CITATION: Bonello v. Gores Landing Marina (1986) Ltd. and Kane, 2018 ONSC 2237
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DATE: 20180406

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
TIMOTHY BONELLO, TED BONELLO, ANNE CUTAJAR WAGNER, ANDREW BONELLO and MARK BONELLO Plaintiffs	*Andrew C. Murray,* for the Plaintiffs
– and –	
GORES LANDING MARINA (1986) LIMITED, JOSEPH DAVIES, and MURRAY E. CARSLAKE and JOSEPH DAVIES JR. also known as JOEY DAVIES Defendants	*R. Steven Baldwin,* for the Defendants, Gores Landing Marina (1986) Limited and Joseph Davies *Russell Tilden,* for the Third Party Anthony Cook
– and between –	*Nadine Nasr*, for the Third Party Gerald Chestnut
CHRIS KANE, CHRIS RYAN, ANTHONY COOK, GABE MANSUETO, GERALD CHESTNUT, JEFF JAGLEL, FRANK BUTTIGIEG, DAN RULE, MIKE BUTTIGIEG Third Parties	*Lianne Sharvit*, for the Third Party Jeff Jaglel *Jeffrey Pasternak,* for the Third Parties Frank and Mike Buttigieg *Lazina Khan*, for the Third Party Gabe Mansueto
	HEARD: February 22, 2018

REASONS FOR JUDGMENT

CAVANAGH J.

Introduction

[1] On August 4, 2007, the plaintiff Timothy Bonello put his left arm through a loop in a rope that was used for a recreational game of tug-of-war. With the commencement of the game, the loop tightened on Mr. Bonello's arm, causing injury to his left forearm that required amputation. The game took place at the Gores Landing campground (the "campground") among a group of about forty men.

[2] Mr. Bonello sued Gores Landing Marina (1986) Limited (the "Marina"), the owner of the campground, and its principal, Joseph Davies Sr. Mr. Bonello later added the son of Mr. Davies Sr., Joseph Davies Jr., as a defendant after learning of his role in finding the rope that was used for the game and making it available to the participants. The amended statement of claim asserts that the Marina and Mr. Davies Sr. are liable under the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, and for common law negligence, and that they are also vicariously liable for the negligent actions of Mr. Davies Jr.

[3] The action was dismissed against the defendant Murray Carslake by order dated January 3, 2012. Mr. Davies Jr. did not defend the action, and he has been noted in default. The plaintiffs, other than Timothy Bonello, are not pursuing their claims.

[4] The Marina and Mr. Davies Sr. issued a third party claim against nine men who were cottagers, campers or visitors at the campground and who had participated in the tug-of-war game. In their third party claim, the Marina and Mr. Davies Sr. seek full contribution and indemnity for any and all amounts which may be found owing by these defendants to Mr. Bonello.

[5] The Marina and Mr. Davies Sr. brought a motion for summary judgment dismissing the action as against them that was heard and decided in August 2016. Six of the third parties had also moved for summary judgment dismissing the third party claim for contribution and indemnity as against them. The third parties' motion for summary judgment was scheduled to be heard, if necessary, following release of a decision on the motion for summary judgment by the Marina and Mr. Davies Sr.

[6] On August 25, 2016, the motion judge granted the motion for summary judgment brought by the Marina and Mr. Davies Sr. The motion judge dismissed the action against the Marina and Mr. Davies Sr., and also dismissed the third party claim for contribution and indemnity.

[7] Mr. Bonello appealed from the motion judge's judgment to the Court of Appeal. On August 2, 2017, the Court of Appeal allowed his appeal and set aside the judgment. The Court of Appeal held that the motion judge had erred in excluding certain discovery evidence from his consideration, and that the excluded discovery evidence established that the vicarious liability of the Marina and Mr. Davies Sr. for any negligence on the part of Mr. Davies Jr. was a genuine issue requiring a trial. The Court of Appeal set aside the motion judge's judgment.

[8] In his reasons at paragraph 40, Lauwers J.A., for the court, wrote that he would "leave the parties free to pursue their claims including, if so advised, other motions for summary judgment, without being bound by any of the determinations made in the decision under appeal."

