ALEXANDER HOLBURN

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E-NEWSLETTER

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1. *Cornwall v. Al Bloushi*, 2022 ONSC 6388

On July 28, 2017, the plaintiff, Connie Cornwall (the "Plaintiff"), suffered a fractured right shoulder when she slipped and fell on broken glass while traversing a paved area between her parked vehicle and a donation bin located at 1009 Wonderland South in the City of London (the "Premises"). The City of London (the "City") owned the Premises, and the donation bin was owned by Textile Waste Diversion Inc. ("Textile") (collectively the "Defendants"). The bin had been placed on the City's Premises without their knowledge or permission. The Plaintiff sued the Defendants for damages arising from the injuries suffered in the fall. Her sons pursued claims further to the *Family Law Act* (the "FLA"), for loss of care, guidance, and companionship.

The action was commenced on July 10, 2018. The claim was amended on March 26, 2019, to name the City as a defendant. On July 30, 2020, the defence of Textile was struck. Textile was noted in default at trial.

The Plaintiff's claim as against Textile, only, was ordered to proceed to trial on an uncontested basis on March 11, 2022. By the time of the trial, the action had been dismissed against all but the City and Textile. At the outset of trial, plaintiff counsel advised the court that the matter was in the process of being dismissed against the City on a without costs basis.

The uncontested trial proceeded only with respect to the Plaintiff's claims, and that of one of the FLA claimants, the Plaintiff's son Blaine. The sole witness at trial was the Plaintiff. On the issue of liability, portions of Textile's discovery evidence was read into the record.

At the time of the loss, the Plaintiff, a widow, was 69 years of age. As of the time of the trial, she was 75 years old. The Plaintiff's son, Blaine, who was 39 at the time of the trial, lived with the Plaintiff.

The loss itself took place on a clear day. The area around the bin was paved and dry. Pieces of scattered glass were located on the ground in front of the bin. As a result of the loss, the Plaintiff, who is right hand dominant, sustained a right fractured humerus.

With regards to liability, the Plaintiff alleged that as an occupier, Textile owed a duty to the Plaintiff to maintain the area around the bin and keep her safe. The liability of Textile was dependent on Textile coming within the definition of an "occupier" pursuant to section 2 of the *Occupiers' Liability Act*.

Section 1 of the *OLA* defines an "occupier" to include "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…".

The court stated that the common law confirms that the imposition of obligations under occupiers' liability depends on control rather than title. The judgment in *Great Lakes S.S. Co. v. Maple Leaf Milling Co Ltd.,* at p. 183, was highlighted in support of this position:

> "Control" is defined by Lord Denning in *Wheat v. E. Lacon & Co. Ltd.* and at 578:
>
> > … wherever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an "occupier" and the person coming lawfully there is his "visitor" …

Another enunciation in the same case came from Lord Pearson at 589:

> The foundation of occupier's liability is occupational control, i.e., control associated with and arising from presence in and use of or activity in the premises.

The court affirmed that responsibility for a premises falls on the person who is in actual occupation or possession of them for the time being, regardless of ownership. Exclusive possession and control over a premises was not required.

Textile had placed the bin on the Premises without the City's permission and had invited members of the public onto the Premises to access the bin. Moreover, they assumed responsibility for maintaining the bin and the area around the bin by employing an independent contractor to inspect the Premises around the bin on a regular basis. Textile also responded to complaints regarding the condition and maintenance of the area around the bins and placed a decal on the bin advising of such.

The fact that the City owned the Premises did not affect the liability of Textile as a joint occupier.

Textile was deemed to be an occupier of the Premises, and as an occupier, it owed a duty to the Plaintiff to maintain the area around the donation bin.

With Textile deemed an occupier, the court then turned to determining whether Textile breached a statutory duty of care to the Plaintiff. As a result of having been noted in default, Textile was deemed to have admitted the allegations contained in the amended Statement of Claim. The deemed admissions of negligence negated the need to have regard to Textile's discovery evidence. Textile was liable to the Plaintiff.

