

CASE ANALYSIS - ACADEMIC ORIENTATION 2012

1. The answers to some of the questions listed below for the Case Analysis session will be found in the following pages as well as in the “Canadian Legal System” section of this booklet.
2. In today’s readings, pay particular attention to the following terms:
 - case law
 - legislation
 - common law
 - equity
 - *stare decisis*
 - precedent
 - *ratio decidendi*
 - *obiter dicta*
3. Apply the principles of precedent and *stare decisis* to the following questions:

You are a justice of the Court of Queen’s Bench in Saskatchewan. One of the lawyers appearing before you urges you to follow the decision from a case called *Smith v Jones*. This decision is favourable to her client. The case has the same facts and legal issues as the case before you which you must judge.

Are you bound to follow the decision in the *Smith v Jones* if that case was a decision of the following courts:

- a) the Court of Queen’s Bench of Manitoba?
- b) the Court of Queen’s Bench of Saskatchewan?
- c) the Provincial Court of Saskatchewan?
- d) the Court of Appeal of Ontario?
- e) the Supreme Court of Canada?

Case Analysis

4. As you read the case of *Purcell v Taylor* (please read all four decisions found on the following pages), consider and prepare to discuss the following points:

- who are the parties to the claim?
 - what are the significant events?
 - what are the claims made by the parties?
 - what were the legal issues before the justices at each level of court?
 - what happened at each level of court?
 - what were the reasons given to support the judicial decision at each level of court?
 - what were the practical effects on the parties following the judicial decision at each level of court?
5. Please read the decision in *Graham (Litigation Guardian of) v 640847 Ontario Ltd.* How does the *Graham* decision affect the ruling in the *Purcell* case?
 6. Please ensure you have read the material concerning case briefing. You will have an opportunity to prepare a case brief in class today.

INTRODUCTION TO CASE BRIEFING*

“Lawyers: persons who write a 10,000 word document and call it a brief.”

Novelist Franz Kafka

What are “case briefs” and why do law students write them?

As the name implies, a case brief is a note summarizing the facts, issues, and reasons for the decision in a given case.¹ A case in this context refers to the written decision of a court where the judge describes the reasons for deciding for or against a person in a legal dispute. The case brief simply summarizes the judge’s written decision.

Case briefs are used by law students to organize the cases they are expected to read for most classes in law school. During the first few weeks of classes, this reading will consume a surprising amount of time. There are three good reasons for making case briefs. “First, the act of preparing and writing a summary of a case tends to fix it more firmly in the mind. Second, brief and accurate notes are helpful for review. Third, and more importantly, making a summary of the significant facts of the case requires skill and judgment. The process of picking out the significant facts from a mass of those that are insignificant is one of the lawyer’s most important skills, and the best way to learn to do it is by practice.”² Ideally, these notes will be written *before* class and will not be more than two pages long. Some may be longer depending on the case but, if your briefs approach 10,000 words, then you are doing something wrong.

Brevity and clarity are the keys to a good brief. Though briefs come in many different forms — perhaps as many as there are law students — good briefs clearly and concisely answer most, if not all, of the following questions: Who are the parties to the dispute? What are their respective interests? What are the relevant facts? What legal issues are at stake in the dispute? What was the Court’s decision? By what reasoning did the Court reach that decision? What are the arguments against the reasoning used by the Court? What practical consequences did the Court’s decision have for the parties? What is your reaction to the reasoning used by the Court? Not all of these questions need be addressed in every brief. As you gain experience in reading and analysing cases, you will develop your own sense of what to include in or omit from a brief.³ Whatever format you choose, “you

¹ S.M. Waddams, *Introduction to the Study of Law*, (5th ed.) (Toronto: Carswell, 1997) at 23.

² *Ibid.*

³ C. Wren & J. Wren, “The Legal Research Manual” in *Legal Process* (4th ed.), ed. by Prof. Julie

will generally brief a case most effectively if you read the case all the way through at least once before you even start to prepare a brief. If you begin to brief before you finish a preliminary reading of the entire case, you are apt to find that you have briefed unnecessary, irrelevant, or even inaccurate points of law or interpretations.”⁴

There are several different case brief formats that law students may use. There is no single correct format for writing a case brief. Some briefs will follow this format: (1) A citation, *e.g.*, *Smith v Jones*, [1999] SCC⁵; (2) a brief statement of the facts, identifying the parties, explaining the nature of the dispute, and summarizing the judicial history of the case; (3) an enumerated list of the issues at stake, *e.g.*, 1. Should a mother be held liable in tort for damages to her child arising from a prenatal negligent act which allegedly injured her foetus?; (4) an explanation of the Court’s holding as well as the reasons for the decision, usually incorporating a statement of the rule at issue, its application to the facts of the case, and the consequences of the rule’s application; (5) explanation of the public policy concerns informing the reasons for the decision; (6) the *ratio decidendi*, or legal principle for which the case stands; (7) *obiter dicta*, or “things said along the way”, *i.e.* an aside or chance remark made by a judge; and, (8) any comments or questions you might have about the case.⁶ Other briefs may follow a much simpler format, including a brief statement of the facts, a list of issues, an explanation of the legal rule at issue in the case, the Court’s application of that rule, and a conclusion. The choice is yours. Try different formats and choose the one that helps you to learn the law and keep well organized notes.

It is not enough to note the legal rule(s) for which each case stands. Legal analysis demands careful application of the law to the *facts* of the instant case. In order to do that effectively, you must know not only what the law says, but also how it has been applied in similar cases from the past. A concise statement of the facts, therefore, is an important part of any brief. There is no need (and, certainly, *no time!*) to note the facts in vivid detail. A fact is worth mentioning in a brief, if a change in that fact could have changed the Court’s reasoning or its final decision.⁷ That is, only legally relevant facts are important. (You will learn more about *legally relevant facts* in your Legal Writing and Research Course). For

Macfarlane, Windsor: University of Windsor Faculty of Law (1996) at 58.

⁴ *Ibid.*

⁵ Identifying the level of Court — in this case, the “SCC” (Supreme Court of Canada) — will help you to remember whether the decision is *binding* or merely *persuasive* in your jurisdiction. For example, decisions of the Ontario Court of Appeal and Supreme Court of Canada are binding in Ontario, while decisions from the Appeal Courts of other provinces are merely persuasive.

⁶ J. Ramsfield, *Legal Writing Manual* (Washington: University of Georgetown, 1991).

⁷ V. Charrow, M. Ehrhardt & R. Charrow, *Clear and Effective Legal Writing* (2d ed.) (Toronto: Little, Brown & Company, 1995) at 49.

example, the following summary of the legally relevant facts of the *Carbolic Smoke Ball*⁸ case would suffice:

FACTS: The Carbolic Co. advertised that it would pay 100 pounds to anyone who caught a cold after using its “smoke ball” remedy for two continuous weeks according to the instructions. Mrs. C. caught cold after using the ball as instructed. Carbolic refused to pay, however, arguing that the ad was only a “puff” and not a binding offer. Mrs. C. now sues for the promised 100 pounds.

Another important part of every case is the dissent. The dissent is the opinion of the judge(s) who disagree(s) with the majority decision of the Court. However, since it is the *majority decision* of the Court and not the *dissent* that becomes the law, you may be tempted to treat these opinions as irrelevant to your work and ignore them. However, a brief note on the dissent can be very useful to you both in an exam situation and in understanding the law. On examinations, you will often be required to argue *both* sides of the case and arguments in dissent may provide assistance in that regard. It has been said that the study of law is largely the study of arguments and, as John Stuart Mill once observed, a person “who knows only one side of the case, knows little of that.”⁹

In conclusion, case briefing is an essential skill that is best learned by doing. Most important is capturing the essence of the Court’s decision in a sufficiently brief but detailed way. Please read the following *Purcell v. Taylor* case once without making notes, and then a second time more slowly. Make notes in the margins. Circle or underline important points. Look up words you do not understand. Please be prepared to discuss this case during the Case Analysis session of Orientation.

⁸ *Carlill v Carbolic Smoke Ball Co.*, [1893] 1 QB 256; [1891-1894] All ER Rep. 121, Court of Appeal.

⁹ *On Liberty* (1859) at 36.

* [Many thanks to Brad Wallace for his assistance in preparing these materials, ed.]

TIPS ON CASE BRIEFING

1. The purpose and significance of note-taking when reading case law includes:

- to summarize the facts, issues, and reasons for the decision so that you are prepared to participate in class by asking and answering questions;
- to create a written record for review purposes (essential at exam time and when preparing for mootings);
- to assist in developing an ability to identify relevant facts, issues, disposition and the judicial reasoning.

