

CITATION: Khurshid v. Richards and Lefcoe, 2021 ONSC 3830
COURT FILE NO.: CV-17-165
DATE: 20210526

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Samia Khurshid

Plaintiff/Moving Party

– and –

Jacqueline Richards and Tira Lefcoe

Defendants/Responding Parties
on the Motion

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) Paul A. Oddi, Counsel for the
) Plaintiff

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) Tobin Hortin, Counsel for the Defendant,
) Jacqueline Richards

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) Calogero Rumeo, Counsel for the Defendant,
) Tira Lefcoe

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)
) HEARD: March 17, 2021

REASONS FOR DECISION ON MOTION

JUSTICE L. SHEARD

Nature of the Motion

[1] The plaintiff brings a motion seeking partial summary judgment on the issues of liability as between the plaintiff and the defendants and a determination of what, if any, contributory negligence should be attributed to the plaintiff.

Disposition

[2] For the reasons that follow, I conclude that the issue of liability is a genuine issue that requires a trial.

Overview

[3] The plaintiff alleges that on June 12, 2015, she suffered injuries when she fell as a result of her encounter with a dog or dogs owned by the defendant, Jacqueline Richards.

[4] The encounter occurred on or near Ms. Richards' front walk. The plaintiff was approaching Ms. Richards' front door when the door opened and one, or both, of Ms. Richards' dogs exited the home. At the time, Ms. Richards was upstairs getting dressed.

[5] Without the knowledge or consent of Ms. Richards, the front door of Ms. Richards' home was opened by Tira Lefcoe, a person who lived in the neighbourhood and who suffers from schizophrenia. Ms. Lefcoe has been hospitalized as a psychiatric in-patient since July 2018. She is unable to give evidence as to the events due to her lack of capacity. Ms. Lefcoe is represented in these proceedings by counsel for the Public Guardian and Trustee, Ms. Lefcoe's Guardian of Property.

Issues on the motion

[6] The plaintiff has identified five issues to be determined on this motion. They are:

- (1) should partial summary judgment be granted to the plaintiff pursuant to rule 20.04 (2)(b) of the Rules of Civil Procedure R.R.O. 1990, Reg. 194 (the "Rules");
- (2) is any liability attributable to Ms. Richards, as the owner of the dog(s);
- (3) is any liability attributable to Ms. Lefcoe;
- (4) is there any contributory negligence on the part of plaintiff; and
- (5) the costs of the motion.

[7] Ms. Richards opposes this motion, in part, on the basis that the plaintiff is attempting to bifurcate the proceedings by having liability determined now and leaving damages to be determined at trial. Rule 6.1.01 provides that with the consent of the parties the court may order a separate hearing on one or more issues in a proceeding. Ms. Richards submits that as the defendants do not consent, the plaintiff's motion ought to be dismissed.

[8] In *Mars Canada Inc. v. Bemco Cash & Carry*, 2018 ONCA 239, at paras. 34-36, the Ontario Court of Appeal confirmed that on a motion for summary judgment the court's jurisdiction is governed by r. 20.04(3), which is its "own, alternative model of adjudication" to which the provisions of r. 6.1.01, does not apply.

[9] Applying *Mars*, I conclude that r. 6.1.01 would not prevent me from granting the order sought by the plaintiff.

[10] Ms. Richards also submits that the issues cannot be resolved on a summary judgment motion as there are significant factual issues in dispute that require a trial to determine. Those issues include key issues that bear upon liability; for example, Ms. Richards' acquaintance with Ms. Lefcoe, a key player in the events, whose mental incapacity prevents her from giving evidence; whether the events that preceded the plaintiff's fall can be considered a dog "attack", a characterization which is disputed by an independent witness; and, whether, and to what extent, the plaintiff is at fault for her own injuries.

[11] I agree with Ms. Richards' submissions above.

[12] Ms. Richards also asserts that this motion for summary judgment will cause unnecessary delay and increase legal costs and that it is not a proportionate, timely or affordable approach to the dispensation of justice.

[13] Ms. Richards' submissions have merit. In an ideal world, motions for summary judgment would be vetted by the court before they were brought. Unfortunately, this matter first came before me as a motion for summary judgment: facts had been exchanged and there were lengthy motion records, referencing examinations for discovery. In other words, many of the costs that Ms. Richards submits will be unnecessarily incurred on this motion for summary judgment, had already been incurred before the matter came before me.

