When Neighbourly Play Turns Negligent

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Parents frequently allow their children to play at neighbouring properties. When this occurs, parents often mistakenly assume there is a mutual understanding on the acceptable standard of parental care, despite never discussing this issue with their neighbours.

This is what happened with the Lever and Katerberg families in *Lever et. al. v. Katerberg*, 2019 ONSC 48 ("*Lever*").

In *Lever*, the neighbourhood children frequently played together on their lawns. The lack of communication with respect to the acceptable standard of parental care was never an issue until the leg of a 5 year old was accidentally mangled by a lawn mower while playing on her neighbour's lawn.

This article will review the decision of *Lever* with respect to a summary judgment motion addressing the *Occupiers' Liability Act,* R.S.O. 1990, c. O.2, and the liability of parents.

The Incident

On a Friday evening in the summer of 2004, Allen Katerberg ("Mr. Katerberg") returned to his home after working for the day and decided to mow his lawn, a big open area, part of which could be seen from the neighbouring Lever property.

At that time, his 5 year old son, Thomas Katerberg, was playing on the Katerberg property, with his neighbours, Bronwen Lever, age 5, and William Lever, age 9. Mr. Katerberg was aware that the children were playing on his property.

While Mr. Katerberg was mowing his lawn with a riding lawn mower, his son climbed on the back of the mower and draped his body around Mr. Katerberg.

With his son still on the mower, Mr. Katerberg looked over his right shoulder while reversing in order to get up a small incline. At the same time, Bronwen Lever slipped and her left leg slid under the blade of the riding lawn mower.

Mr. Katerberg then went forward and noticed Bronwen Lever on the ground. He immediately picked her up and ran to his house.

Bronwen Lever sustained significant and disfiguring injuries to her left leg, ankle, and foot, which resulted in loss of bone, muscle, soft tissue and skin. She required several surgeries.

The Lawsuit, the Law & the Summary Judgment Motion

The Lever family, consisting of parents, Mary Beth Rutherford and Timothy Lever, and their two children, sued their neighbour, Mr. Katerberg.

Under the *Occupiers' Liability Act*, Mr. Katerberg, as the owner and occupier of the property where the incident occurred, had an obligation to take such care as was reasonably necessary in all the circumstances to see that Bronwen Lever was safe while on his property.

Pursuant to section 3 of the *Occupiers' Liability Act*, this duty applied whether the danger was caused by the condition on the property or activity carried out on the property.

Mr. Katerberg counterclaimed against the Lever parents, alleging that they were negligent in their duty to supervise and instruct their daughter.

The leading authority for the acceptable standard of care of parents is *Arnold v. Teno,* [1978] 2 S.C.R. 287 (S.C.C.). This decision provides that parents are under a legal duty to exercise reasonable care to protect their children from reasonably foreseeable dangers.

What is reasonable in the circumstances should be considered in light of the accepted standard of care by parents generally in the immediate community.

The Lever family brought a summary judgment motion on the issue of liability. They asked for judgment that Mr. Katerberg was 100% liable and that the counterclaim be dismissed.

The Disagreement as to the Standard of Care

The Lever parents believed that, when children were in a yard, the owner of that yard was responsible for supervising the children, based on the custom, habit, and routine of the neighbouring families.

In contrast, the Katerberg parents believed that it was the duty of each parent to be responsible for his or her own children, no matter what yard they were in.

This included the obligation to know where their children were, what activities they were involved in, and whether they were playing safely. They did not agree that supervision responsibilities aligned with property ownership.

Of interest, a third neighbouring family (whose children were younger) provided evidence that she had the responsibility as a parent to know where her children were; that they were

playing safely; that it was custom of parents to regularly supervise their own children even when in a neighbour's yard; and that other people's children in her yard were not her responsibility.

Despite the disagreement regarding the acceptable standard of care of parents, Mr. Katerberg conceded that he was at least partially liable, but argued that the Lever parents should share in the liability.

The Outcome

Justice Braid granted partial summary judgment only by ordering that there was no genuine issue for trial with respect to the counterclaim against the father of the Lever children, and dismissed the claim against him.

The integral evidence that absolved Mr. Lever of liability in the counterclaim was that he was running errands when the accident occurred and was not present at his home.

Before Mr. Lever left to run errands, there was no indication that Mr. Katerberg had intended to mow the lawn while the children played in the yard. Therefore, it was not reasonably foreseeable to Mr. Lever that his daughter might encounter the riding lawn mower at the Katerberg property.

Justice Braid ordered that the claim against Mr. Katerberg and the counterclaim against mother of the Lever children must proceed to trial.

Justice Braid outlined an extensive list of unfavourable evidence against Mr. Katerberg that would assist a trier of fact in determining the extent of his liability.

When addressing the counterclaim against the mother of the Lever children, Justice Braid outlined the facts that differed from the father.

For example, the mother was home at the time of the incident. She was aware that her daughter was playing and running on the Katerberg property, and that Mr. Katerberg was operating the riding lawn mower during that time.

Justice Braid indicated that, before the liability of the mother could be addressed, the acceptable standard of care of a reasonably prudent parent in the immediate community had to be determined.

Moreover, Justice Braid found that since there was conflicting evidence regarding the acceptable community standard, the court needed to assess credibility and make factual determinations at a trial to determine the issue of liability.

Justice Braid stated that, since fault can be expressed in fractional proportions in negligence actions, it was in the interests of justice that the conduct of Mr. Katerberg and the mother of the Lever children be assessed together at trial.

Conclusion

It would be a sad state of affairs if the fear of a lawsuit stopped people from permitting neighbouring children from playing on their property.

That being said, property owners need to ensure that people are reasonably safe while on their property. This is particularly important in the case of young children, who are more vulnerable.

Further, parents who allow their children to play on neighbouring properties need to take steps to ensure their children are being appropriately supervised and to teach their children of potential dangers.

As long as appropriate steps are taken, children should be allowed to be children. As stated by Justice Braid, "parents cannot ensure that a child is safe from every peril. All parents can do is inform and instruct, shelter and sustain".