2. When note-taking:

- write legibly;
- develop shorthand notations and be consistent in how you use them;
- leave space in your notes for adding further thoughts or notes;
- do not write everything down;
- aim for structure and basic ideas;
- write out the entire citation, including title and page numbers, to avoid having to go back later to find them.

3. A case brief:

- is an organizational tool;
- uses any or all of the following formats:
 - IRAC (Issue, Rule, Analysis, Conclusion)
 - FILAC (Facts Issues, Law, Analysis, Conclusion)
 - FIRR (Facts, Issue, Reasons, Ratio)
- should include:

- Style of Cause
- Procedural History
- Facts
- Issues
- Decision
- Reasons
- *Ratio Decidendi*
- Commentary

N.B. There is no standardized way to prepare case briefs; it is a matter of individual reference.

CASE DEFINITIONS

The following terms are used in the case:

Plaintiff — the person who starts a lawsuit.

Defendant — the person who defends a lawsuit.

Motion for Summary Judgment — an application to the court for an order/direction that something be done – in this case two of the defendants claim that there is no genuine issue for trial – they want to be dropped from the lawsuit.

Moving Party — the party bringing the motion.

Responding Party — the party who responds to the moving party.

Negligence — omitting to do something which a reasonable person would do, or the doing of something which a reasonable and prudent person would not do.

Breach of Duty — failure to carry out an obligation.

Scienter — knowledge, specifically the knowledge by the owner of an animal about its disposition.

Gravamen — the grievance complained of – the substance of the complaint.

Tort — (from Latin “torquere” meaning “to twist”) – civil wrong committed upon a person or property for which a remedy may be obtained – breach of duty imposed by law.

Damages — a sum of money awarded to a person injured by the tort of another.

Default Judgment/Noting in Default — a judgment entered against a defendant who has failed to plead or otherwise defend against the plaintiff’s claim, often by failing to appear at trial.

Contribution and Indemnity — follows from the concept of “joint and several liability”, that each liable party is individually responsible for the entire obligation/debt, but a paying party may have a right of “contribution and indemnity” from non-paying parties – an equal sharing of the loss.

Joint and Several Liability — liability that is apportionable to multiple tortfeasors (individuals who commit a tort), together and separately.

Absolute Liability (AKA strict liability or liability without fault) — liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe.

Title — ownership - the union of all elements (ownership, possession, and custody) constituting the legal right to control and dispose of property.

Dyslogistic — OED - “Expressing or connoting disapprobation or dispraise; having a bad connotation; opprobrious” - conveying blame/censure.

Non-dyslogistic — expressed using the ordinary meaning of a term or phrase.

Error in Law — a mistake about the legal effect of a known fact or situation - where such an error is made, an appeal court may set the decision of the lower court aside.

Jurisprudence — judicial precedents considered collectively - the philosophy of law.

Supra — Latin for “above”, used as a signal to refer to a previously cited authority.

Directed Verdict — a judgment entered on the order of a trial judge who takes over the fact-finding role of the jury because the evidence is so compelling that only one decision can reasonably follow or because either party fails to establish a *prima facie* case or defence.

Receiver — a person appointed to protect and collect property that is the subject of many claims, generally used in bankruptcy situations.

Inter Alia — Latin for “among other things”.

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Indexed as:
Purcell v. Taylor

Between
Lela Purcell, Plaintiff, and
Bradley James Taylor and Sandra Irene Mills, Defendants

[1992] O.J. No. 2554
Action No. 92-CQ-16622

Ontario Court of Justice - General Division
Toronto, Ontario
Blair J.

December 1, 1992
(9 pp.)

Greg McConnell, for the Responding Party (Plaintiff).

Robin B. Cumine, Q.C., for the Moving Parties (Defendants).

BLAIR J.: —

Overview

Matt and Scooter are black, bandanna-wearing, Labrador retrievers.

On the morning of August 11, 1991, it is alleged, they attacked the Plaintiff, Lela Purcell, and one of them bit her. The incident took place on the public sidewalk in front of 29 Shier Drive, in Scarborough.

Matt and Scooter are the dogs of Ross Taylor, who is the brother of the Defendant Bradley Taylor and who lives in Downsview. The question on this Motion for summary

judgment is whether Matt and Scooter are also the dogs of Bradley and Sandra Mills who do not “own” them in the traditional sense but who do own the premises at 32 Shier Drive in Scarborough where the dogs stayed on the weekend in question. The Taylor-Mills were not at home that weekend. However, it is alleged that they nonetheless “possessed or harboured” Matt and Scooter in a way that transmogrified them into “owners” of the dogs for purposes of liability under the Dog Owners' Liability Act R.S.O. 1990, c. D. 16.

The circumstances are as follows.

Facts

Ross Taylor is a painter. At the time of the incident he was completing a job painting the exterior of the residence at 28 Shier Drive. He had a loose arrangement with his brother whereby he was allowed to stay at the Taylor-Mills residence, with the dogs, when he was working in the Scarborough area. He had done so on approximately a dozen occasions in the previous three years.

On the week-end of August 9 - 11, 1991 Ross and the dogs stayed at 32 Shier Drive again. Bradley Taylor and Sandra Mills were unaware they, had guests, however, as they were spending the week-end at their cottage in Goderich, Ontario.

According to Ms. Purcell, she took her own dog for a walk on the occasion in question. She had walked “around the horseshoe” and had crossed in front of 29 Shier when her dog jumped up into her arms and she saw two black dogs running directly across the street. The two dogs circled around her, and one of them jumped up, grabbed onto her right arm and proceeded to pull on her arm. It wouldn't let go. As a result she alleges that she has sustained injuries to her arm and muscles, suffered nervous shock and emotional, and experienced a loss of enjoyment of life.

The Issues and Law

The Plaintiffs case against the Defendants, as pleaded, rests on two grounds, namely:

- a) liability under the Dog Owners' Liability Act; and,
- b) negligence and breach of duty.

On the Motion, argument focused on the issue of whether Bradley Taylor and Sandra Mills could be liable under the Dog Owners' Liability Act as “owners” of the dogs, within the meaning of that Act. Mr. Cumine submitted, on their behalf, that they could not. Mr. McConnell, on behalf of Ms. Purcell, submitted that they could be liable under the legislation because the definition of “owner” under the Act includes someone who “possesses or harbours” a dog. On the facts, Mr. McConnell argued, the Taylor-Mills could

be said to have possessed or harboured the dogs, and therefore a triable issue exists and the matter must go to trial.

Section 2 of the Dog Owners' Liability Act imposes liability on the owner of a dog for damages resulting from a bite or attack by the animal, and stipulates that liability does not depend upon knowledge of any propensity of the dog or fault or negligence on the part of the owner. The Act thus overrides the old common law principles of scienter in these kinds of cases and puts to rest the widely held perception that "every dog is entitled to one bite". Moreover, negligence need not be established to create liability, although it may continue to do so as well. The Act imposes strict liability on the dog owner for damages cause by the dog as long as it is shown that he or she is the true owner of the dog and the particular dog has, in fact, bitten or attacked the person complaining: *Morsillo v. Migliano* (1985), 52 O.R. (2d) 319 (Ont. Dist. Ct.); *Hudyma v. Martin*, [1991] O.J. 1184 (Ont. Ct. of Justice (Gen. Div)). See also, *Kong v. Arnold et al.* (1987), 59 O.R. (2d) 299 (C.A.).

The issue is whether or not the Defendants are "owners" of Matt and Scooter within the meaning of the Act. Section 1 states as follows:

1. In this Act, "owner", when used in relation to a dog, includes a person who possesses or harbour's the dog . . .

I do not think it can be said that the Defendants were in possession of the dogs, and indeed Mr. McConnell did not seek to place much emphasis on such a contention. The Taylor-Mills were not at home when the incident occurred. They did not even know that Ross Taylor and the dogs were there, although I am satisfied that Ross had their tacit permission to be there. They were not in a position to exercise any control over the dogs or to assert any right to deal with the dogs. There are none of the normal indicia usually associated with the concept of "possession" at law.

Most of the argument centred on whether or not the Defendants had "harboured" the dogs.

The word "harbour", in its ordinary sense, means "to afford lodging to, to shelter, or to give refuge to". In another sense -- its dyslogistic sense -- it carries with it a clandestine element with an aura of secrecy or concealment: see *Black's Law Dictionary*, abridged 5th ed., at p. 365; *Osborne v. Clark*, [1919] 45 O.L.R. 594, at p. 605 (C.A.).