The Evidentiary Record

[14] On a motion for summary judgment, the motions judge must be able to make the necessary findings of fact. In this case, the general sequence of events is known: when approaching the Ms. Richards' house, the plaintiff was frightened by one or two of Ms. Richards' dogs, walked backwards away from the dog(s) and injured herself when she fell off the sidewalk curb.

[15] It is the details of the events that are unclear. On the paper record before me, I conclude that I am unable to make the necessary findings of fact, to which I must apply the law.

[16] The paragraphs that follow set out my summary of some of the evidence. These excerpts are not intended to summarize all relevant evidence but only to provide examples of the inconsistencies in the evidence given by the plaintiff, and the conflicting evidence given by an independent witness, Debbie Maw.

The Plaintiff's Evidence

[17] My summary of some of the plaintiff's evidence, taken from her affidavit on this motion, is as follows:

- (a) when I approached Ms. Richards' townhouse, I saw a woman inside her home through the screen door. I did not see or hear any dogs (para. 11);
- (b) as I walked up the sidewalk of the condominium, I did not say anything to the woman in the unit. As I got closer to the condominium, the woman inside opened the screen door and that is when I first saw the dogs. Ms. Lefcoe opened the door (para. 12);
- (c) two dogs ran out of the townhouse. One was smaller than the other and "both set upon me while barking loudly" (para.13);
- (d) all I remember is the dogs charging at me. I do not know if either dog actually made contact with me. I know they were jumping up at me (para.15);

- (e) as the dogs were “lunging at me I fell backwards on the townhouse sidewalk. Both dogs were at my feet and both dogs were barking at me. To the best of my recollection I took two or three steps backwards before falling to the ground” (para. 16);
- (f) I was very afraid at the time and trying to get away from the dogs “just prior to my fall, I believe it was the smaller dog at my feet jumping at me” (para.17); and
- (g) after I fell, I do not recall the dogs touching me. I do remember they were barking at me” (para.19); and

[18] The plaintiff was examined for discovery on September 2018. The following excerpts are taken from the transcript of her examination:

- (a) I have a phobia of dogs: at p. 20, Q199 – 201;
- (b) As I approached the front door there was a woman inside the house behind the screen door. I did not hear a dog barking or see a dog in the window. When I saw the woman, I was on the perpendicular sidewalk, not on the sidewalk going toward the house: at pps. 27-28;
- (c) I was standing on the perpendicular sidewalk near the parking and the woman saw me coming and opened the door that is when I saw the dogs. I was on the perpendicular sidewalk when I saw the dogs and before the door was opened, I did not say I was scared of dogs I did not have time: at page 29;
- (d) At page 30:

Q 293: Okay. So you are still on the perpendicular sidewalk and she opens the doors?

Q 294 A: I must, a few steps up... and she opens the door;
- (e) At page, 30-31:

Q 306: Did either dog touch you?
A: I don't remember. They came towards me. I remember they charged at me.

Q 307: When you say they charged at you, how close did they get to you?
A: They were here, like here.

Q 308: They were jumping?
A: Yes.

Q 309: Did they touch you or not?
A: I was on the floor, I do not know. Maybe yes they touch me.

Q 312: You told doctors many things.

A: Okay.

Q 313: ... I am looking at a record of April 12, 2018, of Dr. Rajpura, when it says you were attacked and bit by a dog. Were you bit?

A: No.

Q 314: ... So that is inaccurate? And that seems to indicate that there was only one dog. You are saying there was two...

A: There were two dogs.

Q 315: ... Lunging at you?

A: Yes

Q 316: Was it a dog that knocked you over?

A: Yes

Q 317: The dog actually pushed you over?

A: I pushed myself over because I stepped back. I stepped back and I tripped, that is how I fell.

(f) At page 32, the plaintiff was cross-examined on her post-injury medical records:

Q 318: Okay. This one says you tripped over a dog, this is a June 24th, 2015 record of Catherine Ballyk BALLYK...

A: Mm-hum

Q 319: ... From the Brant Community Health Care System. Did you trip over dog?

A: No.

Q 320: No. So you were backing up?

A: Yes.

Q 321: Now I am looking at records from the Brant Community Health Care System, this is June 15, 2015, where it says *the patient was walking, a dog jumped and knocked the patient over*. That is not accurate either, is it? You did not, the dogs knock you over, you backed up and tripped?

A: I backed up because it charged at me.

Q 322: What did you trip over?

A: The sidewalk

Q 323: Like the curb?

