The test for showing causation is the "but for" test. A plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the plaintiff would not have suffered the loss. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, the plaintiff's action against the defendant fails.

- A judge applying the "but for" causation test is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused the loss. Scientific proof of causation is not required.

- The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm. It is sufficient if the defendant's negligence was a cause of the harm. See *Athey* v. *Leonati*, [1996] 3 S.C.R. 458.

In considering all of the evidence before it, the Court found that, as a result of the fall, the Plaintiff sustained a minor head injury/concussion, multiple soft tissue injuries, and low mood. However, the Court also found that the injuries caused by the fall had healed or were resolved within one year, and that any injuries or symptoms experienced in 2015 and in the following years could not be causally linked to the fall, based on the evidence before it. It was concluded that the Plaintiff would have experienced such later injuries and symptoms in any event, and in the absence of the fall, given the debilitating effects of her pre-existing conditions and/or as a result of new occurrences that are unrelated to the fall.

Damages were awarded as follows: (1) $45,000.00 in general damages; (2) $4,000.00 for loss of income (*awarded for the year 2014 only, on the basis that her injuries resolved within a year of the loss); and (3) $161.05 for out-of-pocket expenses, for a total of $49,161.05.

4. *McGuire* v. *Worsley Dundonald Limited*, 2024 ONSC 3617

The plaintiff, Meaghan McGuire (the "Plaintiff"), slipped and fell on February 17, 2019. On March 2, 2020, she filed a claim naming Worsley Dundonald Limited , Sunny Shine Contracting, and the City of Toronto as defendants. On April 28, 2023, the Plaintiff served a motion record on CRH Canada Group Inc. c.o.b. Dufferin Construction Company ("CRH"), seeking leave to amend her Statement of Claim to name CRH as a defendant. CRH opposed the motion on the basis that the claim was statute barred.

There was no issue as between the parties that the Plaintiff did not have actual knowledge of a claim against CRH until January 20, 2022. The issue to be considered on the motion was whether the Plaintiff had a reasonable explanation on proper evidence as to why the claim against CRH could not have been discovered through the exercise of reasonable diligence prior to January 20, 2022, or prior to two years before the bringing of the motion.

While a lack of steps to ascertain a possible claim against CRH is not fatal, the Court noted that the reasonable steps a plaintiff ought to take is a relevant consideration in deciding when a claim is discoverable. Moreover, where the issue on a motion to add a defendant is due diligence, the motion judge will not be in a position to dismiss the plaintiff's motion in the absence of evidence that the plaintiff could have obtained the requisite information with due diligence, and by when the plaintiff could have obtained such information, such that there is no issue of credibility or fact warranting a trial or summary judgment motion.

In the case at hand, the Plaintiff relied on the fact that it was during a December 22, 2021, conference call with all defence counsel that her counsel was first advised that there was video footage of the fall. The footage, allegedly, was of low quality and as such it was unclear whether the Plaintiff fell on a municipal roadway or on a sidewalk. Due to the uncertainty, the Plaintiff took the position that CRH, as the municipality's winter road maintenance contractor, was a necessary party.

CRH took the position that the claim as against it was discoverable as early as April 17, 2019 (*although it is noted that the decision does not explain the significance of this date). However, CRH did not present any evidence of reasonable steps that the Plaintiff could have taken to ascertain a claim against them, and by when the Plaintiff could have obtained such information. Plainly said, there was no evidence before the Court of any earlier "trigger" that would have caused the plaintiff to make enquiries of the involvement of other possible parties (*Ali* v. *Toronto (City)*, [2021] O.J. No. 4548 (Ont. Div.Ct.)).

Having regard to the low evidentiary threshold and giving a generous contextual reading to the evidence, the Court was satisfied of a reasonable explanation for a lack of efforts. The issue of whether the Plaintiff could have discovered the possible claim and identity of CRH with due diligence and, if so, when the Plaintiff could have done so, were issues that required consideration on a summary judgment motion, or at trial.

Leave was grated to add CRH as a defendant to the action, with CRH having the right to plead a limitation period defence.

5. *Karake* v. *741935 Ontario Inc.*, 2024 ONSC 3665

The plaintiff, Marie-Jeanne Karake (the "Plaintiff"), slipped and fell on December 12, 2017, on or near exterior concrete steps leading to the Party Supply Depot Store ("Party Supply"), located in Thornhill. Damages had been agreed upon, and the trial proceeded on the issue of liability, only.

