CITATION: Hudson v. Drain, 2025 ONSC 4499
COURT FILE NO.: CV-18-00000205-0000
DATE: 20250801

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
JOHN HUDSON and LYNN HUDSON Plaintiffs	William Wolfe, counsel for the Plaintiffs
– and –	
WAYNE DRAIN, HEATHER DRAIN and TODD DRAIN Defendants	Robert Zochodne, counsel for the Defendants, Wayne and Heather Drain R. Steven Baldwin, counsel for the Defendant, Todd Drain
	HEARD: July 30, 2025

MOTION TO AMEND STATEMENT OF CLAIM

CHRISTIE J.

Overview

[1] The Plaintiffs, John Hudson and Lynn Hudson, have brought this motion seeking to amend their Statement of Claim to allege that, at all material times, the Defendant, Todd Drain, was an occupier within the definition as stated in the *Occupiers Liability Act*, R.S.O. 1990 c. O-2 ("OLA")

[2] This action arises out of an alleged incident that is said to have resulted in John Hudson receiving injuries on property owned by Heather and Wayne Drain on November 4, 2016. It is alleged that, on this date, John Hudson, who had been hunting with Todd Drain and others, was seriously injured when he fell from a deer blind located on the property. It is suggested that Todd Drain had organized the hunting party and directed John Hudson to occupy the deer blind on his parents' property which was adjacent to his own property. It is said that Todd Drain maintained this deer blind and had also constructed two other deer blinds on his parents' property. Trails ran through both properties. It is said that Todd Drain baited the trails and maintained trail cameras to monitor animal activity. It is said

that Todd Drain would hunt on his parents' property and Wayne Drain would use Todd Drain's property to farm. The two properties together comprise over 260 acres of land.

[3] The Statement of Claim was issued on August 1, 2018. In that Claim, the Plaintiffs did not explicitly allege that Todd Drain was an occupier of the lands owned by Heather and Wayne Drain, rather the Claim was based in negligence. However, the Plaintiffs submit that they more recently received information and formed the opinion that suggests that Todd Drain may meet the legal definition of "occupier" pursuant to s. 1 of the *OLA*. It should be noted that the original claim against Heather and Wayne Drain does allege liability pursuant to the *OLA*.

[4] The Defendant, Todd Drain, opposes the relief requested arguing that any claim under the *OLA* is statute barred by operation of the *Limitations Act*, S.O. 2002, c. 24. According to Todd Drain, the amendment requested, to plead that he is an "occupier" of this land as that term is defined in the *OLA*, is a brand-new fact and a brand-new cause of action.

[5] While counsel for the Defendants Wayne and Heather Drain attended the motion, it was made clear that they took no position on the motion and had filed no responding materials.

Motion to Strike Paragraphs of Affidavit

[6] As a preliminary issue to this motion, the Defendant Todd Drain sought to have certain paragraphs of the affidavit of J.A. Michael Wolfe sworn May 22, 2025 struck and not to be considered by this court.

[7] After hearing from both counsel, this court ruled on this issue striking certain paragraphs but declining to strike others, using the guidance from Rule 39.01(4) of the *Rules of Civil Procedure*. Specifically:

a. Paragraph 3 – While this paragraph is not specifically sourced, none of this information is contentious or in any way denied. As a result, this paragraph remained as part of the affidavit.

b. Paragraph 4 and 5 – These paragraphs set out information which is not sourced in any way and, seemingly, contain facts which are contentious. As a result, these paragraphs were struck from the affidavit.

c. Paragraph 9 and 10 – These paragraphs are specifically sourced to Tanya Hudson. The Responding Party argues that, while sourced, this is contentious information that could have been provided by Tanya Hudson and subject to cross-examination. At the very least, the Responding Party argues that these paragraphs should be given little weight. This court did not agree with the Responding Party. There is nothing in Rule 39.01(4) that restricts information and belief evidence to non-contentious information, as long as it is sourced. This subrule is contrasted with Rule 39.01(5) which restricts the information and belief evidence provided in an affidavit in support of an application to non-contentious information. As a result, these paragraphs remained as part of the affidavit.

d. Paragraphs 17, 18, 19, and 20 – These paragraphs are clearly argument rather than facts. Argument is for counsel to make on the motion but is not properly included in an affidavit. As a result, these paragraphs were struck from the affidavit.