A: Yes.

Q 324: Now I am looking at something from the London Health Sciences on June 12, 2015, these are nursing records.

A: Mm-hum.

Q 325: This says a dog jumped up on you and you fell backwards onto your buttocks. Again, that is inaccurate, correct?

A: That's right.

Q 326: A dog jumped on you?

A: Dog jumped on, jumped, it charged at me. I mean, I do not know what jumped on really means.

(g) At page 33:

Q 328: ... Did a dog's paws and mouth jump and fetch you and push you? That is what that says, is it accurate?

A: It didn't touch me. I don't...

Q 329: Okay.

A: I do not remember. I just remembered charged, charging at me.

Q 330: ... I am looking at a discharge summary from the London Health Sciences from, this is June 13th, 2015. *History of presenting illness, Ms. Kurshid was visiting her daughter in London when she was walking out. Unfortunately she was startled by a dog, the dog subsequently jumped on her and she fell onto her left side.* Again, this is an inaccurate description of what happened, do you agree with that?

A: That is what happened, jumped on me.

Q 331: A dog, it dog jumped on you or did a dog come near you?

A: It jumped on me, that's what I remember.

Q 332: So you're telling me that a dog...

A: That is what I remember, it was like on my face. It was here.

Evidence of Ms. Maw

[19] The affidavit of Ms. Maw, an independent witness to the events, sworn September 10, 2020, was filed on this motion. The following summary is based on that affidavit:

- (a) Ms. Maw has been Ms. Richards' neighbour for many years, and she has known Ms. Richards' dog, Goldie, for several years. She describes Goldie is a very small dog who "would never hurt a fly" and has no history of aggression;
- (b) Ms. Maw observed Ms. Lefcoe, whom she describes as "a disabled woman who used to hang around our neighbourhood", sitting out front of Ms. Richards' unit as the plaintiff approached the unit;
- (c) Ms. Lefcoe opened the front door of Ms. Richards' house, and allowed Goldie to escape; only Goldie went outside, Ms. Richards' other dog remained inside;

- (d) as soon as Goldie escaped, the plaintiff began backing up at a rapid pace, stating that she was afraid of dogs. The plaintiff ultimately backed up off the curb, tripped and fell down;
- (e) at no time did Goldie touch, bite, or attack the plaintiff. Goldie was not even close the plaintiff when she fell off the curb. "Ms. Kurshid overreacted and was not paying attention to her footing when she fell"; and
- (f) "I witnessed that Goldie never touched Ms. Kurshid and the reason she fell was due to her losing balance when she backed up off the curb."

[20] Again, the above references are not intended to provide a complete summary of the evidence but only to identify inconsistencies in the evidence given by the plaintiff, and the conflict between the plaintiff's evidence and that given by Ms. Maw.

The Law

The Dog Owners' Liability Act

[21] The plaintiff places significant reliance upon the *Dog Owners' Liability Act*, RSO 1990, c. D.16 ("*DOLA*") and, in particular, upon section 2, which reads as follows:

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. R.S.O. 1990, c. D.16, s. 2 (1).

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. R.S.O. 1990, c. D.16, s. 2 (2).

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. R.S.O. 1990, c. D.16, s. 2 (3).

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. R.S.O. 1990, c. D.16, s. 2 (4).

[22] The plaintiff asserts that she was “attacked” by the dogs owned by Ms. Richards and that Ms. Richards is liable to the plaintiff pursuant to s. 2(3) of the *DOLA*. The plaintiff acknowledges that the *DOLA* does not define “attack by the dog”.

[23] I find that whether one or both of Ms. Richards’ dogs “attacked” the plaintiff is a central to be determined in this case and that that determination will depend both on the factual finding of the events and the application of the law to that finding.

[24] The plaintiff asserts that Ms. Richards’ liability is subject only to an apportionment of the plaintiff’s own liability pursuant to s. 2(3) of the *DOLA* and to the liability of Ms. Lefcoe, a person with a severe mental illness, who opened Ms. Richards’ front door, allowing one or both of the dogs to leave the home.

[25] The plaintiff submits that, as the owner of the dogs, Ms. Richards is clearly liable and that Ms. Lefcoe did not have “care and control over the dogs” and, therefore, Ms. Lefcoe is not responsible for the dogs at the time of the incident such as may lead to a finding of liability against Ms. Lefcoe. On that latter issue, the plaintiff and Ms. Lefcoe agree.