In my view the Legislature did not intend, by use of the word "harbours" to sweep homeowners such as the Taylor-Mills in circumstances such as these, into the net of dog "owners" under the boia Owners' Liability Act. The Defendants had no legal or possessory title to the dogs. They did not exercise any control over the dogs, or right to deal with them. They did not feed the dogs, train the dogs, walk the dogs or care for them in any way. See *Hudyma v. Martin*, *supra*.

Matt and Scooter were not “stray” dogs to which the Defendants could be said to have offered shelter or refuge. Were such the case it might be said that they had attracted the dogs to their premises and become the “keeper” of them in a way that should also attract the reciprocal liability for harm caused by them during that presence. At common law it was the “keeper” of the animal who was exposed to the scienter action, not necessarily the “owner”. Fleming, in *The Law of Torts* (5th ed), states at p. 348:

“Responsibility devolves not on the owner as such but on the ‘keeper’ i.e. whoever harbours and controls the animal, like a trainer who kept in his stables someone else’s horse that he knew to be accustomed to bite, or an occupier who took care of a vicious dog left on the premises by a previous tenant.” (Underlining added)

More is necessary to turn a home owner into a dog owner, in my opinion, than the mere presence of the wayward dog on the homeowner’s property with the tacit or express permission of the homeowner.

In *Rex v. Foran* (1932), 59 C.C.C. 268, the Court considered the meaning of the term “harbouring” in the context of the Customs Act, R.S.C. 1927, c. 42, and concluded as follows:

“The gravamen of the offence is ‘harbouring’. This is a word not defined by the Customs Act but there are decisions of Courts throughout the Dominion interpreting the word. The trend of these decisions is that ‘harbouring’ implies ownership, care, control, shelter, etc.” (Underlining added)

Thus, I conclude that there must be some degree of care or control of the dogs in question on the part of the person who it is said is “harbouring” the animals before that person can be said to have “harboured” them in a way that makes him or her an “owner” of the dogs for purposes of liability under the Dog Owners’ Liability Act.

The test on a motion for summary judgment, to adopt the words of Henry J. in *Pizza Pizza Ltd. v. Gillespie et al.* (1990), 75 O.R. (2d) 235, at p. 238,

“. . . is not whether the plaintiff cannot possibly succeed at trial; the test is whether the court reaches the conclusion that the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial; if so then the parties ‘should be spared the agony and expense of a long and expensive trial after some indeterminate wait’ (per Farley J. in *Avery*).”

See also *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545.

On the question of the liability of the Defendants under the Dog Owners’ Liability Act, I am satisfied that there is no genuine issue for trial. The facts are not in dispute. As a

matter of law, I conclude, the Defendants are not the “owners” of Matt and Scooter, and thus cannot be found liable as such pursuant to that legislation.

With respect to the other grounds of liability pleaded against the Defendants, namely negligence and breach of duty, I am not satisfied, however, that there is no genuine issue of fact which requires a trial for its resolution. Ross Taylor and the dogs were at the Defendant’s premises with their tacit permission, at least. Bradley Taylor deposes that his brother and the dogs would stay at the property “only on condition that the dogs remain enclosed in the backyard of the property”. There is evidence generated through the discovery process which suggests that there may have been earlier incidents regarding Matt and Scooter in the area. Thus, there may be matters of fact which have to be explored before liability on the question of negligence and breach of duty can be determined.

Mr. McConnell submits that I ought not to split these questions and that both should be left for trial if one is to go that route. The authority on which he relies, Mr. Justice Southey’s decision under the former Rule 63 in *M. Schmitt Painting Ltd. v. Marvo Construction Co. Ltd.* (1977), 16 O.R. (2d) 653, stands for the proposition that the Court should not give judgment for a portion of the claim pursuant to Rule 63 unless that portion is clearly severable. Here, the issue of liability under the Dog Owners’ Liability Act and the issue of liability for negligence or breach of duty are severable. In any event, Rule 20.01(3) makes it clear that a defendant may move for judgment dismissing “all or part of the claim in the statement of claim”.

Disposition

Accordingly, an order is granted dismissing the Plaintiffs claim against the Defendants Bradley Taylor and Sandra Mills in so far as it is based on the Dog Owners’ Liability Act. In other respects, the Motion is dismissed.

As the Defendants have had substantial success, they are entitled to their costs of the Motion in any event of the cause.

BLAIR J.

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Indexed as:
Purcell v. Taylor

Between
Purcell, and
Taylor & Mills

[1993] O.J. No. 1935
Action No. 808/92

Ontario Court of Justice (General Division)
Divisional Court
Toronto, Ontario
Hartt, Campbell and Dunnet JJ.

Heard: April 13, 1993.
Judgment: April 20, 1993.
(2 pp.)

Negligence — Dogs — Scierter — Dog Owners' Liability Act — Meaning of "harbours"

Appeal from judgment dismissing statutory claim under Dog Owners' Liability Act; and cross-appeal from order allowing claim for negligence and breach of duty.

HELD: Appeal allowed. The trial judge erred in too narrowly interpreting the word "harbours" in section 1 of the Act. Cross-appeal dismissed despite weakness of evidence of negligence. There was some doubt about it which should be resolved at trial.

STATUTES, REGULATIONS AND RULES CITED:

Dog Owners' Liability Act, R.S.O. 1990, c. D.16, s. 1. Ontario Rules of Civil Procedure, Rule 20.

No counsel mentioned.

The following judgment was delivered by

THE COURT (endorsement):—

The Appeal

¶ 1 The plaintiff appeals from the order dated December 1, 1992 dismissing the statutory claim under the Dog Owners' Liability Act and the defendants' appeal from the order allowing the claim to continue for negligence and breach of duty.

The Facts

¶ 2 The facts are set out succinctly in the decision of the learned motions judge. We would only add that the homeowner, when asked where the dogs stayed when they visited, said:

A. They were in the backyard, in the fully fenced backyard.

Q. In a cage, or dog house?

A. Well, there's - it's - it's almost like a cage. It's almost like a dog run. It's under - under our deck. There's a gate into the underneath part of the deck, and that's generally where they stay. It's a bit like a dog house.

Harbouring

¶ 3 There is little authority on the meaning of the expression "harbours" in s. 1 of The Dog Owners' Liability Act. The Act expands the natural meaning and common law understanding of the word "owner". Old cases on the meaning of "own" and "keep" are of little if any assistance. To harbour is to provide a lodging for, to shelter, to lodge. It is clear from s. 1 that one may harbour a dog without keeping it or possessing it in the pre-statutory sense.

¶ 4 This is not a case like *Hudyma v. Martin* [1991] O.J. 1184 (Dunnet, J.) where the absentee property owner leased his land to the dog owner years before the attack.

¶ 5 These homeowners controlled the premises and permitted the dogs to stay there. These dogs stayed on the premises at least a dozen times to the knowledge of the homeowner who provided facilities for them in the nature of a dog run or dog house.

¶ 6 That evidence is capable of sustaining the inference that the homeowner provided lodging for, sheltered, or lodged the dogs on a temporary basis. The statute does not require that a homeowner harbour the dogs permanently or control them directly.

¶ 7 The learned motions judge, by interpreting too narrowly the word “harbours”, erred in law in concluding that there was no genuine issue for trial under the The Dog Owners’ Liability Act.

¶ 8 The appeal is allowed against the dismissal of that claim.

Negligence and Breach of Duty

¶ 9 The evidence of negligence, at best, is weak.

¶ 10 Without attempting to determine the abstract scope of Rule 20, or the scope of a homeowner’s liability for damage done by an escaped dog, it may be that the learned motions judge adopted too lenient a test in permitting that claim to continue on the basis that “there may be matters of fact which have to be explored before liability on the question of negligence and breach of duty can be determined.”

¶ 11 On a full examination of the evidence of the dogs’ behaviour and the proposed evidence of the letter carrier, however, we are not satisfied that it would be wrong to permit this part of the claim to continue.

¶ 12 Because the main portion of the claim is to continue and because there is some doubt about the fate of the non-statutory part of the claim, which would not add significantly to the length of the trial, it is best that the entire matter to be decided at the trial.

¶ 13 The appeal is dismissed from the order allowing the claim to continue for negligence.

Costs

¶ 14 The purpose of the summary judgment rule is to decrease, not to increase, the cost of litigation. It is regrettable that this matter should proceed so far without a resolution on the merits, because the cost to the parties may now exceed the value of the potential claim.

¶ 15 The plaintiffs shall have their solicitor-client costs before the learned motions judge pursuant to rule 20.06, payable forthwith. The plaintiffs shall have their costs in this court fixed at \$2500.00.

HARTT J.A.
CAMPBELL J.A.
DUNNET J.A.