[9] Following the Court of Appeal's decision, the Marina and Mr. Davies moved again for summary judgment dismissing Mr. Bonello's claim as against them. I am releasing my decision on this motion separately. In my decision on the motion brought by the Marina and Mr. Davies Sr., I decided that the Marina and Mr. Davies Sr. are precluded by operation of the doctrine of issue estoppel from moving a second time for summary judgment dismissing Mr. Bonello's claims.

[10] Six of the third parties brought motions before me for summary judgment dismissing the third party claim as against each of them. I heard these motions together with the motion for summary judgment brought by the Marina and Mr. Davies Sr.

[11] For the following reasons, I grant summary judgment dismissing the third party claims brought by the Marina and Mr. Davies Sr. against each of the six moving parties.

Analysis

[12] The moving parties and the responding parties agree that the evidence before me consists of all of the material evidence with respect to the events of August 4, 2007. The evidence to which the parties to these motions referred included some evidence that was filed on the motion for summary judgment brought by the Marina and Mr. Davies Sr., including evidence delivered on behalf of Mr. Bonello. No one objected to the use of this evidence on these motions.

[13] In *Hyrniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada addressed the circumstances in which there will be no genuine issue requiring a trial. Karakatsanis J. wrote at para. 49:

> 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.

I am satisfied that the evidentiary record before me is such that I am able to reach a fair and just determination on the merits of these summary judgment motions.

[14] The issue on each of these motions is whether the moving party should be granted summary judgment dismissing the third party claim against him. In addressing this issue, the following questions arise:

a. Has each of the third parties shown that there is no genuine issue requiring a trial in relation to whether he owed a duty of care to Mr. Bonello?

b. If there is a genuine issue requiring a trial in relation to whether a third party owed a duty of care, has each third party shown that there is no genuine issue requiring a trial in relation to whether he met the required standard of care?

Has each of the third parties shown that there is no genuine issue requiring a trial in relation to whether he owed a duty of care to Mr. Bonello?

[15] In their third party claim, the Marina and Mr. Davies Sr. claim against the third parties for full contribution and indemnity for any and all amounts which may be found owing by these defendants to the plaintiffs. Each of the third parties is identified as having been a "cottager" or a "camper" at the campground. Each is identified having "participated in the tug of war". The Marina and Mr. Davies Sr. also plead in the third party claim:

a. Mr. Bonello suffered injury to his left arm and hand arising from his participation in the game of tug-of-war at the campground on August 4, 2007.

b. Mr. Bonello brings action against the defendants for damages for his injuries and losses.

c. The defendants deny liability to Mr. Bonello and all plaintiffs.

d. The fact is that Mr. Bonello and the third parties were responsible for arranging, convening and causing the game of tug-of-war.

e. The tug-of-war was not arranged, organized or supervised by the defendants.

f. The third parties, as adult men, determined to have the game of tug-of-war and each voluntarily assumed the risk of participation and assumed responsibility to each other as participants for the safety of each other.

g. The participants in the tug-of-war permitted an open loop in the rope and commenced the tug-of-war with a loop being in the rope.

h. The third parties as participants in the tug-of-war did not prevent the plaintiff, Timothy Bonello, from putting his left hand and arm through the loop in the rope before commencing the tug-of-war.

i. It is the position of the defendants that Mr. Bonello is responsible for his own injuries, but in the event liability is found against the defendants it follows that the defendants seek full contribution and indemnity from the third parties.

j. The third parties, as adult men organizing and participating in a tug-of-war, were required to ensure that the tug-of-war would be accomplished in a manner that was safe to all participants.

k. The third parties and the plaintiff failed in their duties owed to each other to ensure that the tug-of-war was accomplished in a safe fashion and resulted in injury to the plaintiff.

[16] The Gores Landing campground operates as a seasonal resort with approximately 60 trailer sites, 19 rental cottages, and 102 boat slips, at the southwest end of Rice Lake. It sits on 10

acres of land. The campground can accommodate upwards of 200 to 300 people on a single weekend. For some years, the campground sponsored "Jimmy Buffett Day". Festivities included potluck meals, volleyball, horseshoes, cards and games for the children. The intent was to provide the boaters, cottagers and trailer residents an opportunity to mingle and interact with each other. Flyers and posters were put up at the campground to advertise Jimmy Buffett Day.

