

JUDGE FINDS THE DEFENDANT OCCUPIER FAILED IN ITS DUTY TO ENSURE THAT THE PLAINTIFF WAS REASONABLY SAFE WHILE ON THE PREMISES.

T vs. H

2021 ONSC 2175

The Reasons for Judgment of The Honourable Madam Justice A. Ramsay, Ontario Superior Court of Justice were released on April 6, 2021.

The Plaintiff, Ms. T, a former tenant of an apartment in an apartment complex located at 500 Dawes Road (“the premises”) owned by the defendant H Inc. (“the defendant”), brings an action for damages against the defendant for breach of the Occupiers’ Liability Act, R.S.O. 1990, c. O.2 (the “Occupiers’ Liability Act”) and breach of the Negligence Act, R.S.O. 1990, c. N.1 (“Negligence Act”).

On the evening of September 27, 2012, Ms. T claims she tripped and fell on a wooden post that had been protruding out of the ground in a grassy area at the back of the building. She sustained a serious fracture of her upper arm that required two surgeries. She is seeking compensation for pain and suffering, future treatment costs, loss of housekeeping and handyman capacity and miscellaneous out-of-pocket expenses. Carolyn Krebs is the landlord of the premises as well as the president, officer and director and principal of the corporate defendant, which is the owner of the premises. Ms. Krebs was granted leave to represent the corporate defendant as a non-lawyer. The defendant denies liability and submits that if Ms. T fell, she never fell as she said she did and that her fall was possibly caused by her pre-existing medical conditions or weight, as the area where she fell was always well maintained and had never had any erection or fence since the defendant purchased the property in 1995.

Ms. T, 61 years of age at the time of her fall, is now 70 years old. She has a grade 5 education. She has three children and she has not worked since she was a teenager. She was on ODSP disability benefits before receiving CPP. Her son Mark had an apartment on the premises and she had been living with him and his girlfriend for over a year. Ms. T had a number of health issues before the accident including high blood pressure, diabetes, thyroid dysfunction, COPD, depression and reflux disease. She had been



diagnosed with borderline personality disorder, chronic hepatitis C and dyslipidemia. She had had lower back surgery and had been taking 10 different medications at the time of her examination for discovery. She stated that her weight and medical conditions did not affect her ability to walk.

The incident occurred between 7:00 p.m. and 8:00 p.m. at the premises. It was dark. She went with her son's girlfriend Sarah, to take the dog for a walk. The dog gave chase to another animal and Sarah took off after it. When she didn't return after a few minutes, Ms. T decided to return to the premises, but Sarah had the keys with her. She went around to the back of the building and called up to a friend on the third floor, to throw her a set of keys so she could get back into the building. The keys landed on the ground and when she went to retrieve them she tripped on a piece of wood protruding from the ground. She testified that the area where she fell was dirty and strewn with garbage and the grass was 5 or 6 inches long. She almost passed out from the pain. She could not get up. After some unknown time, her son Mark came looking for her and found her on the ground crying with pain. There was dog feces where she fell, and she had soiled herself. They took her back upstairs and Sarah helped her shower. An ambulance was called. She was taken by ambulance to East York General Hospital. She was told that she had broken her arm and because of the location of the fracture it could not be casted. She was given a sling and discharged.

The morning after the fall, Ms. T went to ask the new superintendent for a video which she believed captured the incident, stating she intended to sue the owner. She was denied the video. She stated that her son Mark went down the next morning to take pictures of where she fell and by the time he got there the post had been cut down and all that remained was sawdust.

Ms. T had weekly x-rays but the fracture was not healing. She ultimately ended up having two surgeries, the first in June 2013 and the second in July 2013. She was unable to have any physiotherapy because she could not afford it. She has pain every day in the right (dominant) arm. The pain is worse with activity, and it affects her ability to sleep properly. Her depression was worse after the fall. She moved in with her sister Nadine shortly after the fall as she needed assistance with her personal care, housekeeping, changing her bandages and her most intimate toiletry. It was Nadine who performed these services. Ms. T stayed with Nadine for about eight months. Ms. T now lives with her daughter, Maryanne, and her boyfriend, Scott. She is able to do some light housework to help out as both Maryanne and Scott work, however they do all of the heavier tasks as well as shopping, errands and cooking.

Madam Justice Ramsay found Ms. T and her family members to be truthful and credible witnesses.

Dr. Robin Richards, orthopaedic surgeon, was qualified as an expert to provide opinion evidence on upper extremity trauma. In his opinion "Ms. T sustained a displaced spiral fracture of the right



humeral shaft (the arm bone), which was broken in two pieces (comminuted).” In cross examination he testified that she may have also sustained associated injuries, and possibly a rotator cuff injury, not yet investigated and diagnosed. He testified that during the first operation a plate and screw was inserted, however it did not hold. During a second surgery a much longer and heavier plate was used, after which the fracture finally healed. “She developed two complications from her injury, a nonunion (her fracture did not heal) and radial palsy (with resultant pain and weakness of the arm). The weakness related to the radial palsy improved. Her fracture healed but she is left with pain and functional limitation in her right dominant arm.”