[8] Of course, it should be noted that this affidavit includes a transcript of the examination of Todd Drain taken on July 16, 2019, which can be considered by this court on this motion. Further, the Responding Party also relied on the transcript of the examination of John Hudson. The parties agree that these transcripts are properly before the court on this motion and can be considered.

Motion to Amend Statement of Claim

[9] The question on this motion is whether or not the proposed amendments rely on facts which have been substantially pleaded in the initial Statement of Claim.

[10] Rule 26.01 of the *Rules of Civil Procedure* states:

> 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[11] Of course, pursuant to the *Limitations Act*, 2002, S.O. 2002, c. 24, Schedule B, ss. 4, 5, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered and the person claiming is presumed to have known of the act or omission of the defendant on the day it took place, unless the contrary is proved.

[12] In *Environmental Building Solutions v. 2420124 Ontario Limited*, 2018 ONSC 3112, the court stated:

> [36] Under the *Limitations Act*, 2002, amendments of a Statement of Claim will be rejected if they seek to advance new causes of action after the two year limitation period has elapsed. When a proposed amendment asserts material facts that are essential to support the claim being advanced, and that were not substantially pleaded in the original claim, the amendment will be deemed to raise a new cause of action.
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> [37] A "cause of action" is a "factual situation the existence of which entitles one person to obtain from the court a remedy against another person." The key is whether substantially all of the material facts giving rise to the "new cause of action" have previously been pleaded, or whether new facts are sought to be added that are relied upon to support a new cause of action.

> [38] A new cause of action is not asserted if the amendments simply pleads an alternative claim for relief arising from the same facts previously pleaded, and no new facts are relied upon, or asserts different legal conclusions drawn from the same set of facts, or provides particulars of an allegation already pled, or additional facts upon which the original right of action is based. The proposed amendment, to survive the limitation period, must rely on facts which have been substantially pleaded in the initial Statement of Claim.

[13] In *1100997 Ontario Ltd. v. North Elgin Centre Inc*., 2016 ONCA 848, the court clarified when an amendment will not be permitted:

> [21] In *Dee Ferraro Ltd. v. Pellizzari*, this court noted the distinction between pleading a new cause of action and pleading a new or alternative remedy based on the same facts originally pleaded. The appellants had commenced an action against their lawyer claiming damages for breaches of contract, trust and fiduciary duty and for fraud and negligence. The appellants then sought to amend their pleading. This court, in overturning the motion judge's dismissal of the motion to amend, concluded that the proposed amendments, such as claims for a mandatory order and a constructive trust over shares, could be made because they flowed directly from facts previously pleaded.
>
> [22] By contrast, a proposed amendment will not be permitted where it advances a "fundamentally different claim" after the expiry of a limitation period: *Frohlick v. Pinkerton Canada Ltd*. In that case, the court did not permit the plaintiff in a wrongful dismissal action to amend the statement of claim to assert a claim for damages for constructive dismissal on the basis that the limitation period had expired. This court dismissed the appeal. The amendment regarding constructive dismissal related to events that occurred prior to the events described in the original statement of claim that were unrelated to that claim. The defendant was unaware of the new allegations prior to the plaintiff seeking the amendments, and the events were not put in issue or encompassed within the original claim.