[17] There were three women who organized adult events for Jimmy Buffett Day, consisting of the tug-of-war and horseshoes. The tug-of-war was organized as a contest between the "trailers" and the "cottagers", and a trophy was to be presented to the winning side. The rope that was used for the tug-of-war in August 2007 was obtained by Mr. Davies Jr. from a box in a shed on the campground property and it was given to one of the women organizing the event. The rope had previously been used by tenants as rope swings and tire swings.

[18] Five of the six participants who have brought motions for summary judgment provided affidavit evidence in support of their motions. Mr. Mansueto did not deliver an affidavit, and he relies upon discovery evidence given by Mr. Davies Sr. and Mr. Davies Jr.

[19] The following is a summary of the material portions of the affidavit evidence of Mr. Chestnut:

a. At the time of the incident, Mr. Chestnut rented a cottage at the campground and had done so every summer since approximately 2003. He was not aware of any previous tug-of-war games occurring at the campground prior to the date of the incident. He had never before participated in a tug-of-war game at the campground and he has not participated in one since the date of the incident.

b. Mr. Chestnut did not have a role in organizing the tug-of-war game and he had no knowledge as to who organized it or how it was organized. He did not supply the rope for the tug-of-war game and had no knowledge as to who supplied the rope or where it came from.

c. He participated in the tug-of-war game that day and recalls that someone told him that he should participate, but he does not recall who told him this. When he arrived at the scene of the game, there was a rope spread along the ground. He recalls that the rope in question had several loops in it and that he, along with other participants, attempted to remove the loops prior to the start of the tug-of-war game. He was successful in removing one loop, but others remained.

d. Prior to the start of the game, Mr. Chestnut recalls hearing other participants warn others not to put their hands through the loops in the rope, but he does not know which participants said this or to whom they were speaking.

e. Mr. Chestnut is not sure where Mr. Bonello was standing in relation to him during the tug-of-war game, and he was not aware that Mr. Bonello had placed his left hand through one of the loops in the rope.

f. After hearing the command to start the game, he began pulling on the rope, along with the other participants. As soon as he heard someone indicate that the tug-of-war game had to stop, he immediately ceased pulling, and dropped the rope.

g. He did not see what happened to Mr. Bonello or what type of injury he sustained.

[20] The following is a summary of the material portions of the affidavit evidence of Frank Buttigieg ("Frank"):

a. Frank has been attending at the campground since 1970 and he has owned a trailer at the campground since 1982.

b. Frank participated in the tug-of-war game on August 4, 2007 but he did not organize the tug-of-war game and did not invite people to participate. Frank did not provide the rope for the tug-of-war game.

c. Frank was the first person in line pulling for the "trailer" team.

d. Frank noticed that there was one loop in the rope. He tried to take the loop out but the knot was too tight and he could not take it out, so he left it. He was concerned that the knot could give in, but he did not think anyone would put their hand in the loop.

e. Frank's son, Mike Buttigieg, told him that he told Mr. Bonello not to put his hand in the loop.

f. Frank stopped pulling the rope when people started screaming to stop pulling.

[21] The following is a summary of the material portions of the affidavit evidence of Mike Buttigieg ("Mike"):

a. Mike has been attending the campground since 1982. His parents have a trailer on the campground property.

b. Mike participated in the tug-of-war game on August 4, 2007 at the campground. He did not organize the tug-of-war. He did not invite people to participate in the tug-of-war. Mike did not provide the rope for the tug-of-war.

c. Mike remembers there being one loop in the tug-of-war rope. He remembers someone trying to get the loop out of the rope, but he does not know who it was. He put his arm in the loop before the tug-of-war began, but he took it out because he thought it was a bad idea.

d. Mike remembers Mr. Bonello holding the loop, but he does not remember him putting his hand through the loop.

e. Mike is pretty sure that he told Mr. Bonello not to put his hand through the loop, because he thought it was a bad idea.

f. When the tug-of-war began, Mike was positioned behind Mr. Bonello. He did not see Mr. Bonello's hand through the loop.

g. When the tug-of-war began, the rope tightened around Mr. Bonello's wrist and he started yelling. Mike immediately yelled for people to stop. It took about 20 to 30 seconds for everyone to stop pulling.