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**** Unedited ****

Indexed as:
Purcell v. Taylor

Between
Lela Purcell, plaintiff, and
Bradley James Taylor and Sandra Irene Mills and Ross Thomas
Taylor, defendants

[1994] O.J. No. 2845
Court File No. 92-CQ-16622

Ontario Court of Justice - General Division
Toronto, Ontario
Borins J.

Heard: October 18 and 19, 1994.
Judgment: December 13, 1994.
(28 pp.)

Torts — Negligence — Animals — Liability, for harbouring dogs — Harbouring, what constitutes.

Action for damages for personal injury. The plaintiff was attacked by two dogs owned by the defendant, RT. Although she was not injured, she was sprayed with the skunk that emanated from the dogs. The other defendants, Mr and Mrs BC, were the plaintiff's neighbours and the owners of the residence in which RT, accompanied by his two dogs, was a guest on the day in question. RT was noted in default. The plaintiffs claim against Mr and Mrs BC was brought under the Dog Owners' Liability Act and at common law. She alleged Mr and Mrs BC were negligent in permitting the dogs to be in their home, knowing that they were dangerous and prone to attack other dogs and human beings. The issue to be decided was whether Mr and Mrs BC were liable to compensate the plaintiff on the ground that they had "harboured" RT's dogs within the meaning of section 1 of the Act.

HELD: Action dismissed. Judgment entered against the defendant RT in the amount of \$2,500. The Act did not apply where a guest was allowed to bring his or her dog into the home of the host. Before an individual could be found to be "harbouring" a dog within the

meaning of section 1, and to be jointly and severally liable with the dog's actual owner under section 2(2), certain conditions must prevail. To "harbour" a dog within the meaning of section 1 required more than the simple act of allowing it to be in one's home or on one's property together with its owner as the present defendants did. This did not make them "harbourers" of the dogs within the meaning of section 1 of the Act.

Statutes, Regulations and Rules Cited:

Dog Owners' Liability Act, R.S.O. 1990, c. 0.16, ss. 1, 2(1), 2(2), 2(3), 2(4).
Ontario Rules of Civil Procedure, Rule 57.01(1)(g), 57.05(1), 57.05(3).

Greg McConnell, for the plaintiff.
Robin B. Cumine, Q.C., for the defendants Bradley James Taylor and Ross
Thomas Taylor.

BORINS J. —

Introduction

¶ 1 This is an action for damages sustained by the plaintiff on Sunday, August 11, 1991 as the result of an attack on her by two dogs owned by the defendant Ross Thomas Taylor ("Ross"). The other defendants, Bradley James Taylor and Sandra Irene Mills ("the Taylors"), who are married to each other, were the owners of the residence in which Ross, accompanied by his two dogs, was a guest on August 11, 1991. Ross has been noted in default and did not participate in the trial. The plaintiffs claim against the Taylors is brought under the Dog Owners' Liability Act, R.S.O. 1990, c.0.16 and at common law, it being alleged that the Taylors were negligent, inter alia, in permitting Ross' dogs to be in their home knowing that they were dangerous and prone to attack other dogs and human beings.

¶ 2 The parties have agreed that the plaintiff's damages amount to \$2,500 plus pre-judgment interest at 5% per annum. She is entitled to a judgment for this amount against Ross. As I will explain, the plaintiff's injuries were not caused by any negligence on the part of the Taylors. The issue to be decided is whether the Taylors are nevertheless liable to compensate the plaintiff on the ground that they harboured Ross' dogs within the meaning of s. 1 of the Dog Owners' Liability Act. Another issue to be decided relates to the costs of this action, arising from the fact that the amount of the plaintiffs damages is within the jurisdiction of the Small Claims Court.

¶ 3 It is convenient at this time to reproduce the relevant provisions of the Act:

1. In this Act, “owner”, when used in relation to a dog, includes a person who possesses or harbours the dog and, where the owner is a minor, the person responsible for the custody of the minor.
- 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.
 - (2) Where there is more than one owner of a dog, they are jointly and severally liable under this section.
 - (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.
 - (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.

Facts

¶ 4 Because there is no issue concerning the amount of the plaintiffs damages, it is unnecessary to recount in detail the circumstances surrounding the attack on her by Ross’ dogs. The plaintiff and the Taylors were neighbours. They lived on the same residential street in Scarborough. On August II, 1991 shortly after midnight the plaintiff took her dog for its nightly walk. Two black labrador dogs owned by Ross approached the plaintiff from across the street “in a full run”. One of the dogs took the plaintiffs right forearm in its jaws and did not let it go for two or three minutes. This did not cause any wound to the plaintiff, nor did it cause any damage to the coat she was wearing. Understandably, the plaintiff was very frightened by this incident which came to an end when the dogs ran off, apparently in response to a whistle or a shout from Ross. As the plaintiff ran home she had the added misfortune of being sprayed by a skunk. The plaintiffs damages of \$2,500 include the cost of her coat which she had to destroy because she was unable to rid it of the odour of the skunk.

¶ 5 In the summer of 1991 the Taylors were the owners of the home in which they lived. Ross is Bradley Taylor’s brother and, at that time, lived in Pickering. Ross was a house painter and also did plumbing and electrical work. He had the Taylors’ permission to stay in their house overnight when he was working in the neighbourhood. For this purpose, he had a key to the house. The Taylors permitted Ross to bring his dogs with him. Ross was required to keep them in the backyard, which was surrounded by a six foot fence. The Taylors did not feed, walk, care for or supervise the dogs. They provided no facilities specifically for the dogs, such as a dog run or a shelter. It was Ross who carried out these responsibilities. It was Ross, and not the Taylors, who exercised control over the dogs. In

the opinion of the Taylors the dogs were not vicious, and were not known to bite or frighten people or to attack other animals. On Friday, August 9, 1991 the Taylors went to their cottage near Goderich. Ross and his dogs arrived after they left and spent the weekend in their home. He did so pursuant to the standing invitation which I have mentioned. However, they did not know that he and his dogs would be spending the weekend in their house. The Taylors were unaware of the incident concerning the plaintiff for several days after it occurred, when they were informed about it by a public health inspector.

¶ 6 On the evidence, there is no doubt that Ross, as the actual owner of the dogs which attacked the plaintiff, is liable to compensate the plaintiff for her injury under s. 2(1) of the Act. Whether the Taylors are jointly and severally liable to do so under s. 2(2) of the Act depends on whether they were harbouring Ross' dogs, within the meaning of s. 1, when they attacked the plaintiff, counsel for the plaintiff having conceded that they were not in possession of the dogs. It is necessary, therefore, to interpret the word "harbours" in s. 1, which extends the meaning of "owner" for the purposes of the Act.

¶ 7 When the word "harbour" is used below, it will be noticed that two spellings have been used. "Harbour" is the Canadian spelling and "habour" is the American spelling. Did the Taylors harbour Ross' dogs?

¶ 8 In interpreting the word "harbours" it is helpful to consider the purpose of the Act. The Act, which was enacted by R.S.O. 1980, c.65, was passed to confer absolute liability on the owner of a dog, as defined in s. 1, for damages resulting from a bite or attack by the dog on a person or a domestic animal: s. 2(1)(3). The statute dispenses with the common law requirement that the plaintiff must establish a previous mischievous or vicious propensity in the dog, the owner's knowledge or reason to know thereof, or that the injury was attributable to neglect on the part of the owner: *Wong v. Arnold* (1987), 59 O.R. (2d) 299 per Finlayson J.A. at 300 (C.A.). As well, at common law liability extends beyond the dog's owner to one who keeps, possesses or harbours it. See: Fleming, *the Law of Torts*, (The Law Book Co. Ltd., 8th ed., 1992) 360, 362; Ludington, Annotation, Who "Harbours" or "Keeps" Dog Under Animal Liability Statute, (1988), 64 A.L.R. 4th 963. The purpose behind the Act is that it makes the owner of the dog, as defined in s. 1, responsible for any damages which it causes by biting or attacking a person. It does not matter that the owner was careful with the dog, or did not know it might hurt somebody, or made efforts to prevent it from causing injury.

¶ 9 In enacting the legislation, Ontario was relatively late in providing a statute which imposes absolute liability on the owner of a dog for damages caused by it. For example, some of the Australian states introduced similar legislation almost thirty years ago: Fleming, *supra*, at 360. In the United States, statutes dealing with the liability of keepers or harbourers of dogs for injury or damage caused by them are among the oldest statutes enacted, extending back to the 18th century: Ludington, *supra*, at 969. Today, twenty-eight states and the District of Columbia have statutes which impose liability without fault on the

owner of a dog: Randolph, *Dog Law*, (Nola Press, 1st ed., 1988) 11/18. However, as I will explain, although strict liability has now been imposed on dog owners by statute, common law liability remains.

