Claim No: 419789

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: C. v. D., 2014 NSSM 2

BETWEEN:

Mr. C and Ms. T

Claimants

- and -

Mr. D

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on December 5 and 11, 2013

Decision rendered on January 10, 2014

APPEARANCES

For the Claimants	self-represented
For the Defendant	Mark Knox, counsel Niall Burke, articling student

BY THE COURT:

Introduction

[1] This a very sad and unusual case. To protect the privacy of the individuals involved, I will refer to everyone by a single initial and provide as little identifying information as I can reasonably do.

[2] The Claimants in this case, Mr. C and Ms. T were residing in a condominium unit which they rented from its owners, Mr. and Ms. L. The building is a low-rise - 4 storeys - which contains some 69 units.

[3] The Defendant is the superintendent for the building and lives in one of the units. The building is managed by a large property management company, to whom the Defendant reports directly.

[4] Although not expressed in terms of any clearly articulated legal cause of action (such as negligence or one of the recognized intentional torts) the claim seeks substantial damages against the Defendant on the basis of what might be characterized as either a breach of privacy or trespass.

[5] Essentially, the allegation is that the Defendant - in the course of a routine and pre-announced inspection of certain features of the condo unit - wandered briefly and unnecessarily (and allegedly for prurient or other improper purposes) into private areas of the unit , namely the walk-in closet and en suite bathroom. This allegedly occurred when Ms. T was alone in the apartment, although property manager Ms. S was elsewhere in the unit. The effect of this alleged

breach of privacy was to traumatize Ms. T to the point where she has suffered extreme debilitating anxiety.

[6] Ms. T is a survivor of two severe sexual assaults, and as she described it, the invasion of her privacy has triggered bad memories and traumatized her all over again.

[7] Based on this incident, the Claimants felt compelled to move out of the apartment on very short notice, as Ms. T no longer felt safe. The move created some significant financial expense, for which they seek recovery. It also led to a series of additional problems, including an allegation that the Defendant intentionally locked them out of the building on August 7, 2013 by deactivating the electronic FOB prematurely. Mr. C was then unable to gain access to the unit to collect his few remaining things, and to clean the unit, giving rise to additional inconvenience and expenses.

[8] The total of the damages claimed is in excess of $8,000.00.

[9] The position of the Defendant is that he emphatically did not enter the private areas of the unit, although he had to pass through the bedroom to access the windows for inspection purposes. He also denies deliberately locking the Claimants out of the unit on August 7th. He says that he deactivated the FOB because he had been informed that they were vacating on the 6th, and that this was a routine security precaution.

[10] Counsel for the Defendant also argued that, legally speaking, this claim did not fall within any known cause of action. He also argued that most if not all of the damages claimed were highly remote and unforeseeable.

The Facts

[11] This all began with a "Window, Balcony & Door Survey" dated June 5, 2013, which was circulated to all of the residents of the building and which sought information in advance of "an upcoming balcony inspection by management and building staff." This survey was filled out by the Claimants, who reported one specific concern having something to do with the sliding screen door to the balcony.

[12] The next communication received by the Claimants was a Notice dated July 15, 2013 of a "Balcony Railings & Siding Inspection" which was to be conducted on July 18, 2013. The Notice indicated that if the residents were not home to allow entry, the units would be accessed by the superintendent (who has master keys.) It is conceded by the Defendant that the Notice did not mention anything about windows, but he and the property manager said that it was clearly intended that windows be part of the inspection, as mentioned in the Survey.

[13] The Claimants take the position in this case that in the absence of specific mention of windows in the Notice, the Defendant had no basis to be in the bedroom (let alone the closet and bathroom), as the balcony and siding could all be accessed through the living room. Mr. C stated that if he had known that the

Defendant might be walking through his bedroom, he would have stayed home that day and not left Ms. T alone in the apartment.

[14] The Defendant was not the author of the Balcony Railings & Siding Inspection Notice. Someone at the property management company was. I am satisfied that the Defendant honestly believed he had the right to inspect the windows. I am also of the view that the Claimants are being overly rigid and technical in their interpretation of what the building staff could and could not do. Condominiums present complex issues of ownership and control, given that the distinctions between common elements (owned by the condominium corporation) and the units (owned by the unit owners) are often artificial. The condominium corporation requires access to common elements, which may necessitate passage through a private unit. How this is done is as much or more a matter of cooperation and courtesy than it is of legalities.

[15] On the day in question, the Defendant along with Ms. S planned to inspect all 69 units in the building, commencing at 10:00 a.m. They actually inspected 67 units. It follows that they were only planning to spend maybe 5 minutes in each unit. That would eat up the whole day.

[16] All parties agree that Ms. T ran into the Defendant and Ms. S earlier in the morning, on the elevator, and the comment was made to the effect “we’ll see you later,” indicating that the inspection would be occurring when they got to the Claimants’ floor.

[17] As described by Ms. S, she and the Defendant knocked on the door and were admitted by Ms. T. Ms. S said that, as was their routine that day, she

headed straight for the balcony while the Defendant turned right out of the hallway to enter the bedrooms to look at the windows, which would have been on the far walls. She said that after a few minutes, when she expected that the Defendant had been looking at the windows, he joined her on the balcony and a few moments later they left, without any indication from Ms. T that anything was amiss. She did not hear any conversation between Ms. T and the Defendant which might illuminate what had (or had not) gone on.