In *Frohlick v. Pinkerton Canada Ltd.*, 2008 ONCA 3, the plaintiff was suing the defendant for damages for wrongful dismissal. The dismissal allegedly occurred when the defendant transferred part of its business to another company. After the expiry of the applicable limitation period, the plaintiff brought a motion under rule 26.01 of the *Rules of Civil Procedure* to amend her statement of claim to allege that she was constructively dismissed over a year before the transfer, at a time when her pay was significantly reduced. The motion was dismissed. The plaintiff appealed. The appeal was dismissed. The court found

that a different factual matrix was being put forward and therefore it was deemed to be a new cause of action which was statute barred. See also: *Schryer (Litigation Guardian of) v. 1232212 Ontario Ltd*., 2009 CarswellOnt 5065 (S.C.J.) See also: *Klassen v. Beausoleil*, 2019 ONCA 407, para 27-29

[14] Amending a Statement of Claim to plead legal consequences flowing from facts already pleaded does not amount to a new cause of action. In *Gladstone v. Canadian National Transportation Limited*, 2009 CanLII 38789 (Ont. Div Ct.), the court stated:

> [37] The master concluded that the proposed amendments were advancing new causes of action and therefore notwithstanding the provisions of Rule 26 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the request for the amendments was denied.
>
> [38] Rule 26 provides the prima facie right to amend pleadings at any stage of the pleadings, subject to the issue of prejudice…
>
> [39] There are cases relevant to the issue of what constitutes a new cause of action, as opposed to pleading an alternative theory of liability based upon the same factual nexus.
>
> [40] Jenkins J. in *Fitzpatrick Estate v. Medtronic Inc*., 1996 CanLII 8118 (ON SC), [1996] O.J. No. 2439 (Ct. J. (Gen. Div.)) where he states:
>
> > I conclude that the modern approach is when substantially all of the material facts giving rise to "the new cause of action," have been pleaded then there is in fact no new cause of action being added.
>
> [41] The decision of Lane J. echoes this approach in *Randolph v. Graye*, [1995] O.J. No. 777 (Ct. J. (Gen. Div.)) dated March 24, 1995. Lane J. allowed an amendment alleging negligence, in a claim originally based on breach of fiduciary duty. He stated that "the new plea is of different legal conclusions drawn from the same set of facts."
>
> [42] The decision of *Denton v. Denton* (1977), 1976 CanLII 831 (ON SC), 14 O.R. (2d) 382 (H.C.) is very helpful. Grange J. allowed an amendment on the basis that the proposed amendments pleaded legal consequences that flowed from the facts as opposed to a new cause of action. He allowed the appeal from the master's refusal to amend the pleading. Grange J. said:
>
> > I am not sure that the mere pleading of an alternative ground for relief arising out of the same facts constitutes the raising of a new cause of action – see *Canadian Industries Ltd. v.*

> *Canadian National R. Co.*, 1940 CanLII 346 (ON CA), [1940] O.W.N. 452 … affirmed 1941 CanLII 16 (SCC), [1941] S.C.R. 591 … , where an amendment in a contract action was permitted to claim relief in negligence based upon the same facts upon the ground that such new claim did not create a new cause of action, but merely an alternative claim with respect to the same cause.
>
> [43] Another case on point that is relevant is the decision of Hoy J. in *Phommachanh v. Toronto Transit Commission*, 2002 CanLII 49427 (ON SC), [2002] O.J. No. 1166:
>
> > As to special circumstances, to the extent required, I believe they exist. No alteration of the nature of the claim against the TTC (negligence) is proposed, no new relief is requested and no new parties are sought to be added. Moreover, I do not believe the amendment constitutes adding a new cause of action. The expanded particulars arise out of the same occurrence. They may relate to the manner in which the streetcar was operated, which was initially pleaded. I do not accept that the proposed amendments constitute a new cause of action because the streetcar and the Spadina line were designed before the accident occurred. Any claim of negligence by [the plaintiff] and his family against the TTC arising out of the alleged unsafe design of the streetcar and the Spadina line necessarily arises out of the accident in question.

[15] In *Beatty v. Waterloo (Regional Municipality*), 2011 ONSC 3599, para 81, the court noted that the overriding concern is fairness.