¶ 10 In my view, cases decided under the common law are helpful in the interpretation of “harbours” in s. 1 of the Act. This follows from the interpretive principle that statutory liability does not extinguish a corresponding common law liability, unless the contrary intention appears in the Act: Bennion, *Statutory Interpretation: A Code*, (Butterworths, 2nd ed., 1992) 51. Bennion explains this principle at 563:

Special protection for the common law. The early struggles of the common law to establish itself against the claims of the king led judges to attempt to shield it from statutory encroachment. These efforts produced the theory that an Act was presumed not to be intended to change the common law. Thus Coke said that ‘it is a maxim in the common law that a statute made in the affirmative without any negative expressed or implied doth not take away the common law’. Similarly it was said in an old case that statutes ‘are not presumed to make any alteration in the common law further or otherwise than the Act doth expressly declare’. Courts prefer to treat an Act as regulating rather than replacing a common law rule. Alteration of the common law is presumed not to be intended unless this is made clear.

See, also, *Morsillo v. Mialiano* (1985), 52 O.R. (2d) 319 at 328 (Dist. Ct.). As the Act does not expressly extinguish the corresponding common law liability, it follows that by imposing strict liability on a person who harbours a dog, it was not the intention of the legislature to change the meaning of “harbours” as developed at common law.

¶ 11 Before reviewing the authorities which have considered the meaning of harbouring a dog for the purpose of common law and statutory liability, there are two matters to be dealt with. First, there is no evidence upon which it can be found that the Taylors were negligent in permitting Ross’ dogs to be in their home on the weekend of August 9-11, 1991. Therefore, their liability depends on whether they were harbouring the dogs that weekend within the meaning of s. 1 of the Act.

¶ 12 The second matter relates to previous proceedings in this case. Pursuant to reasons for judgment released on December 1, 1992, on a motion by the Taylors for summary judgment R.A. Blair J. dismissed the plaintiff’s action against them in respect to her claim founded on the Dog Owners’ Liability Act. He was of the opinion, on facts similar to those outlined above, that the Taylors were not the owners of the dogs within the meaning of s. 1 of the Act. The following portions of his reasons deal with this issue:

The word “harbour”, in its ordinary sense, means “to afford lodging to, to shelter, or to give refuge to”. In another sense -- its dyslogistic sense -- it carries with it a clandestine element with an aura of secrecy or concealment: see

Black's Law Dictionary, abridged 5th ed., at p. 365; *Osborne v. Clark*, [1919] 45 O.L.R. 594, at p. 605 (C.A.).

In my view the Legislature did not intend, by use of the word "harbours" to sweep homeowners such as the Taylor-Mills, in circumstances such as these, into the net of dog owners" under the Dog Owners' Liability Act. The Defendants had no legal or possessory title to the dogs. They did not exercise any control over the dogs, or right to deal with them. They did not feed the dogs, train the dogs, walk the dogs or care for them in any way. See *Hudyma v. Martin*, *supra*.

Thus, I conclude that there must be some degree of care or control of the dogs in question on the part of the person who it is said is "harbouring" the animals before that person can be said to have "harboured" them in a way that makes him or her an "owner" of the dogs for purposes of liability under the Dog Owners' Liability Act.

¶ 13 The plaintiff was successful on an appeal to the Divisional Court from the order of Blair J.: *Purcell v. Taylor*, [1993] O.J. No. 1935. In its endorsement the Divisional Court provided these reasons for allowing the appeal:

There is little authority on the meaning of the expression "harbours" in s. 1 of The Dog Owners' Liability Act. The Act expands the natural meaning and common law understanding of the word "owner". Old cases on the meaning of "own" and "keep" are of little if any assistance. To harbour is to provide a lodging for, to shelter, to lodge. It is clear from s. 1 that one may harbour a dog without keeping it or possessing it in the pre-statutory sense.

This is not a case like *Hudyma v. Martin* [1991] O.J. 1184 (Dunnet, J.) where the absentee property owner leased his land to the dog owner years before the attack.

These homeowners controlled the premises and permitted the dogs to stay there. These dogs stayed on the premises at least a dozen times to the knowledge of the homeowner who provided facilities for them in the nature of a dog run or dog house.

That evidence is capable of sustaining the inference that the homeowner provided lodging for, sheltered, or lodged the dogs on a temporary basis. The statute does not require that a homeowner harbour the dogs permanently or control them directly.

The learned motions judge, by interpreting too narrowly the word "harbours", erred in law in concluding that there was no genuine issue for trial under The Dog Owners' Liability Act.

¶ 14 As if to prophesy the future course of this case, the Divisional Court concluded:

The purpose of the summary judgment rule is to decrease, not to increase, the cost of litigation. It is regrettable that this matter should proceed so far without a resolution on the merits, because the cost to the parties may now exceed the value of the potential claim.

The plaintiffs [sic] shall have their solicitor-client costs before the learned motions judge pursuant to rule 20.06, payable forthwith. The plaintiffs [sic] shall have their costs in this court fixed at \$2500.00.

¶ 15 In interpreting the verb “harbours” in s. 1 of the Act, the place to begin is the dictionary. In the Shorter Oxford English Dictionary, (Oxford University Press, 3rd ed., 1973) Vol. I, 925 “harbour” is defined, in its non-dyslogistic sense, as follows:

To provide a lodging for; to shelter; to lodge, entertain.

¶ 16 The only case which appears to have considered the meaning of “harbours” in s. 1 of the Act is *Hudyma v. Martin*, [1991] O.J. 1184. In this case the defendant Martin, had leased property from the defendant Scott, who permitted Martin to breed Mastiff dogs on it. One of Martin’s Mastiffs injured the plaintiff who sought to recover damages from the landlord, Scott, on the ground that he had harboured the dog. In dismissing the plaintiffs claim against the landlord, *Dunnett J.* held:

They maintain that Scott “harboured” the Mastiff because he provided shelter to the dog by allowing Martin to keep the animal on his property. The evidence is clear that there was no written agreement prohibiting tenants from keeping dogs on Scott’s property. Scott did not feed, walk, train or care for the Mastiff in any way. I conclude that he had no possessory right or title to the dog. Martin and Symmers were the true owners. Scott was not. Under the Act, a dog owner is strictly liable for damages caused by his dog as long as **it** is shown that he is the true owner of the dog and that the particular dog had, in fact, bitten or attacked the person complaining: *Morsillo v. Mialiano* (1985), 52 O.R. (2d) 319 (Ont. Dist. Ct.). I find that Scott is, therefore, not an owner as defined in the statute. [Emphasis added.]

¶ 17 The American cases which I will review are, of course, not binding on this court. However, I find them helpful and persuasive because they represent an extensive body of jurisprudence on the meaning of harbouring a dog within the context of the common law and what are known as “dog bite” statutes.

¶ 18 A case in which the meaning of harbouring a dog was considered in a common law action arising from a dog bite is *Hunt v. Hazen* (1953), 254 P. 2d 210 (Sup. Ct. Oregon). The issue was whether the defendant was the keeper or harbourer of the dog which bit the plaintiff. In addressing this issue, *Perry J.* said at 212-213:

A “keeper” is defined as “a person who keeps; one who watches, guards,” etc.; “one having custody.” Webster’s New International Dictionary, 2d ed.

“‘Harbouring’ means protecting, and one who treats a dog as living at his house, and undertakes to control his actions, is the owner or habourer thereof, as affecting liability for injuries caused by it. Wood v. Campbell, 132 N.W. 785, 28 S.D. i9i; McClain v. Lewiston Interstate Fair & Racing Ass’n, 17 Idaho 63, 104 P. 1015, 1017, 1026, 25 L.R.A., N.S. 691, 20 Ann. Cas. 60 quoting and adopting definition in 2 Cyc. p. 379.” 19 Words and Phrases, p. 65.

Keeping and habouring both necessarily imply an intent to exercise control over the animal and to provide food and shelter of at least a semi-permanent nature. To hold otherwise would make a person liable for injuries caused by animals attracted to their premises, through no overt act on the part of the householder; likewise a meal of mercy to a stray dog might lead to liability. [Emphasis in original.]