The court then turned to consider the contribution of the Plaintiff. With Textile having been noted in default and no defence therefore raised at trial, the court found that it was required to accept as fact that the Plaintiff "walked in a careful and prudent manner" as plead in the Statement of Claim, and that Textile was solely responsible for the Plaintiff's damages.

With liability determined, the court turned to the issue of damages.

The Plaintiff testified that pre-loss, she had no medical, mobility, or visual issues.

The Plaintiff's fracture was treated conservatively. While the fracture healed well, the Plaintiff complained of stiffness in the arm since the break. Her range of motion was reduced. She further complained of nightly pain, which caused her headaches. No surgical recommendations were made. A notation of a torn right rotator cuff was made one year post-loss.

While considering general damages, the court noted that the Plaintiff did not require surgery and rejected the suggestion that her right rotator cuff tear was accident related as there were no notations in the medical records of same until one year post-accident. The Plaintiff was awarded $65,000 in general damages.

The court then considered the Plaintiff's special damages claim.

Pre-loss, the Plaintiff was employed as a real estate broker. Following the loss, she took 8-10 months off work, returning to her duties in April/May 2018. She testified at trial that her ability to perform her tasks as

a realtor were compromised as a result of the pain associated with her injuries, and that she lost clients during her time off of work. Her income tax returns supported a reduction in income post-loss.

On the issue of past income loss, it was noted that the Plaintiff did not retain a forensic accountant Consequently, the court's damage award was described as being "similarly imprecise". The court took into account the Plaintiff's pre and post incident commission income and considered the balance of the effects of the pandemic on the residential real estate market, which lead to an increase in home prices. She was awarded $50,000 per year for 5.25 years, less her commission income earned, for a total of $154,247 in pre-accident income. Turning to future income, the court noted that the plaintiff retired in June 2022, but found that but for her injuries she would have worked to age 80. Accordingly, she was awarded $250,000 in damages for her future income loss as a result of retiring 5 years earlier than expected.

Out-of-pocket expenses for medications, lawn care expenses, and cleaning expenses were awarded. The OHIP subrogated claim was allowed for in the amount of $4,446.27.

Finally, the FLA claim was considered. The court noted that the FLA claimant did not testify at trial. While the Plaintiff testified as to his loss of companionship, care, and support, her evidence constituted hearsay. His claim had not, therefore, been proven on a balance of probabilities and was dismissed.

2. *Lyng v. Ontario Place Corporation*, 2022 ONSC 1861

On July 14, 2016, the plaintiff Patrick Lyng (the "Plaintiff"), then 21 years old, attended at a concert at Ontario Place. Following the concert, the Plaintiff exited the concert stands with a friend and the pair made their way towards a bridge to take them to a nearby Go Station. Finding that the bridge was closed for the Molson Indy, the Plaintiff and his friend decided to traverse down a wet grassy hill located beside the bridge. In doing so, he suffered a knee injury. The Plaintiff brought a claim against Ontario Place Corporation ("Ontario Place") for compensation for his injuries, pursuant to the *Occupiers' Liability Act* (the "*Act*").

The court was tasked with determining two issues. First, did Ontario Place exercise reasonable care in the circumstances to make the premises reasonably safe; and second, what damages were payable to the Plaintiff.

With respect to liability, the Plaintiff relayed to the court that it was his belief that on the date of loss he was wearing running shoes. During the course of the concert, he consumed between two to four beers, but will say that he was not intoxicated. Upon leaving the concert, there was a heavy downpour and the Plaintiff's clothing, and shoes became wet. It was his intention to cross a bridge in order to access a Go Station, however the bridge was blocked off by security guards. The Plaintiff followed a crowd of people that went around a concrete embankment to enter a grassy area that led down to a roadway. He confirmed on cross-examination that the area was well lit. The Plaintiff will say that the first part of the hill was slippery due to the grass being wet. He admitted on cross-examination that he was aware that the grass was wet prior to walking on it. Due to the wet grass, it was his evidence that he slipped, pushed off the hill, and landed on hit foot with a straight leg. He heard a "pop" and his knee landed on the pavement of the roadway. The Plaintiff conceded to the court that he could have taken shorter steps or taken an alternative route.