[16] The case of *Davis v. East Side Marios*, 2018 ONCA 410, presented a fairly unique set of circumstances. In the original statement of claim the allegations pleaded – "negligence, breach of duty, breach of contract and breach of the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2" (the "*OLA*") – were focused on the staircase on which the appellant's fall occurred. The respondent was granted summary judgment as the court found that the plaintiffs failed to provide evidence of a breach of its duty of care imposed by the *OLA*. On an alternative argument, the plaintiff argued that the defendant breached its statutory warranty that its service supplied would be of reasonably acceptable quality pursuant to the *Consumer Protection Act*. The motion judge considered the interplay between the *CPA* and the *OLA* to be a novel argument that would have significance in determining whether or not there was a duty to advise of a main floor washroom but noted that the Claim did not plead such a duty of care or cite any section of the *CPA*. The Plaintiffs did not seek to amend their pleadings before this first motion judge. The first motion judge granted summary judgement on the record before him, dismissing the action as pleaded, but did so without

prejudice to the plaintiffs bringing a motion to amend their statement of claim to plead the novel questions of law. The motion to amend was brought and permitted, seemingly on consent. A second motion for summary judgment was granted on the basis that it was the same essential complaint reframed in different legal terms. The appeal was dismissed, the court stating that the second motion judge achieved the right result for the wrong reason. The court stated:

> [35] The original statement of claim focused on the staircase that they alleged was dangerous, inadequately maintained, poorly lit and caused the plaintiff to fall.
>
> [36] In the amended claim the plea is very different. The appellant pleads a new duty of care: a duty to advise the appellant of the existence and availability of washroom facilities on the main floor of the restaurant. They argue that provisions of both the *OLA* and the *CPA* support these arguments. While the *OLA* was pleaded in the original statement of claim, it was pleaded in relation to the condition of the staircase.
>
> [37] The new claim is a fundamentally different claim based on facts not originally pleaded. It is not mere particulars of the prior claim. The *CPA* and its relationship with the *OLA* is a new plea in support of a new cause of action and the Second Motion Judge erred in finding to the contrary.
>
> [38] Because the new plea raises a new cause of action, it is statute-barred as it is raised for the first time, long after the two year period of limitation has expired.

[17] In *Shwaluk v. HSBC Bank of Canada*, 2023 ONCA 538, the court dealt with a plaintiffs claim for LTD benefits that had been denied. One defence put forward was that the plaintiff had not complied with the terms of the policy and had not actually submitted an application for LTD benefits. The plaintiff then brought a motion to amend her Statement of Claim to plead relief from forfeiture pursuant to the *Insurance Act*, R.S.O. 1990, c. 1-8 over five years after issuing her claim. The Court of Appeal, in overturning the motion judge's decision denying leave to amend, stated at para 46:

> [46] However, an amendment is not an assertion of a new claim if it merely pleads an alternative claim for relief arising from the same facts already alleged, different legal conclusions drawn from the same facts, particulars of an allegation already pleaded, or additional facts upon which the original right of action is based. In making the assessment of whether a new claim is advanced, the original pleading is to be read generously, with some allowance for drafting deficiencies: *Klassen*, at paras. 29-30.

Application of Principles to the Case at Bar

[18] Section 1 of the *OLA* defines "occupier" as:

> "occupier" includes,
>
> (a) a person who is in physical possession of premises, or
>
> (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,
>
> despite the fact that there is more than one occupier of the same premises; ("occupant")

[19] If someone fits into this definition of "occupier", the duty is set out in section 3 of the *OLA:*

> 3 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
>
> (2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.
>
> (3) The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty.

[20] Section 2 states that the *OLA* supersedes the common law duty of care.

[21] The Plaintiff submits that Todd Drain meets the definition of "occupier". This court provides no comment on whether it would agree with this proposition or not. This motion does not require this court to come to such a conclusion. The question on this motion is whether this amendment seeks to rely on facts which have been substantially pleaded in the initial Statement of Claim. If so, a new cause of action is not asserted. If not, a new cause of action is asserted – one that is statute barred.