¶ 19 Mr. Ludington’s Annotation, *supra*, provides a useful collection and analysis of United States federal and state cases discussing who “keeps” or “harbours” a dog within the meaning of legislation imposing liability for an injury caused by a dog on the person who owns, keeps, or harbours it. Generally speaking, the legislation considered by the cases reviewed in the Annotation, like the Minnesota statute in *Verrett v. Silver* (1976), 244 N.W. 2d 147 (Sup. Ct. of Minnesota), provides that “[t]he term ‘owner’ includes any person harbouring or keeping a dog”. In Ontario, s. 1 of the Dog Owners’ Liability Act provides that “‘owner’ . . . includes a person who possesses or harbours the dog”. The general conclusion which Mr. Ludington reached on the basis of his analysis of the cases is found at 969:

Keeping has a proprietary aspect. Reference is sometimes made to the keeper’s “dominion” over the dog. Keeping is often defined in terms of the three Cs - that is, that keeping is exercising some measure of care, custody, or control over a dog.

Habouring seems to lack the proprietary aspect of keeping. It is usually defined as sheltering or giving refuge to a dog.

This analysis was referred to with approval by the Court of Appeal of Wisconsin in *Pattermann v. Pattermann* (1992), 496 N.W. 2d 613 at 615n.

¶ 20 Mr. Ludington found that the “keeper-harboured” dog cases fall into seven general categories. The facts of this case come closest to the categories Mr. Ludington refers to as the “guest-host” cases and the “landlord-tenant” cases.

¶ 21 Typical of the “guest-host” cases is the *Verrett* case, *supra*. In this case the defendant permitted a friend and her dog to stay in his house while the friend’s house was being

redecorated. The dog was fed and cared for by the friend. After the dog had been in the home for about a week, the defendant left for a vacation and returned home the day after the plaintiff had been bitten by the dog. The plaintiff sought to recover damages from the defendant on the ground that the defendant was harbouring or keeping the dog within the meaning of the Minnesota statute referred to above. A jury returned a verdict for the defendant. In dismissing the plaintiffs appeal, Yetka J. stated at 149:

The jury was instructed on the issue of whether defendant was harbouring or keeping a dog as follows:

Now, let us talk about the word owner. You must determine whether or not the Defendant Silver was the owner of the dog that bit Jason. It is the finding by the Court that the Defendant Silver was not the actual owner of the dog. However, it is not necessary that the plaintiff prove that the Defendant Silver was the registered or actual owner since the statute defines an owner as including any person who either harbours or keeps a dog. Harbouring or keeping a dog means something more than a meal of mercy to a stray dog or the casual presence of a dog on someone's premises. Harbouring means to afford lodging, to shelter or to give refuge to a dog. Keeping a dog, as used in the statute before us, implies more than the mere harbouring of the dog for a limited purpose or time. One becomes the keeper of a dog only when he either with or without the owner's permission undertakes to manage, control or care for it as dog owners in general are accustomed to do. Thus in order to find for the plaintiff you must find that the defendant was the owner of the dog as the term is used under the statute either as a harbourer, as a keeper, as I have just defined.

This instruction properly states the law concerning the liability of one who harbours or keeps a dog as declared by courts of other states. *Hunt v. Hazen*, 197 Or. 637, 254 P. 2d 210 (1953); *Elender v. White*, 14 So. 2d 280 (La. App. 1943); *Hagenau v. Millard*, 182 Wis. 544, 195 N.W. 718 (1923).

¶ 22 Mr. Ludington summarizes the result of the "landlord-tenant" cases in which an absentee landlord permitted a tenant to keep the guilty dog in or on the leased premises at 995:

In the following cases, absentee landlords were held not to be the keepers or harbourers of their tenants' dogs, within the meaning of a statute imposing liability on dog keepers or harbourers for damage done by their dogs, even though the landlords permitted the tenants to keep dogs on the premises and even though the landlords had the power to make rules governing the keeping of dogs on the premises.

¶ 23 *Gilbert v. Christiansen* (1978), 259 N.W. 2d 896 (Sup. Ct. of Minnesota) is an example of a case in which it was found that a landlord was not a harbourer under the Minnesota

statute referred to above where a tenant's dog bit the plaintiff. The tenant kept the dog in his apartment with the landlord's permission and paid an increased rental of \$10 a month to do so. In dismissing the plaintiffs appeal from a directed verdict in favour of the landlord, at 897, Kelly J. quoted the jury instructions set out above in the Verrett case, *supra*, and then referred to the following passage from Restatement, Torts 2d, s. 514, comment a:

[T]he possession of the land on which the animal is kept, even when coupled with permission given to a third person to keep it, is not enough to make the possessor of the land liable as a harbourer of the animal.

¶ 24 In *Woiciechowski v. Harer* (1993), 496 N.W. 2d 844, the Court of Appeals of Minnesota applied the Verrett case, *supra*, and the Gilbert case, *supra*, in upholding a summary judgment dismissing an action against a landlord, where a tenant's dog had attacked the plaintiff, on the ground that the landlord was not harbouring the tenant's dog. In his opinion, written on behalf of the court, Amundson J. at 846 stressed the fact that the landlord "never undertook any effort to control or manage the dog".

¶ 25 *Steinberg v. Petta* (1986), 501 N.E. 2d 1263 (Sup. Ct. of Illinois) is another example of a case in which the court emphasized the need for there to be some measure of care, custody or control over a dog before a person can be found to harbour it within the meaning of an Illinois statute which defined "owner" as a person "who keeps or harbours a dog". The dog which attacked the plaintiff, was owned by a tenant who leased the ground floor of a home owned by the defendant. The defendant, who lived elsewhere, did not know of the presence of the dog until after the plaintiff was injured. The plaintiff claimed against the defendant as the harbourer of the dog. After reviewing a number of authorities, Miller J. concluded at 1265:

Harbouring or keeping an animal therefore involves some measure of care, custody, or control, and it is in those senses that the terms "harbour" and "keep" have been construed under this and similar legislation.

At 1266 he added:

Whether the defendant kept or harboured the dog would usually be a question for the trier of fact (see *Thompson v. Dawson* (1985), 136 Ill. App. 3d 695, 699-700, 91111. Dec. 586 483 N. E. 2d 1072), but on the record before us we believe that the trial judge erred in denying the defendant's motions for a directed verdict and for judgment notwithstanding the verdict. The evidence presented at trial established nothing more than that the defendant, acting through his agent, permitted the tenants to keep a dog on the premises, which included the area of the backyard. We believe that the Act contemplates some degree of care, custody, or control on the part of a harbourer or keeper, and that was not shown here.

. . . The defendant was an absentee landlord, and he did not have the tenants' dog in his care, custody, or control; he simply allowed the tenants to have a pet on the premises, and by no fair inference can he be deemed to have harboured or kept the animal, as those terms are used in the Act.

To find the defendant liable under section 16 of the Act in these circumstances would, we believe, expand the scope of the statute beyond that intended by its drafters.

¶ 26 In *Buturla v. St. Onge* (1987), 519 A. 2d 1235 (App. Ct. of Connecticut) the defendant St. Onge kept a dog in his apartment with the consent of his landlord. The dog injured the plaintiff who sought to recover damages from the landlord under a Connecticut statute which imposed absolute liability on the owner or keeper of a dog. The statute defined "keeper" as "any person, other than the owner, harbouring or having in his possession any dog". In upholding a summary judgment dismissing the claim against the landlord, Hull J. stated at 1236-1237:

Words & Phrases and *Corpus Juris Secundum* define "habourer" somewhat differently. Both refer to the case of *Markwood v. McBroom*, 110 Wash. 208, 211, 188 P. 521(1920) and state that a habourer of a dog is one who treats a dog as living in his home and undertakes to control the dog's actions. 39A C.J.S. 354; 19 Words & Phrases (West 1970), p. 96; see also *McCarthy v. Daunis*, 117 Conn. 307, 309, 167 A. 918 (1933) (a case using almost identical language to that quoted above).

In *Hancock v. Finch*, *supra*, 126 Conn. at 123, 9 A. 2d 811, the court stated that "possession cannot be fairly construed as anything short . . . of dominion and control" (Emphasis added.) We find, as did the trial court, that in order to harbour or possess a dog, some degree of control over the dog must be exercised. The two cases cited by the trial court followed the same analysis. In *Bailey v. Desanti*, 36 Conn. Sup. 156, 414 A. 2d 1187 (1980), the court found that the defendant landlord had harboured the dog involved because the dog was kept in an area of the yard under the direct control of the landlord. Similarly, in *Larsen v. MacDonald*, 5 Conn. Sup. 150 (1937), the court used a "control of the dog" standard to find that the defendant employer was keeper of his employee's dog.