Evidence was provided to the court by a security guard hired for the purpose of securing the grounds outside of Ontario Place. The guard advised that the pedestrian bridge that the Plaintiff sought to traverse on the day of loss was closed. There was a guard stationed at the bridge to prevent people from crossing. There was no advance signage that advised pedestrians that the bridge was closed, nor were there any barriers preventing people from going down the hill located on either side of the blocked bridge. The security guard completed an occurrence report documenting the Plaintiff's injury, in which he described the Plaintiff as being "an intoxicated young man". The Plaintiff was noted to be wearing flip-flops.

An attending paramedic also provided evidence to the court. The paramedic authored a clinical information report contemporaneous to the time that she treated the Plaintiff post-fall. In the report she indicated "Patient jumped down hill". She advised that court that she further recalled that the Plaintiff advised her that he was "fooling around and jumped", landing on a straight leg. The Plaintiff expressed to her that he had a "couple of drinks" but that he was not intoxicated. The evidence was corroborated by a fellow paramedic at trial. The court found the paramedics to be credible, and their evidence forthright. Their evidence was accepted in its entirety.

Notes taken by a triage nurse were also reviewed by the court. The triage notes indicated that the Plaintiff "admits to drinking tonight, jumped down a hill and landed on left knee…".

In considering liability, the court found that the Plaintiff's evidence was contradicted by evidence provided by the attending paramedics and the triage nurse – professionals that were described by the court as having "an obligation and duty to write what happened on records", and who had created their records "virtually contemporaneous with the event".

The Plaintiff's version of events was rejected by the court on the basis that it was materially contradicted by witnesses and recorded evidence. The court concluded that while the hill was slippery after a substantial downpour, the Plaintiff had a few drinks and was "fooling around as could be expected from a 20 year old young man". The Plaintiff decided to "jump over the last six feet of the hill" while wearing flip flops, landing awkwardly, causing himself injury.

The Plaintiff retained an engineer to provide an opinion on liability. Their investigation found that while the slope at the top of the hill was 17 percent, the slope in the last six feet of the hill was 44.8 percent. The steeper slope would place a greater downhill force on people walking on it.

Evidence was tendered by a representative of Ontario Place. Ontario Place's Manager of Loss Prevention and Security advised the court that the security guards present on the date of the loss were hired by Live Nation Entertainment Corp. Any directions given to individuals leaving the concert grounds would be given by the security staff, although Ontario Place could, if warranted, develop a safety plan regarding the giving of instructions. It was conceded that there were no additional measures taken by Ontario Place relating to dark or rainy evenings, or the closing of the pedestrian bridge. While Ontario Place had access to barriers, and barriers could have been placed that would have prevented people from traversing down the hill on either side of the pedestrian bridge, none had.

The Court engaged in a consideration of the obligations of Ontario Place pursuant to section 3 of the *Act,* and the application of section 4(1) as it pertained to the allegation that the Plaintiff willingly assumed the risk that befell him.

In considering the actions of Ontario Place, the court found that it had blocked a pedestrian bridge and placed two guards to prevent entry to the bridge. It was aware that there were heavy downpours that evening that would make the hill at the side of the blocked bridge slippery and wet. Ontario Place was found to be aware that the hill was a slip and/or fall hazard. It was further aware that potentially thousands of people would leave the concert and could potentially traverse the area. Without signage or assistance, it was not reasonable for Ontario Place to expect that two security guards could provide adequate directions to departing attendees. It was, therefore, reasonable to foresee that a significantly sized crowd would approach the blocked bridge and would go around the bridge and onto a "wet, slippery, hazardous hill". Such a situation had been created by the decision of Ontario Place to block the bridge. Ontario Place was found to have made no reasonable effort to prevent the crowd - a number of whom may have consumed alcohol - from accessing the hill. And in doing so, it failed in its duty to take care that persons were reasonably safe while on its premises. Accordingly, Ontario Place failed it its duty as prescribed by Section 3 of the *Act*.