[22] In the view of this court, on this request to amend, the original Statement of Claim contained all the pleaded facts necessary to come to the legal conclusion that Todd Drain may be liable in negligence for breach of a duty of care, or liable for breaching his duty of care as an "occupier" in the *OLA.* No additional facts are pleaded in support of the amendment except to suggest an alternative legal route to impose a duty of care. The material facts pleaded against Todd Drain are essentially the same allegations made against Heather and Wayne Drain who are alleged to be "occupiers". The allegation that Todd

Drain is an “occupier” is not a new cause of action but rather a legal conclusion that flows directly from the facts and allegations as originally pleaded.

[23] While not specifically pleaded in the original Statement of Claim that Todd Drain is an “occupier” as defined, all of the building block facts are there to make that argument. The following was included in the original pleadings:

a. On or about November 4, 2016, John was with Todd Drain and others in a cabin on Todd's property. John went to leave the cabin and bow hunt deer. (para 6)

b. Todd instructed John to go to the deer blind on the defendants' property. Todd had built the deer blind approximately ten years prior. The deer blind was approximately 20 feet off the ground, nestled in a tall spruce tree and had planks in front in order to hide from deer. (para 7)

c. The Plaintiffs state and the fact is, that the slip and/or fall and John's injuries were caused solely by the negligence of the defendants, particulars of which are as follows:

…

As Against the Defendant Todd Drain:

(a) he was negligent in the construction of the deer blind;

(b) he was incompetent and/or unqualified to properly construct the deer blind;

(c) he failed to maintain the deer blind in a safe condition;

(d) he wrongfully permitted the deer blind to constitute a hazard;

(e) he allowed the hazard to constitute an unusual danger and/or a trap for users, including the plaintiff;

(f) he knew or ought to have known that the surface was unsafe and/or dangerous;

(g) he failed to properly inspect the deer blind for the existence of possible danger(s) or possible danger(s);

(h) he failed to properly oversee and ensure the safety of persons using the deer blind;

(i) he failed to have in operation a proper system, or any system, for inspection and/or maintenance of the deer blind;

(j) he knew or ought to have known that the deer blind, if left unattended or unsecured, would cause a safety hazard to persons using it;

> (k) he failed to take steps to warn the plaintiff John of the existence of danger(s) or potential danger(s);
>
> (l) he knew or ought to have known that a warning might have prevented the slip and/or fall of the plaintiff John and his subsequent injuries;
>
> (m) he failed to take any steps to avoid the plaintiff John's injuries which he anticipated or should have anticipated were imminent; and
>
> (n) any or all of the foregoing. (para 9)

[24] The Plaintiffs have already pleaded and relied upon the *OLA* at paragraph 12 of the Claim.

[25] The only amendment that the Plaintiff seeks to make is in paragraph 5 as follows:

> The defendant, Todd Drain ("Todd"), resides in the Township of Havelock- Belmont-Methuen, in the Province of Ontario, and was at all material times ~~responsible, in whole or in part, for the construction of a deer blind or tree stand on the defendant's property ("the deer blind").~~ an "occupier" of the premises as defined by the Occupiers Liability Act, R.S.O. 1990, c. O-2. Todd was responsible for and had control over the conditions of the deer blind or tree stand and the activities carried out thereon and control over the persons allowed to enter and use the premises.

[26] Of course, whether or not Todd Drain is an "occupier" as defined and/or whether or not he was responsible for and had control as expressed remains to be determined. Just because it is pleaded does not mean it is the case. Further, even if he is determined to be an "occupier" and therefore has a duty of care, there will still need to be a determination of whether he breached the standard of care required.

