CITATION: Tran v. 1109221 Ontario Limited, 2012 ONSC 1241
COURT FILE NO.: 05-CV-302674 PD3
DATE: 20120221

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :	)	
	)	
KHAI CHUON TRAN, BERNARD CHAN, BERNIE CHAN and JANE MENG	)	*Stacey Stephens* for the Plaintiffs
	)	
Plaintiffs	)	
	)	
– and –	)	
	)	
1109221 ONTARIO LIMITED carrying on business as NEW HO KING RESTAURANT, HAK FUNG WONG, LINDA HOK YUNG WONG, PETER HOK SHING WONG and TONY HOK LEUNG WONG	)	*Christine Fotopoulos* and *Scott Jones* for the Defendant 1109221 Ontario Limited
	)	
Defendants	)	**HEARD:** January 23, 2012

KRUZICK J.:

[1] This is the defendant's summary judgment motion to dismiss the plaintiffs' action.

BACKGROUND

[2] On Sunday January 4, 2004, between 2:30 and 3:30 am the plaintiffs Bernard Chan and Khai Chuon Tran were patrons at the New Ho King Restaurant. An altercation broke out between two groups of male patrons. During the course of the fight a gun was fired into the crowd. Both Tran and Chan were shot.

[3] Both men sustained personal injuries. They bring this action against 1109221 Ontario Ltd. carrying on business as New Ho King Restaurant. The action against the other defendants was discontinued.

[4] New Ho King is a restaurant in downtown Toronto. It is open 7 days a week with regular hours of operation from 11:30 am to 4:00 am (Sunday to Thursday) and 5:00 am (Fridays and Saturdays).

[5] At the time of the incident the restaurant did not have security or cameras in place to monitor the entrance or the interior of the establishment.

[6] The restaurant is licensed to sell alcohol until 2:00 am. Thereafter all alcohol must be removed by 2:45 am. The restaurant also provides take out services.

[7] The shooting was investigated by Toronto Police Services. The gunman was never identified or apprehended by police.

[8] The plaintiffs bring this action against the restaurant seeking damages for their injuries.

ISSUES

[9] The issues as put before me are whether:

(a) the evidence as proposed by the plaintiffs, specifically the evidence of Paul Babich and Michael Fenton, should be struck as being inadmissible; and

(b) there is a genuine issue requiring trial.

ANALYSIS

(a) The Evidence

[10] The affidavit of Paul Babich was sworn for the purposes of this motion. He is an investigator hired by the plaintiffs. The defendant argued that his evidence was obtained 8 months following the incident. The defendant argued that the evidence is irrelevant and inadmissible because it portrays the defendant after the incident, to demonstrate subsequent negligent acts.

[11] Michael Fenton is tendered as an expert in the area of security. The defendant admits that Mr. Fenton may have expertise in certain security related areas but lacks the expertise to opine on restaurant security. It is also argued that his report lacks the information and analysis to justify his opinion.

[12] In reading the affidavit of Mr. Babich, sworn June 16, 2011, he sets out the particulars of the investigation he conducted for counsel. His investigation included obtaining a statement from Sandy Hum who was at the restaurant morning of the incident. The investigator also interviewed the police and made attempts to find other witnesses.

[13] While the affidavit contains information about a visit Mr. Babich made to the restaurant, after the incident, I find his investigative role may be relevant at trial given the nature of the claim. It is alleged that the restaurant functioned as an after-hours club and served liquor, after hours. The role of the investigator here was to conduct an investigation into how this establishment carries on business. On the balance of probabilities that the probative value of the evidence outweighs its potential prejudicial effect, I would allow the evidence of Mr. Babich for the purposes of the motion before me.

[14] The defendant challenges the affidavit and report of Paul Fenton. The defendant submits this is not an expert report and that Mr. Fenton is not qualified to opine on the issues in this law suit. I was referred to the principles set out in *R. v. Mohan*, [1994] 2 S.C.R. 9. The defendant challenges the report of Mr. Fenton alleging that it contains little information or analysis, and fails to comply as an expert report.

[15] Here the plaintiff tenders Mr. Fenton and therefore has the evidential and legal burden to satisfy the *Mohan* admissibility criteria on a balance of probabilities. At this stage and for the purposes of this motion, after reviewing the affidavit and attachments I am satisfied that each *Mohan* criterion has been satisfied.

[16] This is not the trial; however, the criteria for admissibility of expert opinion are the same:

(1) a properly qualified expert;

(2) relevance;

(3) necessity;

(4) reliability;

(5) prejudice/probative analysis; and

(6) the absence of an exclusionary rule.