Turning to Section 4(1), the court rejected the defendant position that the Plaintiff assumed the risk of going down the hill.

Despite the court finding that Section 4(1) did not apply, the Plaintiff was, nonetheless, contributorily liable for his injuries. On the basis that he was wearing flip flops, had consumed alcohol, and had jumped, the Plaintiff was found to be 25% liable.

With liability concluded, the court considered the Plaintiff's damages. The Plaintiff tore his ACL in his left knee and suffered damage to his meniscus. Surgical intervention was required, which was deemed successful. Due to his injury, the Plaintiff no longer engaged in soccer, hockey, and skiing. As of the time of trial, the Plaintiff's knee had healed completely, with minimal discomfort. There was potential that, 10-15 years in the future, the plaintiff may have to undergo an additional surgery to address his ACL. The Plaintiff was awarded $50,000 in general damages.

In considering his income loss claim, the judgment notes that the Plaintiff was employed as a plumber. At the time of the trial, he had transitioned into a plumbing sales position. Post-loss, the Plaintiff remained off work for 30.5 weeks, 21.5 of which was time taken off of paid employment. His time off work resulted in a delay in the Plaintiff advancing in his plumbing apprenticeship levels, resulting in an alleged loss of wage differential. The Plaintiff was awarded past income loss in the amount of $25,367.21.

The Plaintiff also advanced a loss of competitive advantage claim. On the basis that it was possible that the Plaintiff would have to undergo a second surgery somewhere between the ages of 31 to 36 and would be left with another 30 to 35 years left until a normal retirement age of 65, the Plaintiff was awarded a lump sum of $100,000 for future loss of competitive advantage.

The total awards were reduced by the Plaintiff's 25% contribution.

3. *Johnston v. Nichilo*, 2022 CanLII 101413 (ON SCSM)

In this Small Claims Court matter, the plaintiff, Liam Johnston (the "Plaintiff") sought $25,000 in damages for injuries suffered when the window and window sash of the room that he was renting fell out and injured him.

The Plaintiff rented a room on the second storey of a house owned by the defendant Livio Nichilo (the "Defendant"). He had occupied the room for one month prior to the loss. Between the time he moved in and the time that the loss occurred, the Plaintiff relocated the room's bed from where the Defendant had originally placed it to a position directly under the window. On July 3, 2018, while in bed, the Plaintiff reached towards the window in an effort to close it. The window, including the glass and sash, fell out and landed on his head. The glass broke, causing a 5 inch laceration to his forehead, which required 12 stitches. The Plaintiff, who was 22 years old at the time of the loss, was left with a scar near his hairline.

The Plaintiff claimed damages pursuant to Section 3 of *Occupiers' Liability Act* (the "*Act*"), on the basis that the Defendant failed to take such care in all of the circumstances of the case as was reasonable to see that persons upon the premises were reasonably safe. It was undisputed that the Defendant was an occupier of the premises. As an occupier, the Defendant had a duty to have a reasonable system of inspection in place to ensure the safety of the premises. Furthermore, the Defendant was subject to a standard of care for windows set out in the Municipal Code on the basis that the property qualified as a rooming house (*although not licensed) under the City of Toronto's Rooming House By-Law.

On the issue of a system of inspection, the court found that the Defendant did periodically inspect the Plaintiff's room. He attended at the property 1-2 times per week. While he would not enter a tenant's room without notice, he made tenants aware that he could be advised of any issues with their individual rooms. The Defendant had not received any complaints regarding the property's windows. The Defendant had cleaned the Plaintiff's room prior to him moving in, which would have occurred approximately one month pre-loss, during which the room was inspected.

The evidence supported a finding that the Defendant had a reasonable system of inspection in place at the time of the loss. However, the Defendant was found by the Court to have failed to apply for a rooming house license. Having not applied for the license, the Plaintiff's room had not benefited from an independent inspection or system of inspections that would have been required as part of the licensing process. However, the failure to conduct reasonable inspections was not, in the view of the court, sufficient to establish that the Defendant breached a duty of care. The court opined that, if the Defendant took positive steps when conducting his personal inspections to ensure that the window met all applicable standards for second storey windows in rooming houses in Toronto, his conduct could be considered reasonable overall. As such, the court turned its analysis to whether the window met the applicable standards.