The fall occurred on a snowy day. The Plaintiff had finished her workday as a teacher, and amongst other errands, intended to shop at Party Supply. She had been to the store on prior occasions. The Plaintiff arrived at the store at 4:00 pm, and parked her vehicle in a parking lot situated at the side of the store. From the side parking lot, there is a sidewalk that leads to the front of the store. She was able to traverse the sidewalk and steps, while wearing winter boots, and entered into the store. As she traversed the sidewalk, she took note that a store employee was salting the sidewalk near the front door.

The Plaintiff spent 1 ½ hours inside Party Supply. By the time that she exited the store, between 4:30 and 5:00 pm, it was dark outside. The Plaintiff elected to leave her shopping cart by the store entrance and to first walk to her vehicle with the intention of driving it closer to the storefront to load her purchases. She observed that the sidewalk running along the front of the store was salted and was not icy. She also observed that additional snow had fallen, and that she had to remove snow from her vehicle when she returned to it.

The Plaintiff drove her vehicle from the side of the store to the front, close to the concrete stairs. She stepped out of her vehicle and onto the parking lot surface, which was snow covered. She was able to walk to the rear of her vehicle to open the trunk. She then subsequently walked from the rear of her vehicle and towards the steps. She stepped onto the first step, which was not snow covered, with her right foot. She will say that as soon as she put her right foot down, she "flew" and her body landed in the snow to the left of the stairs. She landed on her outstretched left arm. Following the loss, the Plaintiff's husband and son attended at the store and took photos and a brief video of the incident area. No salting was apparent.

The defendant Bayview Summit Development Ltd. ("Bayview") was responsible for winter maintenance of the sidewalk abutting the store and the exterior concrete staircase. An employee of Bayview advised that during winter weather, he would shovel snow from, and apply salt to, the concrete walkways and stairs near the store. On the date of loss, the property was first maintained between 9:56 am and 10:15 am. Although not shown on Bayview's maintenance log, evidence was provided that there was a second attendance at 2:00 pm, during which the sidewalk and steps were re-salted. Bayview's employee was unable to advise how much salt had been used on the date of loss.

Party Supply kept a bucket of salt available in the store and employees would salt the stairs and walkway when they deemed it advisable or necessary to do so. During a winter storm, Party Supply employees would check the condition of the walkway and steps at least hourly. On the date of loss, it was the evidence of Party Supply that their employee salted the area hourly, with salt having been applied at least five times that day. They advised that the last time that the salted the area was at 4:50 pm.

The Court considered the obligations of an occupier under the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 (the "OLA"), citing the requirement that, as an occupier, a defendant owes a duty of care to a plaintiff to take such care as in all the circumstances of the case is reasonable to see that persons entering the premises are reasonably safe while on the premises.

It was the opinion of the Court that the defendant Bayview's system of inspection, maintenance, and monitoring of the condition of the steps were insufficient. The Bayview maintenance log did not capture the frequency of salting of the steps. While Bayview relied on the evidence that Party Supply store employees maintained the area throughout the day, the Court noted that Party Supply's maintenance records did not record any entry post 11:07 am. There was no contemporaneous record to evidence that salting and inspection took place around the time of the loss. Moreover, photos taken by the Plaintiff's son did not support the evidence of Party Supply's employee that the step whereupon the Plaintiff slipped had last been salted at 4:50 pm. The Defendant Bayview was found 75% liable for the loss.

The Plaintiff was held to be 25% liable for the loss on the basis that she did not keep a proper lookout, or exercise sufficient caution. The Court noted that she failed to look for ice despite the weather conditions; and she did not hold an available handrail while mounting the steps.

6. *Walpole* v. *Crisol*, 2024 ONCA 400

This appeal arises further to a lower Court decision that considered liability for a dog bite.

Chestnut, a dog belonging to the defendants Tammy Brush and Larry Ostertag (the "Defendants") attacked the 6 year old minor plaintiff (the "Minor"), causing injuries to her face. The Minor was visiting the Defendants' rented home. The home was owned by landlords Julian Crisol and Marianette Crisol (the "Respondents"). The Respondents were not present when the dog attacked. As a result of the attack, a claim was commenced on behalf of the Minor, by her litigation guardian, and on the behalf of multiple family members (the "Appellants").