[22] The following is a summary of the material portions of the affidavit evidence of Anthony Cook:

a. Mr. Cook recalls that the incident occurred on a Saturday in August, 2007 at the campground. In August 2007, Mr. Cook did not own or rent any property at the campground. He was staying at the trailer of his friends on the day of the incident.

b. On the date of the incident, Mr. Cook was sitting with his friend on a porch of his friend's trailer and he was approached by two women whose identities he cannot recall. They asked Mr. Cook and his friend to participate in a tug-of-war because they were short two people and needed to even out the teams. Mr. Cook was unaware prior to being advised by the two women that such an event was to occur.

c. Mr. Cook went to the common area where the tug-of-war was being held. When he arrived there, he cannot recall if men participating were already holding the rope. He was directed to take a position at the end of one side of the rope. He did not know most of the men on the side where he was directed to stand.

d. Mr. Cook estimates there were approximately 25 men on each side of the rope. He was the second to last person. Approximately one or two minutes passed from the time he arrived until the tug-of-war started.

e. Mr. Cook did not know at the time of the incident who supplied the rope for the tug-of-war. He had no involvement in the supply of the rope. He was not involved in the organization of the tug-of-war. He did not see any loops in the rope. He did not attempt to remove any loops. He did not hear any person discuss loops in the rope when he arrived, before the tug-of-war commenced, or after the tug-of-war was stopped.

f. Mr. Cook does not recall any horn, whistle or other indicator to begin the tug-of-war. He only recall someone yelling "pull!" He did not hear any whistle, or other indicator to stop pulling the rope, although he did hear some people yelling to stop playing. Within 10 seconds of putting his hands on the rope and pulling, everyone stopped pulling. He did not exert any significant force in the rope, but did pull on it briefly.

g. Mr. Cook did not see Mr. Bonello from his position, and he simply dropped the rope to the ground after hear people yelling to stop pulling. Mr. Cook did not see the injury to Mr. Bonello as it occurred.

[23] The following is a summary of the material portions of the affidavit evidence of Chandrick Jagel, incorrectly named in the third party claim as Jeff Jagel:

a. Mr. Jagel saw Mr. Bonello in the park in which the tug-of-war took place prior to the game, however he did not personally know Mr. Bonello and he had never previously spoken to him, nor did he know his name.

b. He was asked to participate in the tug-of-war by one of three individuals whose last names he does not know. He does not recall which of these individuals asked him to participate in the tug-of-war on August 4, 2007.

c. When he joined the tug-of-war, the first rope that was used was already in the participants' hands. He joined at the end of one side of the first rope used in the tug-of-war. Shortly after he joined the tug-of-war, all of the participants including himself pulled on the rope and it broke.

d. Joseph Davies Junior obtained a second rope. The second rope had a loop in it, and two women attempted to untie the loop, but were unable to do so. He does not know if there was more than one loop in the rope.

e. After all of the participants started pulling the rope, Mike Buttigieg yelled stop. He told everyone that Mr. Bonello had got caught in the rope.

f. Mr. Jagel did not provide any instructions to Mr. Bonello regarding the tug-of-war and he was not involved or responsible for organizing the tug-of-war. He did not supply the rope for the tug-of-war, nor did he tie any loops in the rope. Mr. Jagel had no interaction with Mr. Bonello throughout the tug-of-war.

[24] The following is a summary of the discovery evidence from the examination for discovery of Joseph Davies Sr. upon which Gabe Mansueto relies:

a. Mr. Davies Sr. has no information that Mr. Mansueto was involved in any way in the organization of the tug-of-war.

b. Mr. Davies Sr. has no information that Mr. Mansueto was in any way involved in the supply of the rope that was used in the tug-of-war.

c. Mr. Davies Sr. has no information that Mr. Mansueto was involved in any way in convening the event or convening the actual tug-of-war.

d. Mr. Davies Sr. has no information that Mr. Mansueto in any way encouraged Mr. Bonello to become involved in the tug-of-war.

e. Mr. Davies Sr. has no information that Mr. Mansueto had any opportunity to stop Mr. Bonello from putting his arm in the loop in the rope in the tug-of-war.

