

SUPERIOR COURT OF JUSTICE - ONTARIO

**RE: AUGUSTINA ANSAH, ROBERT FORDJOUR,
ANDREA FORDJOUR and TEDDY FORDJOUR by his
Litigation Guardian Augustina Ansah**

Plaintiffs

- and -

**H&R PROPERTY MANAGEMENT LTD./GESTION
IMOBILIERE H&R LTÉE; THE CITY OF TORONTO;
METROPOLITAN TORONTO AND REGION
CONSERVATION AUTHORITY; TORONTO AND REGION
CONSERVATION AUTHORITY; EUGENE KOHN
CONSTRUCTION LIMITED carrying on business as
FIELDGATE DEVELOPMENT AND CONSTRUCTION LTD.;
534078 ONTARIO LIMITED carrying on business as
FIELDGATE DEVELOPMENT AND CONSTRUCTION LTD.
and FIELDGATE DEVELOPMENT AND CONSTRUCTION LTD.**
Defendants

BEFORE: Justice M. Forestell

COUNSEL: Joy Stothers, for the Plaintiff

**Matthew Lefave, for the Defendant, Toronto and Region
Conservation Authority**

DATE HEARD: June 21, 2007

E N D O R S E M E N T

[1] The Toronto and Region Conservation Authority (the “TRCA”) bring this motion for summary judgment pursuant to Rule 20.01(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 on the basis that the plaintiffs’ claim against it discloses no genuine issue for trial.

[2] The claim arises from the drowning death of Robert Fordjour Jr. on or about July 31, 2004 in the Mimico Creek in Etobicoke, Ontario.

[3] The plaintiff claims that the deceased gained access to the creek through a hole in a fence surrounding the apartment building at 10 and 22 Willowridge Road.

[4] The allegations against the TRCA are that (1) the TRCA is an “occupier” of the property, including and adjacent to the Mimico Creek and (2) the TRCA was responsible for the construction and maintenance of the concrete banks of the creek, the design of which contributed to the death.

[5] The jurisdiction of the TRCA is defined by the *Conservation Authorities Act*, R.S.O. 1990, c. C.27, section 21(1).

[6] The Act provides that the TRCA has authority to regulate properties within its jurisdiction. Property owners must submit applications to the TRCA prior to altering property within a TRCA regulated area.

[7] The area of the drowning is within a TRCA regulated area. The fence of the apartment building may be within a TRCA regulated area.

[8] The area of the creek is not owned by the TRCA, but by the Ministry of Transportation. The TRCA has not received any application for any alterations of land at or near the apartment properties.

[9] The onus rests on the moving party on this motion to show that there is no genuine issue of material fact requiring a trial.

[10] The plaintiff argues that under the *Occupiers’ Liability Act*, R.S.O. c. O.2, s. 1, an occupier is an entity who has “responsibility for and control over the condition of the premises”. Premises are defined as lands and structure and include water.

[11] The TRCA has the power to erect works and structures and to control the flow of surface waters.

[12] On the basis of the TRCA’s statutory authority to control alterations to the property, the plaintiff argues that the TRCA is an occupier.

[13] The concrete banks of the Mimico Creek are structures which control the flow of surface water. This area is an area subject to the regulation of the TRCA.

[14] While the affidavit of Mr. Dewell, filed on this motion, indicates that he could find no application for alteration of the property in this case, his affidavit defines the “property” as 10 and 22 Willowridge Road. Specifically, he says “at no time has TRCA had any involvement whatsoever with respect to the erection of fencing or other construction at or near the perimeter of the Property”. While this statement addresses the responsibility of the TRCA for the fencing, it does not address the issue of the concrete banks.

[15] If the creek was in its natural condition at the area of the drowning, there would be no evidence available of any involvement of the TRCA. However, the TRCA regulates alterations to waterways and alterations to property in the TRCA regulated area. An available inference is that the TRCA permitted the construction of the concrete banks.

[16] It has been pleaded that the design of the sloped concrete banks caused the deceased to fall into the creek. The plaintiff alleges negligence in the design of the concrete banks. In this motion the plaintiff argues that the TRCA committed misfeasance in the execution of its statutory authority.

[17] The TRCA argues that there is no authority for holding a conservation authority liable for damages as a result of personal injury not owned or occupied by it.

[18] While the claim is a novel one, I cannot conclude that it has no chance of success. The tort of public misfeasance is not specifically pleaded but could be implied within the claim.

[19] As noted in *Reynolds v. Kingston (City) Police Services Board*, [2007] O.J. No. 2161 (Ont. C.A.) “the law relating to the tort of public misfeasance [is] uncertain and constantly evolving, driven by the particular facts of individual cases”.

[20] The determination of unsettled legal issues should only be made with a full factual record. In this case, the potential responsibility of the TRCA for approval of the design of the banks, the scope of its authority and the actual involvement of the TRCA in the design must be considered in order to reach a conclusion on the legal issue of the liability of a regulating body for the condition of premises within its jurisdiction.

[21] I therefore find that there are genuine issues for trial as there are material facts and questions of law in dispute.

[22] Counsel for both parties submitted costs outlines at the hearing of this motion. I have considered the costs outlines. Costs are fixed at \$2,396.24 payable to the plaintiffs forthwith.

Forestell J.

DATE: July 5, 2007