The Plaintiff engaged the services of an expert engineer to comment on the cause of the failure of the window. Although the expert engineer's evidence was largely dismissed by the court, the court did key in on the expert's finding that the subject window failed to be protected by a guard mechanism, which was required by the Toronto Municipal Code. The presence of a guard could have prevented the sash from falling out.

Although the court found that the Plaintiff had not established that the window was defective prior to the incident, the court did find that the standards set out in the Toronto Municipal Code had not been met. On this basis, "it (wa)s more likely than not that the defendant breached his duty of care to the plaintiff by failing to have a guard mechanism in place on the window".

Considering causation, while it was suggested that it was possible that the window and sash fell out because the Plaintiff applied too much force to the window, the court accepted the uncontroverted expert evidence that had a guard mechanism been in place, the likelihood of the sash failing out entirely would have been reduced. It followed from that finding that the failure of the Defendant to install such a guard caused the Plaintiff's injury.

The Defendant submitted to the court that the Plaintiff should be found contributorily liable for the loss on the basis that he had moved the bed from the place that the Defendant had originally placed it to under the window, without his consent. The court accepted that, but for the Plaintiff's decision to move the bed, he would not have been able to reach up to close the window. But for the action of the Plaintiff, the loss would not have occurred. The Court found the Plaintiff to be 50% contributorily liable.

The Plaintiff was awarded $5,000 in general damages, which was reduced by 50% for his contribution to $2,500.

Q4 Occupiers' Risk Management Tip

Following on our Q4 tip on the importance of creating inspection and maintenance checklists, it is also important that an occupier develop and utilize an Incident Report form. Key to a successful defence is documenting and preserving as much information about the loss and the injuries allegedly sustained by a claimant contemporaneous to the time of the loss.

An Incident Report form should include, at a minimum:

1. The date and time of the incident;
2. The date and time the incident was reported;
3. The weather conditions;
4. The specific location of the loss, including whether it occurred indoors or outdoors;
5. The name of the individual completing the form along with their title and contact information;
6. The names and contact information of any witnesses;
7. The name and contact information of the injured party;
8. A description of the incident by the person completing the form;
9. A description of the incident from any witnesses to the loss,
10. A description of the incident from the injured party,
11. A description of any injuries alleged by the injured party and assistance provided;
12. A checkbox that indicates whether an ambulance was called and/or attended at the scene;
13. A description of the condition of the area where the loss allegedly occurred;
14. A description of any corrective action taken, if any;
15. A checkbox that indicates whether photos of the loss area were taken;
16. A checkbox that indicates whether the loss was captured by CCTV footage and whether said CCTV footage was preserved; and
17. The signature of the individual completing the report.

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Jennifer is a member of the firm's Insurance Group and is based in Alexander Holburn's Toronto Office. She defends matters relating to complex personal injury, occupier's liability, CGL claims, municipal liability, professional negligence, D&O claims, product liability and recall, property claims, and subrogated claims. Jennifer also handles coverage disputes, and fraudulent claims. She works for insurers, and private clients alike. Jennifer is committed to working with her clients in a collaborative approach to develop a litigation strategy that is mindful of their goals, and needs, as an organization. She is client focused and customer service driven, and is dedicated to understanding her clients' business objectives, in an aim to not only deliver high quality work, but also an exceptional client experience. Jennifer has completed a certificate in Risk Management holds a Canadian Risk Management Designation. As a value-added service to her clients, she can provide advice on risk mitigation and financing, and strategies to reduce claims.

ABOUT ALEXANDER HOLBURN BEAUDIN + LANG LLP

Alexander Holburn is a leading full-service, Canadian law firm with offices in Vancouver, British Columbia and Toronto, Ontario. We have operated in British Columbia for nearly 50 years and opened our Ontario office in 2019. With over 100 lawyers, we provide a full spectrum of litigation, insurance, business, and personal law services for clients based in Canada, the United States, and Europe.

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