[25] The following is a summary of the discovery evidence from the examination for discovery of Joseph Davies Jr. upon which Mr. Mansueto relies:

a. Mr. Davies Jr. knows Mr. Mansueto. He does not recall whether he saw him at the campground on the day of the incident.

b. Mr. Davies Jr. has no information that Mr. Mansueto helped organize or supervise the tug-of-war.

[26] The evidence before me shows the circumstances under which the participants joined the tug-of-war game, and the recollection of each participant who swore an affidavit of the events before and during the game. Although there are many areas of commonality, there are also some differences. In particular, the evidence of Mr. Chestnut, Frank Buttigieg and Mike Buttigieg is that each noticed a loop or loops in the rope before the game started. Mr. Chestnut's evidence is that he was able to remove one loop, but not others. Frank Buttigieg tried to remove the one loop he saw, but he was unsuccessful in doing so. Mike Buttigieg remembers one loop in the rope and he recalls someone trying to get the loop out of the rope. He is pretty sure he told Mr. Bonello not to put his arm through the loop. He thought this would be a bad idea. Mr. Jagel saw that the rope that was used had a loop in it, and he saw two persons attempt unsuccessfully to untie the loop. Mr. Cook did not see loops in the rope, and there is no evidence that Mr. Mansueto saw any loops.

[27] Mr. Jagel recalls that at the event on August 4, 2007, one rope broke, and Mr. Davies Jr. brought another rope that was used for the game. He is the only participant with this recollection. At the hearing of this motion, I was shown a video of a tug-of-war game at the campground from 2006. The video showed the tug-of war contest from 2006. During the game, the rope broke. Frank Buttigieg gave evidence that when the rope broke, he "got dented", and when the rope snapped, it hit him.

[28] Canadian courts have not recognized that the relationships between and among participants in a recreational activity that is not inherently dangerous, such as a game of tug-of-war, is a category of relationships that gives rise to a duty of care owed by one participant to another. If a case does not clearly fall within a relationship previously recognized as giving rise to a duty of care, it is necessary to carefully consider whether proximity is established: *Childs v. Desormeaux,* 2006 SCC 18 at para. 15. The duty proposed in this case does not fall within a recognized category and, therefore, a threshold question to be determined on this motion is whether each third party has shown, on the evidence of the factual circumstances that is before me, that there is no genuine issue requiring a trial in relation to whether a given third party owed a duty of care to Mr. Bonello.

[29] In *Cooper v. Hobart*, 2001 SCC 79, the Supreme Court of Canada restated that where a duty of care has not been recognized by Canadian courts, the approach to be taken to determine whether a duty of care exists is the one followed in *Anns v. Merton London Borough Council*

(1977), [1978] A.C. 728 (U.K. H.L.). In *Anns*, it was held that a duty of care required a finding of proximity sufficient to create a *prima facie* duty of care, followed by consideration of whether there were any factors negativing that duty of care. In *Cooper*, McLachlin C.J.C. and Major J., for the court, wrote at para. 24 that the Supreme Court of Canada has repeatedly affirmed that approach as appropriate in the Canadian context.

[30] In *Cooper*, the Supreme Court of Canada explained the approach to be taken to the two stages of the *Anns* test:

> In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the *relationship* between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

[31] In *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, the Court of Appeal addressed the proximity requirement which is necessary to establish a duty of care:

> The proximity requirement cannot be reduced to a list of factors or circumstances which, if they exist, will always create a relationship of proximity between the plaintiff and a defendant. Proximity is a concept, not a test: see *Canadian National Railway v. Norsk Pacific Steamship Co*., [1992] 1 S.C.R. 1021 (S.C.C.), at 1151. The concept of proximity describes a relationship between the plaintiff and the defendant that is sufficiently close and direct to render it fair and reasonable to require that the defendant, in the conduct of its affairs, be mindful of the plaintiff's legitimate interests: see *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 129 (S.C.C.), at para. 23; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 (S.C.C.), at para. 31.