[26] The plaintiff relies on *Morris v. Bailey*, [1970] CanLII (ON CA), to support her submission that a court could find Ms. Richards liable even if the facts show that her dog had not made contact with the plaintiff.

[27] In *Morris*, the Court of Appeal upheld the trial decision that the dog owner was liable for injuries suffered when the owner’s dog, a 90-pound Collie, known to bark and run at people, ran across the front lawn of the dog owner’s home and down a slope toward the sidewalk to where the plaintiff was walking. It was “getting dark” at the time of these events and, although the dog did not make contact with the plaintiff, whose fall was occasioned by the manner of the dog’s approach, the dog-owner was held liable.

[28] The appellate court noted that the dog’s owners were aware of their dog’s habit of running and barking at people – the postman had threatened discontinue deliveries unless the dog was restrained – and found that the injuries suffered by the plaintiff “was a foreseeable consequence” of the dog owner’s failure to fulfil his duty to restrain the dog.

[29] *Morris* is distinguishable from the case before me in a number of ways. First, it was decided pre-*DOLA*. Second, the defendant was found liable in negligence, following a trial. Third, unlike in *Morris*, here there is no evidence that either of Ms. Richards’ dogs had a history of running at strangers – in fact Ms. Maw’s evidence is that the dogs were not aggressive. Fourth, while the plaintiff cannot recall, Ms. Maw’s evidence is that it was only Goldie, the smaller of Ms. Richards’ dogs, who approached the plaintiff. Fifth, according to Ms. Richards, Goldie weighs perhaps 18 pounds, a description that is consistent with plaintiff’s recollection who described one dog as “fox-like”. Sixth, the events happened in broad daylight. Seventh, the plaintiff acknowledges that she has a phobia of dogs, evidence that might corroborate Ms. Maw’s view that the plaintiff “overreacted” to Goldie.

[30] Ms. Richards submits that this court ought to prefer Ms. Maw’s evidence as to the events, because the plaintiff chose not to cross-examine Ms. Maw. In response to that submission, the plaintiff submits that this court could order that Ms. Maw be cross-examined.

[31] On that issue, I note that it was open to the plaintiff to cross-examine Ms. Maw prior to the motion, and the plaintiff chose not to do so. In any event, it is not clear to me that a cross-examination of Ms. Maw would have overcome the conflicts in the evidence identified above.

[32] Counsel for the parties did not refer this court to any other case involving the *DOLA* in which, as the case here, there was no contact between the plaintiff and the dog.

Summary Judgment

[33] Rule 20.04(2)(a) of the *Rules* provides that the court shall grant summary judgment if it “is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.”

[34] The respondent on a motion for summary judgment “is not permitted “to sit back and rely on the possibility that more favourable facts may develop at trial”, and is instead required to “lead trump or risk losing” and “put its best foot forward”, as “the court is entitled to assume that the record contains all the evidence the parties would present at trial”: *Kode Contracting Ltd. v. B.K. Industrial Power Inc.*, 2020 ONSC 7354, at para. 9.

[35] The burden of establishing that there is no genuine issue for trial with respect to a claim or defence remains on the moving party: *Kode Contracting*, at para. 9.

[36] Rule 20.04(2.1) of the *Rules* sets out the powers of the court on a motion for summary judgment:

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

[37] The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, guides the Court on a summary judgment motion. The governing principles can be found at paragraphs 49 and 50:

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows

the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[38] The Court further held at para 66:

... There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[39] Summary judgment is a procedural tool that, when used in the right circumstances, provides litigants with timely and affordable access to the civil justice system: *Malik v. Attia*, 2020 ONCA 787. The court set out a process that, if followed, would lead to a determination of whether the “right circumstances” existed. At paras. 61 and 62, the court stated that:

... before embarking on hearing a motion for partial summary judgment a motion judge must determine whether, in the circumstances, partial summary judgment will achieve the objectives of proportionate, timely, and affordable justice or, instead, cause delay and increase expense. (Citations omitted)

When faced with the request to hear motion for partial summary judgment, the motion judge should make three simple requests of counsel or the parties:

- (i) Demonstrate the dividing the determination of this case into several parts will prove cheaper for the parties;
- (ii) Show how partial summary judgment will get the parties’ case in and out of the court system more quickly;
- (iii) Establish how partial summary judgment will not result in inconsistent findings by the multiple judges who will touch the divided case.