The Respondents brought a summary judgment motion in the lower Court arguing that there was no genuine issue for trial under both the *Dog Owners' Liability Act*, R.S.O. 1990, c. D.16 ("DOLA"), and the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 ("OLA"). They asserted that a landlord could not be held liable for damages resulting from an attack by a tenant's dog while on the rented premises. The motion judge concluded that where a bite or attack occurs on the premises of the owner of a dog, liability is determined under the DOLA and not the OLA. Since the bite in this case occurred on the rented premises where the dog's owners resided, and since the DOLA does not impose liability on anyone other than the dog's owners, the motion judge concluded that the Respondents were statutorily exempt from any liability that might otherwise have attached to them under the OLA.

Additionally, the motion judge found that, even if the failures alleged against the Respondents were made out, (1) they would not establish a duty of care to the Appellants which had been breached; and (2) the failures were not causally connected to the Minor's injuries. Partial summary judgment was granted.

The Appellants first ground of appeal focused on the motion judge's reliance on section 3(1) of the DOLA, which provides:

> 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 [R.S.O. 1990, c. O.2 ("the OLA")]

The Court of Appeal agreed with the Appellants that the motion judge erred by concluding that s. 3(1) of the DOLA entirely ousts the operation of the OLA in situations where the dog bite or attack occurs on the dog owner's property. Section 3(1) of the DOLA only provides that when a dog bite or attack occurs "on the premises of the owner", the liability of the owner is determined under the DOLA, rather than under the OLA. It does not address the potential liability, under either the OLA or common law, of persons other than the owners of the dog.

The Court further opined that, the word "owner" in s. 3(1) must be understood as meaning the owner of the dog and not, as the Respondents contend, as the owner of the property where the bite or attack occurred. Interpreting "owner" to mean "owner of the premises", as the Respondents proposed, would have the undesirable effect of immunizing property owners who are not also the owners of the dog under the s. 1 definition from being found liable for dog bites that occur on their property, even in circumstances where they have negligently breached a duty of care owed to the victim under the *OLA.*

Accordingly, the Court of Appeal agreed with the Appellants that the motion judge erred in law by concluding that the *DOLA* barred the Respondents from being found liable under the *OLA.*

However, since the motions judge also held that even if she was wrong in her interpretation of the DOLA she would have still granted summary judgment, the analysis did not end there. The Appellants challenged the adequacy of this aspect of the motion Judge's reason and as a remedy, asked that her decision be set aside and the case remitted to trial court.

Section 134(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 empowers an appellate court to "make any order or decision that ought to or could have been made by the court or tribunal appealed from". When the adequacy of judicial reasons is raised as a ground of appeal, the exercise of this power becomes intertwined with the underlying question of whether the reasons of the court appealed from are insufficient to allow for "meaningful appellate review of the correctness of the … decision" (*R.* v. *Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869).

While the motion judge's reasons in the case were described as "brief", the Court of Appeal was satisfied that the record as a whole clarified and explained why she concluded that the Appellants' claim against the Respondents did not present any genuine issues that required a trial. The evidence established that the Respondents were absentee landlords; the dog had only been acquired after the tenancy commenced; and there was no evidence that the Respondents had ever assumed any responsibility over the dog or asserted any control over who the Appellants could invite onto their rented property. There was no evidence that the Respondents had any prior knowledge of the dog's temperament or history of behaviour. Significantly, the Court noted that the Appellants had failed to point to any case where an absentee landlord was held liable for injuries caused by a tenant's dog in similar circumstances.

The Appellants further argued that the motion judge did not properly consider section 8(1) of the OLA, which applies whether or not a landlord is found to be an occupier and states that:

> 8 (1) Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show towards any person or the property brought on the premises by those persons, the same duty of care in respect of dangers arising from any failure on the landlord's part in carrying out the landlord's responsibility as is required by this Act to be shown by an occupier of the premises.

Section 8(1) was found to have no application to the case at hand.

Finally, the Court of Appeal saw no merit in the Appellants' submission that the motion judge made any error by rejecting their reliance on section 20 of the *Residential Tenancies Act*, which imposes a duty on landlords to ensure that rented premises are in "a good state of repair", and the associated regulation that requires common areas to be "kept … free of hazards".

The appeal was dismissed.

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ABOUT ALEXANDER HOLBURN BEAUDIN + LANG LLP

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