

LexisNexis® Agricultural Law *NetLetter*

A twice-monthly current awareness service reviewing recent cases on land use, marketing boards, environmental issues, creditor rights, animals, grain, import/export and other matters in an agricultural context.

Friday, December 7, 2018 - Issue 409

HIGHLIGHTS

- * A Justice of the Ontario Superior Court has concluded that the landlord of a residential property which was also used a farm, was liable when mules owned by the tenant escaped the property by pressing against an unlocked gate, and went onto a public highway where one of the mules was struck by a motorcyclist who sustained serious injuries. The Court found the landlord guilty of negligence by relying on the provisions in the Ontario Residential Tenancies Act and the Regulations thereunder which obligate landlords to maintain fences and to keep them structurally sound and free from hazard. The Court distinguished case law limiting a landlord's liability for tenants acts under commercial leases, to which the provisions of the Residential Tenancies Act did not apply. (Youssef v Redi-Mix Limited, [CALN/2018-030](#), [\[2018\] O.J. No. 5658](#), Ontario Superior Court of Justice)

NEW CASE LAW

Youssef v Redi-Mix Limited;

Ontario Superior Court of Justice,

Mulligan, J,

October 26, 2018.

[CALN/2018-030](#)

[\[2018\] O.J. No. 5658](#) | [2018 ONSC 6409](#)

Stray Animals — Liability of Landlords for the Negligence of Tenants Who Keep Livestock — Fencing Requirements under the Ontario Residential Tenancies Act.

Amir Youssef ("Youssef") sued Margaret Misselbrook and, 693316 Ontario Limited, carrying on business as Toronto Redi-Mix Limited ("Redi-Mix"), the Regional Municipality of Durham, and Mark Burnfield ("Burnfield") for damages as a result of serious physical injuries sustained by

Youssef when the motorcycle he was operating struck a mule owned by Burnfield on September 6, 2009 at 3:00 a.m. on a public highway.

Youssef lost control of his motorcycle after he struck the mule.

As a result of the injuries Youssef sustained, he was found to be incompetent and was represented in the litigation by a guardian at the Office of the Public Guardian and Trustee.

Redi-Mix applied for an Order for summary dismissal of Youssef's claim. Youssef made a cross-application at the hearing for summary judgment against Redi-Mix.

Redi-Mix had purchased a 100 acre rural residential property bordering Winchester Road in September of 2006. Redi-Mix leased the property to Burnfield on October 1, 2006. Redi-Mix was aware that Burnfield intended to keep livestock on the property.

The lease was a month-to-month lease.

When the property was purchased one of Redi-Mix's officers who had farming experience inspected the property. He walked the entire property and observed no defects in the fencing around the property. He considered the fencing and gates adequate for use of the property as a residence and farm.

Redi-Mix had no ongoing procedure to inspect either the fences or the gates on the property after the lease was signed.

After the accident a police officer inspected the fences. He found the fences to be in good condition, but found that he was able to pry open a gate on the property which was shut, but not locked, with the force of his hand.

Third parties had observed mules on the farm property prior to the accident.

On the night of the accident there were a number of mules outside of the property on the road. When the police officer opened the gate to the property, the mules walked back into the property.

The tenant, Burnfield, did not defend and had been noted in default.

Decision: Mulligan, J granted Youssef judgment against Redi-Mix on the issue of liability [at para. 46]. Mulligan, J considered the following issues:

1. Statutory duty under the Occupier's Liability Act.

Mulligan, J accepted the submission of counsel for both parties that there could not be liability based on occupiers liability under the Occupier's Liability Act, RSO 1990 c 0.2 because s. 3 of the Act only deals with an occupier's duty of care to persons entering property to ensure their safety while on the premises. The accident in this case occurred on Winchester Road, which was a public highway [at para. 31].

2. No strict liability.

Mulligan, J accepted the submissions of both counsel that the doctrine of strict liability did not apply, relying on the decision of the Supreme Court of Canada in *Fleming v Atkinson*, [1959 SCR 513](#) in which the Court rejected a strict liability approach and concluded that the ordinary rules of negligence apply to cases involving straying animals [at para. 32].

3. Nuisance.

Mulligan, J accepted the submission of both parties that the doctrine of nuisance did not apply to the landlord Redi-Mix, although it may apply to the tenant, Burnfield when his mules strayed

onto Winchester Road [at para. 34 and 35].

4. Negligence and the Residential Tenancies Act.

Mulligan, J observed [at para. 36] that s. 20(1) of the Ontario Residential Tenancies Act provides as follows:

"A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards."

and that a landlord's obligation to fences is specifically addressed in s. 8 of Ontario Regulation 517/06 which provides:

"Retaining walls, gardens and fences in exterior areas shall be maintained in a structurally sound condition and free from hazard."

Mulligan, J distinguished two Ontario decisions which Redi-Mix relied on as authority for the proposition by Redi-Mix that it had no duty to monitor the activities of its tenant and that the ordinary rules of negligence which apply to the issue of liability of an owner of animals should not be applied to landlords because they do not have care and control over the daily activities of tenants: *Durling v Sunrise Propane Energy Group Inc.*, [2014 ONSC 1041](#), [\[2014\] O.J. No. 833](#) (Div. Ct.); *Sorbam Investments Ltd. v Litwak*, [2017 ONCA 706](#), [\[2017\] O.J. No. 4678](#) Mulligan, J stated that these cases related to commercial tenancy agreements to which the Residential Tenancies Act did not apply.

5. Whether Redi-Mix as landlord was responsible for the tenant's negligence?

Mulligan, J concluded that Burnfield was negligent in allowing his mules to wander from the property onto Winchester Road by failing to secure the gate or fence along that side of the property, relying on the evidence of the police officer who was able to pry open the gate with "simple human force" [at para. 44].

Mulligan, J concluded [at para. 23] that on a balance of probabilities, the force of a mule or mules pried the gate open allowing their exit from the property.

Mulligan, J also concluded that the landlord, Redi-Mix, was negligent because it had no policy or procedure to inspect or repair fences, that it had an obligation to do so under the Residential Tenancies Act, and that this evidence was sufficient to make a determination of a landlord's negligence without the necessity of a trial [at para. 46].

CREDITS

This NetLetter is prepared by Brian P. Kaliei, Q.C. of Miller Thomson LLP, Edmonton, Alberta.



For more information about the LexisNexis® Quicklaw® service, call 1-800-387-0899 or email service@lexisnexis.ca.

For more information about LexisNexis products or services, visit www.lexisnexis.ca.

Design and compilation © 2018 LexisNexis Canada Inc. All rights reserved. Unless otherwise stated, copyright in the content rests with the author(s). LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under licence. Quicklaw is a registered trademark and NetLetter is a trademark of LexisNexis Canada Inc. Other products or services may be trademarks, registered trademarks or service marks of their respective companies. Use of this NetLetter is subject to the LexisNexis Canada Inc. Terms and Conditions of Data File Usage.