[27] The Responding Party states that there was no previous pleading that Todd Drain had any control of persons going onto the premises. This court does not agree. While this court appreciates that it was not stated as it is now proposed, it was clearly stated that Todd Drain instructed John Hudson to go to the deer blind on the defendants' property and that he failed to properly oversee and ensure the safety of persons using the deer blind. This certainly suggests an element of control over the persons allowed to enter and use the premises.

[28] This court acknowledges that the Statement of Claim directly alleges occupier's liability against Wayne and Heather Drain but does not allege that such directly against Todd Drain. If it did, this motion would not be necessary. However, this is not the question to be answered on this motion. The focus on this motion and the determinative factor is that there are no new facts pleaded that were not already in the original Claim. This is merely a legal conclusion to draw – a different legal route to possibly establish a duty of care based on the same facts.

[29] This court accepts that Todd Drain has, in part, defended the allegations in the Statement of Claim by reference to his not owing a duty of care to the Plaintiffs. However, it is worth noting that Todd Drain also pleaded in his Statement of Defence:

> This defendant was not an owner or occupier of the premises in question.

It seems that Todd Drain possibly anticipated such an argument and conveyed his position.

[30] Further, Todd Drain pleads that:

> 16. The plaintiff willingly assumed the risks of utilizing the deer blind which by its reason and purpose is to be elevated from the ground to improve the opportunity to observe deer in the pursuit of the hunt.
>
> 18. The unfortunate fall of the plaintiff was a result of his own lack of care and attention to his own safety.
>
> 19. This defendant puts the plaintiff to the strict proof of his alleged injuries, losses and damages.

In other words, beyond any duty of care, this Defendant denies any breach of a standard of care, denies that any breach caused the injuries, and denies that there was loss or damage caused by any breach of the standard of care. These are all arguments that will remain open to this Defendant.

[31] Further, as a result of allowing this amendment, Todd Drain will also have the ability to file an amended Statement of Defence, if he wishes, and to argue that he does not fall within the definition of "occupier", that even if he does, he did not fall below the standard of care, and that there was no causation. The fact that the *OLA* may provide another route to liability, perhaps even a more direct route over establishing a duty of care, does not lead to prejudice, in the sense of unfairness, to the Defendant.

[32] This court appreciates that this motion to amend the Statement of Claim arrives 6.5 years after the Statement of Claim was issued and more than 8 years after the alleged events of November 4, 2016. The trial is presently scheduled to commence on September 9, 2025 for 2 weeks. The Plaintiffs are of the view that the trial can still proceed despite an amended Statement of Claim. The Plaintiffs acknowledge that an amended Statement of Claim will permit an Amended Statement of Defence and possibly further discovery, however, they are optimistic that the trial can remain on track. The Defendant Todd Drain appears less optimistic about the trial proceeding in these circumstances. This court is concerned about any further delay to these proceedings that may be occasioned by permitting this amendment, however, it seems that it is still possible for the trial to proceed as scheduled if things move along efficiently.

[33] Having carefully considered all of the circumstances, and for all of the foregoing reasons, this motion is granted, permitting the Statement of Claim to be amended in accordance

with the draft provided. This Amended Statement of Claim is to be served and filed immediately – not later than the end of the business day on August 5, 2025. The Defendants will be permitted to serve and file an Amended Statement of Defence, which must be accomplished within 20 days of being served with the amended claim. If any further discovery is to take place, this court would encourage the parties to immediately start making those arrangements and to be very flexible with their time to permit this to happen as soon as possible. This court urges the parties to work together to keep this trial on track.

[34] As for costs of this motion, the court strongly encourages the parties to consult with each other and attempt to reach a reasonable agreement. If the parties are unable to agree as to costs, the court will accept written submissions on costs, which shall be no more than two pages in length, excluding supporting documentation. All costs submissions are to be filed through the civil JSO portal as well as directly with my assistant to my attention by email to BarrieSCJJudAssistants@ontario.ca and which shall be provided no later than 4:30 p.m. on August 8, 2025.

Justice V. Christie

Released: August 1, 2025