Dr. Richards testified that there is a possibility that Ms. T’s pre-existing diabetes and COPD may have negatively influenced her healing process, “the former would have affected her healing, and the latter, if she was coughing a lot, could contribute to nonunion”. He did not agree with the defendant’s suggestion that removal of the plates and screws would improve her pain and did not believe her pain was in fact caused by the hardware. Removal of the hardware carried a high risk of injuring the radial nerve, risk of fracture through radial screw holes and risk of infection. He would not recommend removal as “the chances of helping her was very very low” and there was a very good chance it would make her worse. He stated that the source of her pain was the sequelae of her injury: the broken bone with disruption of nerve endings, bleeding into the surrounding tissues, scarring as a result of her initial injury and additional scarring from the two surgeries. In his opinion it was not uncommon for someone with such an injury to have chronic pain. Madam Justice Ramsay comments further on Dr. Richards testimony as follows:

”[56] Dr. Richards testified that Ms. T has serious and permanent impairment which affects her normal activities in her dominant upper extremity. She has stiffness, weakness, pain and chronic sleep disturbance and does not have the same functionality as she did before. She cannot perform her household chores and recreational activities as she did previously. He testified that the more she does, the more she has pain. He was of the view that there is a possibility that Ms. T will require further surgical treatment. Her arm is stiff with the plate, she may develop an infection, and she is at risk of developing arthritis.

[57] On cross examination, he stated that physiotherapy would not make a difference to her disability or limitations but may temporarily relieve her symptoms. He stated physiotherapy may have helped to a minor extent initially after the second surgery but would not have changed the ultimate outcome. He testified that Ms. T has chronic musculoskeletal pain and as a result requires analgesics medication for her pain, and may benefit from intermittent courses of physiotherapy, massage and acupuncture therapy to alleviate her pain, but stated that treatment would not make any change in her functionality.



[58] I found Dr. Richards’ testimony to be impartial and of assistance to the court. He did not appear to be an advocate on behalf of either side...” [emphasis added]

Ms. Krebs testified at length regarding the good maintenance of the building, both inside and out, going back to 1995. She described maintenance schedules and named various employees and their cleaning duties. She testified that the grass was always well maintained and always short in the summer weather. She had a contractor who had at least 2 men in his crew who came every week. She was surprised that none of her other witnesses could remember him. She stated that there was never anything protruding from the ground, “never any stick, fence or free-standing structure.” She testified that all exits had exterior lights and there were additional flood lights here and there and “it was up to code”.

Madam Justice Ramsay states “Ms. Krebs credibility was repeatedly undermined, both during her testimony, and in statements made to the court that were later proved inaccurate.... Ms. Krebs portrayal of the premises as well maintained is undermined by the evidence of her own witnesses who spoke of the repeated inspections by the City, and the two City audits which outline numerous deficiencies, including lighting deficiencies.” The defendant did not produce any documents to support her claim that the grass was cut every week. The defendant did not demonstrate that a system of maintenance was in place and the Court found that “An adverse inference may be drawn from the fact that it [the defendant] did not call the second head super to testify or any person who actually was involved in the maintenance of the area from the contracting company.” Despite testimony that there was a camera in that area, the defendant did not produce any footage even to demonstrate to the plaintiff that the incident was not captured.

Madam Justice Ramsay concluded “Based on the foregoing, I did not find Ms. Krebs to be a truthful and credible witness.” The Court did however accept Ms. T’s version of events and found her to be “a very credible witness”.

Further, she found that the defendant did not establish any contributory negligence on the part of the plaintiff. As the occupier, the defendant was responsible for the maintenance of the premises and did not meet that obligation. “I find that the defendant failed in its duty to ensure that the plaintiff was reasonably safe while on the premises.”

DAMAGES

In discussing general damages the Court reiterated Dr. Richards’ testimony “that it is possible that her pre-existing diabetes and COPD could have had an impact on her healing, the first would have affected her ability to heal, and the second (if she was coughing a lot) the union of the fracture.” Given Ms.



T's pre-existing underlying conditions, she was more vulnerable to serious consequences, which did materialize, when she broke her arm. Madam Justice Ramsay found that “With respect to her right arm, the plaintiff was a thin skull plaintiff..”

“**[131]** Dr. Richards state [sic] that she is left a permanent and serious impairment as a result of the fall. Almost nine years later, she is left with permanent impairment and ongoing pain in her right arm which impacts her function including her ability to complete her pre-incident recreational activities, affects her sleep, and her activities of daily living. The disability with respect to her right dominant arm is significant. She is also left with two disfiguring scars from the two surgeries.”

In assessing loss of housekeeping capacity Madam Justice Ramsay noted that Ms. T is no longer able to complete certain housekeeping chores because of the pain in her right arm. She has functional limitation which is permanent. She relied on Dr. Richards’ opinion that Ms. T would “experience difficulty with any activity involving her elevating her right arm.”

DISPOSITION OF THE COURT

The defendant is liable to the plaintiff for damages as follows:

Non-pecuniary damages	\$150,000.00
Damages for loss of housekeeping and handyman capacity	
Past	\$20,000.00
Future	\$25,000.00
Future care costs (treatment and medication)	\$15,000.00
OHIP subrogated claim	\$26,626.36
TOTAL DAMAGES	\$236,626.36

The plaintiff is entitled to prejudgment interest pursuant to the Courts of Justice Act, plus costs to be assessed.

The full Reasons for Judgment of The Honourable Madam Justice A. Ramsay [CAN BE FOUND HERE:](#)

WRITTEN BY STELLA GOWANS, PARALEGAL

IF YOU WOULD LIKE TO BOOK AN ASSESSMENT WITH DR. ROBIN RICHARDS, ORTHOPAEDIC SURGEON, PLEASE CONTACT US AT INTEGRA