¶ 27 *Markwood v. McBroom* (1920), 188 P. 521 (Sup. Ct. of Washington), referred to in the opinion of Hull J., is a rather unusual case on its facts. The action was brought against the receiver of the Washington Motion Picture Corporation for damages for the death of a child caused by a dog owned by an employee of the company. After the defendant McBroom was appointed receiver of the company, the dog remained on the company's property, and was cared for, on behalf of its owner, by a watchman employed by the company. The receiver did not know that the dog was on the company's property or that it was being cared for by a company employee on behalf of its owner. As this was a common law action, it was

necessary that the plaintiff establish that the receiver was the owner, keeper or harbourer of the dog. In respect to this issue, Main J. stated at 522:

. . . That question then arises whether the receiver was the owner, keeper, or harbourer of the dog that bit the respondent's son. That he was not the owner or keeper is obvious. But the question whether there are facts which would sustain a finding that the receiver was the harbourer of the dogs requires further consideration.

In Words and Phrases, vol. 2, p. 820, harbouring is defined as follows:

"'Harbouring' means protecting, and one who treats a dog as living at his house, and undertakes to control his actions, is the owner or harbourer thereof, as affecting liability for injuries caused by it."

There are no facts or inference from facts to sustain a conclusion that the receiver was the harbourer of the dogs. They were not a part of the assets of the motion picture corporation. They did not come into the possession of the receiver, and he had no knowledge of their existence, or that they were being kept upon the ground, which was covered by the lease to the motion picture company. . . .

¶ 28 Finally, it is helpful to consider the English common law approach to the liability of a person who is not the actual owner of the animal. It is conveniently summarized by Fleming, *supra*, at 362:

Responsibility devolves not on the owner as such but on the "keeper", that is whoever harbours and controls the animal, like . . . an occupier who took care of a vicious dog left on the premises by a previous tenant. [*M'Kone v. Wood* (1831), 5 C. & P. 1; 172 E.R. 8503. But the mere fact that an occupier has tolerated an animal, which he neither possesses nor owns, to stay on his land is not sufficient. Thus a father was acquitted for injury by a dog owned and fed by his daughter of responsible age, [*North v. Wood*, [1914] 1 K.B. 6293 and a school when a pet dog kept by the caretaker mauled a charlady. [*Knott v. L.L.C.*, [1934] 1 K.B. 126].

¶ 29 In the *Knott* case, *supra*, at 140, Lord Wright, in discussing the basis for liability, said that "the real test of responsibility is not ownership but possession and control". At 141 he spoke of the true test of liability being "ownership or possession and control". In the same case Slessor L.J. rejected the submission of plaintiffs counsel that any person who keeps the dog on his premises or allows it to resort there may be liable, stating at 144: "There must be . . . something in the nature of the real keeping of a specific dog to make a person who is not the owner liable."

¶ 30 On the basis of the cases and authorities which I have reviewed, both at common law and under the “dog bite” statutes, the weight of authority supports the conclusion that liability for injuries caused by a dog rests with its owner or an individual who has put himself or herself in the position of the owner. This conclusion accords with the purpose of statutes such as the Dog Owners’ Liability Act. As stated earlier in my reasons, the purpose of the Act is to confer absolute liability on the owner of a dog for damages resulting from a bite or attack by the dog on a person or a domestic animal by dispensing with common law requirements for liability. It was not the intention of the legislature to expand the categories of those on whom the common law placed responsibility - the dog’s owner, or one who possesses, keeps or harbours it; the intention of the legislature was to impose absolute liability on such persons. In my view, it is clear from the American cases which I have reviewed, particularly the landlord and tenant cases, that a person does not harbour a dog, within the ordinary meaning of “harbour”, unless he or she exercises some degree of care or control over the dog. This follows, as well, from *Knott v. L.C.C.*, supra, and the other cases referred to by Fleming in the passage quoted above. None of the cases to which I have referred, it would seem, were considered by the Divisional Court when it set aside the summary judgment which the Taylors had obtained dismissing the plaintiffs action against them under s. 1 of the Act.

¶ 31 In my view, on the facts of this case the Taylors were in a situation similar to that of a host who permits a guest to bring along his or her dog while visiting or to that of an absentee landlord who permits a tenant to keep a dog in the leased premises. Although they did not know that Ross would stay in their home with his dogs while they were at their cottage for the weekend, they had given him permission to stay in the home with the dogs on previous occasions. However, on those occasions they never exercised any care or control over the dogs, nor did they provide any specific facilities for them. And they certainly did not do so on August 11, 1991 when they were away at their cottage and unaware that the dogs were in their home. It cannot be said, therefore, that the Taylors had put themselves in the position of an owner of the dogs at the time they attacked the plaintiff.

¶ 32 Ross was a guest of the Taylors. They permitted him to stay in their home, together with his dogs. In my view, the Act does not apply where a guest is allowed to bring his or her dog into the home of the host. Otherwise, permitting a guest to bring along his or her dog while visiting would lead to liability under the Act which was not intended to apply to the casual presence of a dog, accompanied by its owner, in someone’s home.

¶ 33 As the intent of s. 1 of the Act is to expand the definition of owner to include an individual who has put himself or herself in the position of the owner, before an individual can be found to be harbouring a dog within the meaning of s. 1, and to be jointly and severally liable with the dog’s actual owner under s. 2(2), certain conditions must prevail. The intention of the person who provides a home for a dog incidental to providing hospitality for the dog’s owner - i.e., shelter or lodging - must be to take care of it. Taking care of a dog requires, inter alia, feeding it and exercising it. All of this requires that a

measure of control be exercised over the dog. In addition to providing shelter for the dog, the individual must temporarily assume those responsibilities toward the dog which dog owners customarily assume. To harbour a dog within the meaning of s. 1 requires more than the simple act of allowing it to be in one's home or on one's property together with its owner as the Taylors did in this case. In my opinion, this did not make them harbourers of the dogs within the meaning of s. 1 of the Act.

¶ 34 Accordingly, the plaintiffs action against the Taylors must fail.

Costs

¶ 35 The plaintiff has obtained a judgment against Ross Taylor for \$2,500 plus pre-judgment interest at 5% per annum from January 31, 1993. (Ross was not added as defendant until January, 1993). The amount of the plaintiffs recovery is, therefore, within the monetary jurisdiction of the Small Claims Court. As the judgment is a default judgment, rule 57.05(1), of the Rules of Civil Procedure, which enables the court to deprive a plaintiff of costs where the amount recovered is within the monetary jurisdiction of the Small Claims Court, does not apply. Under rule 57.05(3), which applies to default judgments, the plaintiffs costs "shall be assessed in accordance with" the tariff of the Small Claims Court.

¶ 36 As the plaintiff has not succeeded in her claim against the Taylors, I see no reason why the usual rule should not apply and why costs should not follow the event. Accordingly, the Taylors are awarded their costs of this action. I believe that it is appropriate that I fix the amount of costs, rather than direct that they be assessed. The same can be said in respect to the costs payable by Ross Taylor. It is obvious from its history that this litigation got out of hand a long time ago. This was recognized by the Divisional Court when it allowed an appeal from the summary judgment granted by Blair J. Anything which I can do to bring it to an end as expeditiously and inexpensively as possible will be an act of mercy to all concerned with the case.

¶ 37 This was a trial which lasted for a day and a half. What did the trial achieve? The plaintiff obtained a default judgment against Ross Taylor for \$2,500 and her action against the Taylors was dismissed. She did not need a trial to achieve this. She could have moved for default judgment after Ross was noted in default. If she had been successful in collecting the judgment this trial would have been unnecessary. Counsel for the plaintiff claimed that the Taylors were brought to court because they would not accept her offer to settle her claim for \$3,500 and because they refused to respond to her request to admit that Ross Taylor owned the dogs which attacked her. Counsel for the Taylors conceded that they should have admitted that Ross owned the dogs, but submitted that the plaintiff should have obtained a default judgment against Ross and tried to collect it before taking the Taylors to trial. However, he pointed out their rejection of the plaintiffs offer to settle was not unreasonable, given the result of the trial. In my view, when counsel for the plaintiff realized that her damages were very modest - which should have been obvious when the plaintiff made her

offer to settle - he should have transferred the case to the Small Claims Court when the offer was not accepted. As well, rule 51.04 and rule 57.0 1(l)(g) state that in exercising its discretion respecting costs the court may take into account the refusal of a party to admit the truth of a fact. As the result of the trial suggests, the Taylors did not act unreasonably in rejecting the plaintiffs offer to settle. Had they admitted that Ross Taylor owned the dogs, although this would not have eliminated the need for a trial, it would have resulted in a shorter trial. Taking all of these factors into consideration, I fix the Taylors' costs at \$2,000.

¶ 38 In the result, the plaintiff will have judgment against Ross Taylor for \$2,500 plus pre-judgment interest at 5% per annum from January 31, 1993 to this date and costs fixed at \$500, inclusive of disbursements, plus G.S.T. The plaintiffs claim against the Taylors is dismissed with costs fixed at \$2,000, inclusive of disbursements, plus G.S.T.