[32] In *Garratt v. Orillia Power Distribution Corp.*, 2008 ONCA 422, the Court of Appeal, at para. 48, explained the concept of foreseeability as it applies at the first stage of the *Anns* analysis:

> Foreseeability of the *possibility* of resultant harm is inadequate to establish a duty of care. We do not expect omniscience, prescience or clairvoyance, or impose a duty of care on all who fall short of any such standard. Foreseeability of the probability of resultant harm involves the *likelihood* that such harm will result from the alleged wrongdoer's conduct. Said in different words, a duty of care is established only where what happened was a natural and probable result of what the alleged wrongdoer did or failed to do. (Emphasis in original)

[33] In *Childs v. Desormeaux*, 2006 SCC 18, the Supreme Court of Canada addressed the circumstances in which a duty of care will be established where the conduct alleged against a defendant is a failure to act, as opposed to the commission of an overt act. McLachlin C.J.C. explained the approach to be taken in respect of such a claim at para. 31:

> Foreseeability without more *may* establish a duty of care. This is usually the case, for example, where *an overt act of the defendant has directly caused foreseeable physical harm* to the plaintiff: see *Cooper*. However, where the conduct alleged against the defendant is a *failure to act*, foreseeability alone may not establish a duty of care. In the absence of an overt act on the part of the defendant, the nature of the relationship must be examined to determine whether there is a nexus between the parties. Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved. (Emphasis in original)

[34] In *Childs*, McLachlin C.J.C. referred at paras. 34-37 to three situations that have been identified by the courts as ones that function to elucidate factors that can lead to positive duties to act. The first situation is where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls. These cases turn on the defendant's causal relationship to the origin of the risk of injury faced by the plaintiff or on steps taken to invite others to subject themselves to a risk under the defendant's control. The second situation concerns paternalistic relationships of supervision and control, such as those of parent-child or student-teacher. The duty in these cases rests on the special vulnerability of the plaintiffs and the formal position of power of the defendants. The third situation concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large. In these cases, the defendants offer a service to the general public that includes attendant responsibilities to act with special care to reduce risk.

[35] McLachlin C.J.C. wrote at para. 38 that running through all of these situations is the defendant's material implication in the creation of risk or his or her control of a risk to which others have been invited. McLachlin C.J.C. gave as an example that the operator of a dangerous sporting competition creates or enhances the risk by inviting or enabling people to participate in an inherently risky activity. In such circumstances, the operator must take special steps to protect against the risk materializing. McLachlin C.J.C. also described at para. 39 another concern running through the examples in the cases:

> Also running through the examples is a concern for the autonomy of the persons affected by the positive action proposed. The law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene. It is only when these third parties have a special relationship to the person in danger or a material role in the creation or management of the risk that the law may impinge on autonomy. Thus, the operator of a risky sporting activity may be required to prevent a person who is unfit to perform a sport safely from participating or, when a risk materializes, to attempt a rescue. Similarly, the publican may be required to refuse to serve an inebriated patron who may drive, or a teacher be required to take positive action to protect the child who lacks the right or power to make decisions for itself. The autonomy of risk takers or putative rescuers is not absolutely protected, but, at common law, it is always respected.

McLachlin C.J.C. held that the theme of reasonable reliance unites the examples in all three categories: *Childs*, at para. 40.

[36] In their third party claim, the Marina and Mr. Davies Sr. plead that (i) the third parties "determined to have the game of tug of war" and "voluntarily assumed responsibility to each other as participants", (ii) the participants "permitted an open loop in the rope and commenced the tug-of-war with a loop being in the rope", (iii) "the third parties as participants in the tug of war did not prevent the Plaintiff, Timothy Bonello, from putting his left hand arm (sic) through the loop in the rope before commencing the tug of war", and (iv) the third parties, as adult men organizing and participating in a tug of war, were required "to ensure that the tug of war would be accomplished in a manner that was safe to all participants".

[37] I read the allegations in the third party claim to be allegations of a failure to act that caused physical injury to Mr. Bonello, rather than allegations of the commission of an overt act.