[40] As mentioned earlier in these reasons, the steps outlined above did not take place in this case, and, apart from the time spent in oral submissions on the motion itself, when the motion was brought before this court, the parties had already incurred the costs associated with a motion for summary judgment.

[41] The trial action is set to be heard by a jury. The plaintiff's motion for summary judgment was limited to the issue of liability, leaving the determination of her damages be determined at trial. In oral submissions, the plaintiff expressed some optimism that if liability were determined, the parties might then be able to reach an agreement on damages.

[42] That the parties had not already agreed on damages somewhat undermines the plaintiff's stated optimism respecting agreement on damages. It is far from certain that a determination of liability would result in the plaintiff's case getting in and out of the court system more quickly. Similarly, it is difficult to conclude that a determination of liability on this motion will prove cheaper for the parties: a trial will still be required, at which the plaintiff and other witnesses would be required to testify. For those reasons, I cannot conclude that this motion for summary judgment will meet the objectives of proportionate, timely, and affordable justice rather than to cause delay and increase expense.

[43] There is another, insurmountable hurdle that cannot be overcome on this motion: I find that it is simply not possible to evaluate the credibility and reliability of the evidence based on the paper record before me.

[44] As noted above, the plaintiff's own evidence is inconsistent on such things as whether the dogs pushed her over, lunged at her, or whether, because of her phobia of dogs, the plaintiff walked backwards, without looking where she was going and fell off the curb, injuring herself.

[45] In contrast to the plaintiff's inconsistent evidence about what happened, is the evidence of a witness, Ms. Maw, who appears quite certain about what happened: 1) only the smaller dog went outside; 2) at no time did that dog "touch, bite, or attack" the plaintiff; 3) that dog was "not even close" to the plaintiff when she fell; and, 4) the plaintiff "overreacted and was not paying attention to her footing when she fell".

Discretionary Powers under r. 20.04(2.1)

[46] Rule 20.04(2.1) allows me to weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence "unless it is in the interest of justice for such powers to be exercised only at a trial".

[47] In determining that I should not exercise the discretion found in r. 20.04 (2.1), I have considered that the plaintiff's evidence is inconsistent on the key events whereas the evidence of Ms. Maw, an independent and impartial witness, appears unequivocal. I note also that the plaintiff chose not to cross-examine Ms. Maw. As a result, Ms. Maw's evidence was not tested or challenged by cross-examination.

[48] While the paper record might appear, however, to support the court preferring the evidence of Ms. Maw to that of the plaintiff, I cannot conclude that doing so would result in a fair determination of the plaintiff's case on its merits.

[49] Determining what happened is particularly important in a case such as this, in which statutory liability attaches even if the dog owner is not negligent. In addition, the facts in this case are particularly unique such as: the plaintiff's alleged phobia of dogs; the fact that the person who opened the dog-owner's front door, allowing the dog(s) to leave the home, was a mentally-

incapable person who lived in the neighbourhood and happened by the dog-owner's home, uninvited and unauthorized to enter the home; and, there is no or, at least, inconsistent evidence that a dog made contact with the plaintiff or whether the events constitute an "attack" for the purposes of the *DOLA*.

[50] I conclude, therefore, that it is in the interests of justice that a determination of what happened prior to the plaintiff's fall, including whether those events constitute an "attack" under *DOLA* be determined at a trial.

Order Granted:

[51] For the reasons set out above, the plaintiff's motion for summary judgement is dismissed.

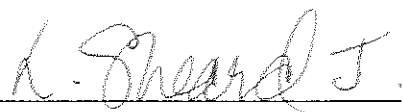
Costs:

[52] The defendants/responding parties on this motion are presumptively entitled to costs, on which I would urge the parties to agree.

[53] If the parties are unable to agree on costs, then costs submissions may be made as follows:

1. By June 9, 2021 the defendants shall serve and file their written costs submissions, not to exceed three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers.
2. By June 23, 2021, the plaintiff shall serve and file her responding costs submissions of no more than three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers.
3. The defendants' reply submissions, if any, are to be served and filed by July 2, 2021 and are not to exceed two pages.
4. If no submissions are received by June 23, 2021, the parties will be deemed to have resolved the issue of the costs and costs will not be determined by me.

Date: May 26, 2021


Justice L. Sheard

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Samia Khurshid

Plaintiff

- and -

Jacqueline Richards and Tira Lefcoe

Defendants

REASONS FOR DECISION ON MOTION

Justice L. Sheard

Released: May 26, 2021