I recognize that the criteria of necessity, reliability or the prejudice/probative test are often interrelated and overlapping. See: *R. v. K(A.)* (1999), 45 O.R. (3d) 641 (C.A.).

[17] For the purposes of this motion I also allow the evidence of Mr. Fenton.

[18] In my analysis the criteria as they relate to Mr. Fenton are as follows:

(1) I am satisfied that Mr. Fenton has expertise in security and security related topics. While the defendant argued that he had no expertise in restaurants, I am of the view his expertise does not have to be so narrow. From my review of Mr. Fenton's *curriculum vitae* he appears to have worked in all facets of the security industry ranging from commercial to residential security. This establishment functions as a commercial operation. Even though he may not have the specific experience with restaurants, given his wide commercial background, I am satisfied with Mr. Fenton's credentials to give evidence as to the security of New Ho King's function and operation.

(2) The issue of security is clearly relevant to the facts of this case and specifically to the claim that is being made and the defence that is being raised as to duty of care.

(3) The evidence of Mr. Fenton may be necessary to the issue at trial and is necessary to the issues on this motion as they relate to duty of care. With this evidence a fuller and more complete assessment of the standard may be achieved at trial. On this motion the evidence was helpful.

(4) While Mr. Fenton was not present the evening of the incident, the evidence to my mind meets the reliability criterion he was cross-examined by the defendant. I accept the fact that the investigation was conducted several months after the incident and that there may be aspects of the investigation that may not be permitted as evidence at trial. For trial purposes it may have limited or no value. However, for the purposes of this motion I am of the view that I need not go that

far. I do find that the evidence as tendered is reliable as to security and the general nature of the operation of the defendant establishment.

[19] Even if I struck the evidence of Mr. Babich and Mr. Fenton as being inadmissible, which I am not prepared to do, the evidence of the plaintiffs Tran, Chan and Sandy Hum, all of whom were there at the night of the incident, is sufficiently compelling for my analysis on the motion for summary judgment.

(b) Genuine Issue for Trial

[20] Pursuant to *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 the Court of Appeal has recently provided some further direction with respect to a motion for summary judgment under R.20.

[21] The Court of Appeal set out a "full appreciation" test. The motion judge may therefore grant summary judgment where the judge can fully appreciate the issues and evidence needed to make a dispositive judgment based on the motion record.

[22] A motion for summary judgment is intended to provide a means of resolving litigation expeditiously and that the amendments to R.20 broaden the power on a motion or summary judgment. It is argued by the defence that this action does not deserve a long and expensive trial and that the claim as made has no merit.

[23] In exercising my power to dismiss the action I must be satisfied that there is no factual or legal issue raised by the parties that requires a trial for its fair and just resolution. (*Combined Air, supra,* para. 37).

[24] The standard of care that New Ho King owed to the plaintiffs is pursuant to s.3(1) of the *Occupiers' Liability Act*, R.S.O. 1990, c.0.2, s.3(1):

> An occupier of premises owes a duty to take such care as in all the circumstances of case is reasonable to see that persons entering in the premises, and the property brought on premises by those persons are reasonably safe while on the premises.

[25] The defendant relies on the fact that the attack was spontaneous and unfolded rapidly and was not reasonably foreseeable. I was referred to a number of decisions to support the defendant's position, specifically: *Temple v. T. & C. Motor Hotel Ltd.*, [1998] A.J. No. 107 (Q.B.), *McKenna v. Greco* (No. 2) (1985), 52 O.R. (2d) 85, *Duncan v. Braaten*, [1980] B.C.J. No. 1715 (B.C.S.C.), *Ouellet v. Uranium City Hotel Ltd.*, [1979] S.J. No. 305, *Ortega v. 1005640 Ontario Inc.*, [2004] O.J. No. 2478 (C.A.).

[26] In this case, the defendant relies on *Ortega* for the principle that there was no duty of care here because nothing that the restaurant could have done would have prevented or made the injuries sustained less likely.

[27] The defendant argues that this is a restaurant. The plaintiff argues it is more than a restaurant in the traditional sense of an eating establishment, given its hours of operation and its service to an after-hours clientele.

[28] In the case of New Ho King the restaurant functions as a late night eatery (and perhaps more). While it has limited hours for liquor service the evidence of Mr. Hum supports that the restaurant serves alcohol after hours as "cold tea" (beer served in a tea pot).