[38] None of the third parties intentionally attracted and invited persons to an inherent and obvious risk that he created or controlled. A tug-of-war game is not an inherently risky activity. In any event, there is no evidence that any of the third parties, although they were willing participants in the game, was an organizer or supervisor of the game. The activity was one of a number of activities organized to be held on that day involving the community of cottagers, campers and their guests at the campground. There is no evidence to support a causal relationship between the third parties and the organization of an activity that is inherently risky or dangerous. The situation which the participants in the tug-of-war game were in is not one that falls within the first category of situations described by McLachlin C.J.C. in *Childs* that had been identified by the courts as leading to positive duties to act. This situation also does not fall within the descriptions of the second or third categories of situations identified by McLachlin C.J.C.

[39] This situation involving voluntary participation by members of a community of campers and cottagers in an outdoor recreational activity at a campground is one where, to the extent that a possible risk may have been identified or identifiable because of the presence of loops in the rope, none of the participants, including those who noticed the presence of a loop or loops, and

who attempted to remove loops, or Mike Buttigieg who advised Mr. Bonello not to put his hand through a loop, was in a special relationship with Mr. Bonello or had a material role in the creation or management of the risk. As was stated by McLachlin C.J.C. in *Childs*, the law does not impose a duty to eliminate risks, and it accepts that competent persons have the right to engage in risky activities. This is a situation where the autonomy of the participants in the game of tug-or-war should not be impinged by the imposition of a duty of care on each participant requiring him to take positive actions that would minimize or eliminate the possible risks to other participants in the game, including Mr. Bonello.

[40] If the allegations in the third party claim can be read to be allegations of the commission of an overt act through engagement by the participants in the tug-of-war game without ensuring that the game would be accomplished in a manner that was safe to all participants, it is necessary to consider whether the overt act directly caused foreseeable injury to Mr. Bonello. As noted by McLachlin C.J.C. in *Childs*, foreseeability without more may suffice to establish a duty of care where, for example, an overt act has directly caused foreseeable physical harm to the plaintiff.

[41] In my consideration of whether the third parties participation in the tug-of-war game directly caused foreseeable injury to Mr. Bonello, I am mindful of the statements made by the Court of Appeal in *Garratt* that foreseeability of the *possibility* of harm resulting from commission of an overt act is inadequate to establish a duty of care. Many activities that are common, everyday, recreational activities involve the possibility of harm or injury. Mere participation in a recreational tug-of-war game would not involve the *likelihood* that harm will result. Even if a participant observed loops in the rope to be used for a tug-of-war game, and even if steps were unsuccessfully taken to try to remove loops, the injury suffered by Mr. Bonello is not a natural and probable result of participation in a tug-of-war game using a rope with loops. To impose a duty of care on the participants would, in my view, require an expectation of prescience or clairvoyance on their parts. The Court of Appeal in *Garratt* has held that there is no duty of care in such circumstances.

[42] It would not have been within the reasonable contemplation of any of the participants in the tug-of-war game that the injury suffered by Mr. Bonello would be a natural and probable result of carelessness on the part of each participant in relation to what he did or did not do. I conclude that the relationship between the third parties who have moved for summary judgment and Mr. Bonello, who were participants in a recreational tug-of-war game that day, is not sufficiently close and direct to render it fair and reasonable to establish a *prima facie* legal duty of care. Each of the third parties who has moved for summary judgment has shown that there is no genuine issue requiring a trial in relation to whether he owed a duty of care to Mr. Bonello.

[43] The Marina and Mr. Davies Sr. also submit that each is an occupier of the campground within the meaning of this term in the *Occupiers' Liability Act*, and that each of the third parties owed a duty to them that if he is going to use the campground for a tug-of-war game, he is required to take reasonable care and not engage in activities that would cause harm to other participants. I disagree. For the reasons that I have found that there is no genuine issue requiring a trial in relation to whether each third party owed a duty of care to Mr. Bonello, there is also no genuine issue requiring a trial in relation to whether each third party, as a participant in a

recreational game of tug-of-war at the campground, owed a duty of care to the Marina and Mr. Davies Sr.