BORINS J.

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**** Unedited ****

Indexed as:
Purcell v. Taylor

Between
Lela Purcell, plaintiff (appellant), and
Bradley James Taylor and Sandra Irene Mills and Ross Thomas
Taylor, defendants (respondents)

[1996] O.J. No. 4655
Court File No. 16/95

Ontario Court of Justice (General Division)
Divisional Court
Steele, Boland and Saunders JJ.

December 16, 1996.
(2 pp.)

Practice — Appeals — Duty of appellate court regarding findings of fact by a trial judge — Dismissal of appeals.

Appeal by the plaintiff from trial judgment.

HELD: Appeal dismissed. The trial judge directed his mind to the term “harbouring” and concluded that there must be some degree of care and control. He applied that principle properly to the facts of this case.

Counsel:

Greg McConnell, for the appellant, Lela Purcell.
Robins B. Cumine, Q.C., for the respondents in appeal, Bradley James Taylor and Sandra Irene Mills.

The judgment of the Court was delivered by

¶ 1 **STEELE J.** (endorsement):— This appeal is dismissed. The trial judge directed his mind to the term “harbouring” and concluded that there must be some degree of care and control. We see no papable or overriding error in his application of that principle to the facts of this case.

¶ 2 On consent the reasons for decision of this Court dated April 20/93 is hereby amended by adding to the end of the first sentence in the last paragraph there of the words “to be assessed”.

¶ 3 Costs of the appeal payable to the respondents fixed at \$2500.00.

STEELE J.

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Case Name:

**Graham (Litigation Guardian of) v. 640847 Ontario Ltd.
(c.o.b. Roycroft Motel)**

Between

Donald Graham, a minor, by his Litigation Guardian
Kimberly Graham and Kimberly Graham, plaintiffs, and
640847 Ontario Ltd., carrying on business as Roycroft
Motel, and Shanmugajarah Annamalai, defendants

[2005] O.J. No. 3685
Court File No. 99-BN-2668

**Ontario Superior Court of Justice
J.R. Belleghem J.**

Heard: June 22, 2005.
Judgment: June 30, 2005.
(14 paras.)

Tort law — Occupiers' liability Duty of occupier — Legislation Motion by defendant motel for summary judgment — Motel allowed guest's sister to bring dog onto premises, despite no dogs allowed policy No evidence to suggest dog had bitten anyone before, that it was likely to bite anyone, or that for any other reason it was unreasonable to permit its presence on the premises — By thus permitting the dog to remain on the property, the motel did not become an owner of the dog within meaning of s. 1 of Dog Owner's Liability Act — Neither was it liable under Occupiers Liability Act for failing to maintain premises in reasonably safe state for visitors — No genuine issue for trial and action dismissed.

Civil procedure Judgments and orders — Summary judgments — To dismiss action — Whether genuine issue for trial — Motion by defendant motel for summary judgment — Motel allowed guest's sister to bring dog onto premises, despite no dogs allowed policy — No evidence to suggest dog had bitten anyone before, that it was likely to bite anyone, or that for any other reason it was unreasonable to permit its presence on the premises — By thus permitting the dog to remain on the property, the motel did not become an owner of the dog within meaning of s. 1 of Dog Owner's Liability Act — Neither was it liable under Occupiers Liability Act for failing to maintain premises in reasonably safe state for visitors — No genuine issue for trial and action dismissed.

Statutes, Regulations and Rules Cited:

Dog Owner's Liability Act, s. 1, s. 2

Occupiers Liability Act

Ontario Rules of Civil Procedure, Rule 20.04(4)

Counsel:

Andrew J. Mantella, for the plaintiffs

Barry Cox, for the defendants

REASONS FOR JUDGMENT

J.R. BELLEGHEM J.

The Application

¶ 1 The defendants move for judgment under Rule 20.04(4) dismissing the plaintiffs' action.

Background

¶ 2 On December 26, 1998, the infant plaintiff, while a guest at the defendant motel, suffered serious injuries, when he was bitten by a dog, on the motel premises. The dog belonged to, and had been brought onto the premises by, the infant minor's aunt, one Wendy Dawson. Ms. Dawson has not been sued because she cannot be located and, in any event, is judgment proof. Ms. Dawson was not a registered guest at the hotel and was merely visiting her sister and her sister's child, the minor plaintiff, when the incident occurred.

¶ 3 While the motel owner had asked Ms. Dawson to remove her dog from the property, it, nevertheless, permitted the dog to remain on the property, and made no further active steps to remove the dog, apart from the request being made to its owner, Ms. Dawson, the infant minor's aunt.

Analysis

¶ 4 The Dog Owner's Liability Act makes an "owner of a dog . . . liable for damages resulting from a bite or attack by the dog on another person . . ." The damages in this case resulted from a "bite or attack by the dog on another person", and the owner is therefore "liable" under s. 2 of the Dog Owner's Liability Act. In other words, Ms. Dawson, as "owner" indisputably, is liable.

¶ 5 Section 1 of the Act, however, defines "owner" as including ". . . a person who possesses or harbours the dog . . .". The plaintiff initially argues that by "permitting" the dog to remain on the property that the motel owner became an "owner" of the dog within the meaning of s. 1 of the Act.

¶ 6 I disagree.

¶ 7 In *Purcell v. Taylor*, [1994] O.J. No. 2845, December 13, 1994, Ont. C.J. (Gen. Div.), Borins J., after reviewing a number of authorities, concluded that ". . . a person does not harbour, within the ordinary meaning of 'harbour', unless he or she exercises some degree of care or control over the dog." In that case, the owner had been permitted to stay on the defendants' property with his dogs. Borins J. held that the mere fact that the owner and his dogs were given shelter or lodging did not make the property owner the "dog owner". To be an owner, there must be an intention "to take care of it" (the dog).

¶ 8 Borins J. added,

Taking care of a dog requires, inter alia, feeding it and exercising it. All of this requires that a measure of control be exercised over the dog. In addition to providing shelter for the dog, the individual must temporarily assume those responsibilities toward the dog which dog owners customarily assume. To harbour a dog within the meaning of s. 1 requires more than the simple act of allowing it to be in one's home or on one's property together with its owner . . .

¶ 9 I apply the ratio in the *Purcell* case to the facts in the case before me. At best, the motel owner "permitted" Ms. Dawson to have her dog on the motel property. In accordance with the reasoning of the *Purcell* case, which I adopt and apply, that did not make the motel owners the "owner" of Ms. Dawson's dog. There is no evidence suggested by either side that the owner of the motel had any intention or interest in "possessing" or "harbouring" the dog.

¶ 10 The plaintiff argues, in the alternative, that "permitting" the dog to remain on the premises was a violation under the Occupiers Liability Act which requires the occupier to make the premises reasonably safe for visitors. The Dog Owners Liability Act makes the "owner" absolutely liable. As the motel owner is not the "owner" of the dog, it is not absolutely liable, and if there is any liability on the motel owner, it must be found within the

terms of the Occupiers Liability Act. The issue, therefore, becomes whether by violating its own policy “no dogs allowed on the premises”, it could reasonably foresee that Ms. Dawson’s dog would cause harm to visitors.

¶ 11 This raises the doctrine of “Scienter”. There is no evidence to suggest that the motel owner knew that the dog had bitten anyone before, nor that it had a vicious propensity. There is, therefore, no evidence that the motel owner was creating an unsafe condition by “permitting” the dog to remain on the premises, in violation of its own “no dogs allowed” policy.

¶ 12 It is argued that there is a triable issue of whether the motel owner knew or could reasonably foresee that the dog’s presence on its premises constituted a danger to visitors. However, the plaintiff is obliged to put its “best foot forward” on the summary judgment motion. I am to assume that the evidence in the plaintiffs affidavit is the best evidence it can produce at trial. The obligation on the court on a summary motion application is to weed out cases for which there is no “genuine issue for trial”.

¶ 13 In the present case, there is simply no evidence tendered to suggest that the dog had bitten anyone before. There is no evidence that the motel owner knew that the dog had bitten someone before. There is no evidence that the dog was of a temperament that it was likely to bite someone, or that for any other reason it was “unreasonable” to permit Ms. Dawson to have her dog on the motel premises while she was visiting her sister and her sister’s son, the minor infant plaintiff.

¶ 14 That being the case, I am satisfied that there is simply no genuine issue for trial, and that judgment should issue dismissing the action, with costs fixed at \$3,500 “if demanded”. I order accordingly.

J.R. BELLEGHEM J.