[29] The evidence as put before me supports, that on the morning of this incident, the interior of the restaurant was almost full. There was a group of people standing for pick up take out orders. There were also patrons seated at tables. While the plaintiffs were in the establishment an altercation broke out and then the shooting occurred. The evidence supports that liquor was served after the permitted hours and that intoxicated patrons are permitted in the restaurant.

[30] The case before me is a case of mixed fact and law as to the function of "the restaurant", or how it operates and raises the legal issue what, if any, duty is owed to the clientele given its nature. In other words is the duty of care what the defendant says, merely that of a restaurant or is the duty of care an expanded one given the nature of this operation?

[31] The defendant argues that there is no duty of the restaurant or its staff to its patrons. If there is any duty, it is argued that duty was discharged.

[32] The plaintiffs argue that where the establishment is licensed to sell liquor and then operates after hours serving liquor after hours knowing the nature of its clientele (after hours party goers) there is an enhanced risk of harm and an expanded duty of care from that of a restaurant.

[33] The plaintiffs argue that based on the law and the facts of this case, a trial is necessary because the motions judge cannot fully appreciate the evidence on the issues in order to make dispositive findings.

[34] In the case before me it would appear that alcohol was served after hours. The premises in issue are small and on the day of the incident the establishment was crowded. There is only one entrance. The nature of the establishment and its hours of operation gives rise to a greater

likelihood of incidents among the patrons. While I agree that a restaurant does not owe a duty of care to protect its patrons from a random shooting, it is arguable that this establishment changes its role or function from a mere restaurant to a venue where there is greater risk to its patrons. In coming to my conclusions I bear in mind this court's decision in *Mellanby v. Chapple*, [1995] O.J. No. 1299 and *Mitchell v. Famous Players Inc.*, [2005] O.J. No. 4453.

[35] In *Mellanby*, causation was argued. Jarvis J. rejected the argument of causation. However, on the facts before me I am not satisfied that the defendant could not have done more than they did so as to have prevented the incident.

[36] As in *Mitchell*, I find that this case falls somewhere between the line of cases on the duty of care to which I was referred. The facts are that there was a crowd in a very small space. The clientele may have been drinking before they arrived at the establishment and may also have had the opportunity to be served alcohol there and after hours. I find, therefore, that the issue of liability is not as straightforward as the defendant argues, but is rather a more complex mix of fact and law and of which I cannot say I have full appreciation of this case. As stated by Belleghem J. in *Mitchell* at paragraph 24:

> The issue of liability in this case is a complex one of mixed fact and law. In order to articulate the nature of the duty owed by the occupier, one must "flesh out" the facts, in considerable detail, not only in the specific case at hand, but in any reasonable fact scenario faced by a proprietor in the position of Famous Players, in developing a "policy" to deal with situations which it can reasonably foresee, given the nature of its business.

CONCLUSION

[37] While the defendant put forward an excellent and well prepared argument I am not satisfied that there is "no triable issue". It is reasonably argued that given the nature of the defendant's operation, and its inadequate security and vigilance, that there was in the circumstances and an expanded duty of care to the plaintiffs here.

[38] The facts of the present case and particularly the changing nature of the establishment, from a restaurant to what has been described as something closer to a "late night bar" or even, as alleged, a "nightclub", leads me to find that the absence of reasonable security measures may give rise to liability.

[39] While I cannot say whether the plaintiffs will or will not succeed, I am satisfied that for the purposes of this motion the evidentiary burden has been met to dismiss the motion. I am satisfied that there is a triable issue so that the moving party has not convinced me that the matter should be dismissed. The triable issue here is the nature and duty or care owed by the defendant given the nature of its operation and whether the defendant has in fact met that duty.

[40] At trial the gate keeping function with respect to the evidence of Mr. Babich and Mr. Fenton remains for the trial judge to decide.

SUMMARY

[41] For the purposes of the motion I allow the evidence as put forward by the plaintiffs.

[42] The defendant has not convinced me there is "no triable issue", therefore the motion for summary judgment is dismissed.

[43] Counsel did not have the opportunity to argue costs. If they are not able to settle that issue they may make submissions in writing limited to two pages with their bills and costs outlines.

KRUZICK J.

RELEASED: FEB 2 1 2012

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Plaintiffs

– and –

1109221 ONTARIO LIMITED carrying on business as NEW HO KING RESTAURANT, HAK FUNG WONG, LINDA HOK YUNG WONG, PETER HOK SHING WONG and TONY HOK LEUNG WONG

Defendants

REASONS FOR JUDGMENT

KRUZICK J.

RELEASED: February 21, 2012