[44] Having reached this conclusion, it is not necessary for me to analyze whether, if I had found otherwise at stage one of the *Anns* analysis, there are policy considerations outside the relationship of the parties that operate to negative a *prima facie* duty of care. It is also not necessary for me to analyze the evidence and decide whether each of the third parties satisfied his onus to show that there is no genuine issue requiring a trial in relation to whether he met the required standard of care.

[45] The Marina and Mr. Davies Sr. submit that if there is a genuine issue requiring a trial in relation to whether they are vicariously liable for any negligence on the part of Mr. Davies Jr., then it follows that there must be a genuine issue requiring a trial in relation to whether the third parties were negligent and are liable for the claim of contribution and indemnity that is made against them. They submit that this is so because Mr. Davies Jr. was merely a participant in the tug-of-war game, and that he is in the same position as the third parties who were also participants.

[46] I disagree. The Court of Appeal decided that the vicarious liability of the Marina and Mr. Davies Sr. in the main action for any negligence on the part of Mr. Davies Jr. was a genuine issue requiring a trial. The third party claim against the third parties is not based upon principles of vicarious liability. The Court of Appeal expressly granted leave for parties to bring other motions for summary judgment without being bound by any determinations made by the motion judge in the decision that was under appeal. The third parties have done so, and they are entitled to have their motions decided on their merits.

[47] Counsel for the Marina and Mr. Davies Sr. made a submission at the hearing of these motions that each of the third parties is an occupant within the meaning of this term in s. 1(b) of the *Occupiers' Liability Act*, and that there is a genuine issue requiring a trial in relation to whether each is liable for breach of the statutory duty of an occupier under this statute.

[48] In the *Occupiers' Liability Act*, the term "occupier" is defined in s. 1:

> 1 In this Act,
> "occupier" includes,
> (a) a person who is in physical possession of premises, or
> (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,
> despite the fact that there is more than one occupier of the same premises; ("occupant")

[49] Counsel for the Marina and Mr. Davies Sr. submits that as renters of cottagers or occupiers of trailers at the campground, the third parties would have had a right to exclude others from using areas of the campground that counsel described as "common areas" and that the area where the tug-of-war game took place was a common area. Counsel submits that the third parties

had responsibility or control over the condition of the premises (the area at the campground where the game took place), or activities there carried on, or control over persons allowed to enter the premises.

[50] The third parties submit that there is no genuine issue requiring a trial in this respect and, further, they point out that there is no pleading in the third party claim that the third parties are liable because of a breach of a statutory duty under the *Occupiers' Liability Act*.

[51] Each third party (who was not a guest) had physical possession of the cottage or trailer that he occupied, but there is no evidence that any of them had responsibility for and control over the condition of other areas of the campground or the activities there carried on, or that any of them had control over persons allowed to enter the campground. In any event, such a claim would have had to have been pleaded, and it was not. I conclude that there is no genuine issue requiring a trial in relation to whether any of the third parties is liable for breach of a statutory duty under the *Occupiers Liability Act*.

Disposition

[52] For these reasons, the motions by the six third parties who have moved for summary judgment are granted, and the third party claim as against each of them is dismissed.

[53] If the parties are unable to resolve costs, the moving parties may make written submissions within 20 days. The Marina and Mr. Davies Sr. may make responding written submissions within 15 days thereafter.

Cavanagh J.

Released: April 6, 2018

CITATION: Bonello v. Gores Landing Marina (1986) Ltd. and Kane, 2018 ONSC 2237
COURT FILE NO.: CV-09-383809-00A1
DATE: 20180406

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TIMOTHY BONELLO, TED BONELLO, ANNE CUTAJAR WAGNER, ANDREW BONELLO and MARK BONELLO

Plaintiffs

– and –

GORES LANDING MARINA (1986) LIMITED, JOSEPH DAVIES, and MURRAY E. CARSLAKE and JOSEPH DAVIES JR. also known as JOEY DAVIES

Defendants

– and between –

CHRIS KANE, CHRIS RYAN, ANTHONY COOK, GABE MANSUETO, GERALD CHESTNUT, JEFF JAGLEL, FRANK BUTTIGIEG, DAN RULE, MIKE BUTTIGIEG

Third Parties

REASONS FOR JUDGMENT

Cavanagh J.

Released: April 6, 2018