[18] The evidence of Ms. T. differed only to this extent. She testified that after Ms. S and the Defendant entered, the Defendant walked into the master bedroom and, unexpectedly, took a short detour through the walk-in closet and bathroom, and only then did he walk over to start looking at the window. She said that she asked him if he needed help, to which he replied “no.” Ms. T says that she went into an immediate state of fright. She said she felt violated because the Defendant had entered her private space where things of a personal or intimate nature were present. She said that it triggered an immediate reaction where she started to relive her horrific sexual assaults. She said that she froze. She admitted that she did not say anything in protest of the Defendant’s action, because she was in a frozen state and she also just wanted them out of the apartment as soon as possible.

[19] The Defendant testified that he simply did not venture into the closet or bathroom. He says that he was very focussed on the task of inspecting all of these units, and he had no interest in snooping in other areas of the units. He had no idea that this allegation would be made until several days later when the accusation surfaced in emails to the property manager.

What does the evidence establish?

[20] It is my task to make a finding of fact as to whether or not this alleged intrusion occurred, because much flows from this. Even so, this would only be the beginning of the analysis, since there are many other issues that need to be addressed.

[21] The exercise of determining facts in a courtroom involves the assessment of credibility, in the broadest sense. Although many people equate credibility with truth-telling, it is much more than that. Assessing credibility means weighing the quality and reliability of the evidence overall. Courts are very familiar with the phenomenon of people relaying information that they honestly, perhaps even passionately, believe to be true, but which yet is not objectively true. Triers of fact must look beyond mere sincerity of belief.

[22] In a classic “he said, she said” credibility contest between parties who are “interested” (in the sense that they have an inherent bias), finders of fact are guided by the test articulated by the British Columbia Court of Appeal in *Faryna v. Chorny* [1952] 2 D.L.R. 354 at page 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[23] Having heard all of the evidence, the question of whether or not the Defendant took a detour and entered the closet and bathroom is strictly the word

of Ms. T against the word of the Defendant. There is no question that Ms. T has many supporters, not the least of whom is her partner, Mr. C, but also her psychologist and Mr. and Ms. L, the unit owners, all of whom have taken her at her word and acted accordingly.

[24] I have no doubt that Ms. T had an extreme psychological reaction to something that happened on that day, associated with the Defendant being in her bedroom where, as I have found, he had a legitimate reason to be as it was necessary for him to pass through to inspect the windows. But did it occur as she has reported, with the brief detour through the closet and bathroom?

[25] Looking, as I must do, at all of evidence, the allegation made by Ms. T seems inherently improbable.

[26] The Defendant was working as a team with Ms. S, and they had a lot of ground to cover that day. The Defendant was very likely focussed on the task at hand. He knew that the Claimants lived there as a couple, and it is hard to believe that he would have found anything enticing about entering a closet and a bathroom - in full view of Ms. T. What would he have hoped to see? Dirty clothes and toiletries, or more intimate personal items? It is hard to believe that this would have been an attraction sufficient to distract him from getting on with his work.

[27] Mr. C suggested on cross examination and in argument that the Defendant's alleged excursion into the closet and bathroom was somehow connected to the fact that Ms. T is a young and attractive woman. While Ms. T. is undoubtedly young and attractive, this hardly seems to be an explanation for

why the Defendant, who is a married man in his mid-sixties, would want to peek into her closet and bathroom, in full view of Ms. T and mere yards away from his supervisor, Ms. S, who might have responded in a heartbeat had a cry of protest been made.

[28] The Defendant testified that he did not do what is alleged, and nothing in particular was established to impugn his credibility.

[29] One might well ask why Ms. T would make this allegation, if it were not true? I accept that Ms. T appears to <u>believe</u> that this occurred as she has stated. But experience has shown time and again that humans are capable of mis-perceiving an event and coming to believe with the full force of their being that their misperception is factually true.

[30] Another way of saying this is that I do not believe that Ms. T is lying. I accept that she believes that she is telling the truth. However, I have some doubts about whether what she perceived is the same as what she describes.

[31] In the final analysis, the Claimants bear a legal onus to prove on a balance of probabilities that the Defendant did as they allege. At best the probabilities are equal. In such a case, the claim cannot succeed.

Later events

[32] Once the accusation was made and reported to the property management and to the Defendant, events moved quickly. The Claimants hired legal counsel

to formally complain about the alleged invasion of their privacy. Everything that subsequently occurred was filtered through the lens of this alleged event.

[33] According to the Claimants, the Defendant reacted to the accusation made against him with a campaign of intimidation and threats, which reinforced their perception that they were no longer safe in the building. The Defendant denies that he did anything of the sort.

Attempt to puncture tires

[34] Mr. C has accused the Defendant of attempting to sabotage their vehicles and their safety, by strategically placing two items (a screw and a rivet) under their tires with the intention of puncturing them. Mr. C. picked up these items and placed them in evidence. He admitted that no one actually saw the Defendant do this, but he asks that the inference be drawn because the Defendant has free and ready access to the parking garage.

[35] I have examined these items closely. One of them is a smallish 3/4-inch round-headed Robertson screw, probably a wood screw but possibly suitable for sheet metal. The other is a 1-inch long metal rivet, with a rounded head. It appears to have been sheared off at the other end, suggesting that it broke off its original placement.

[36] The screw is capable of standing in an upright position, though barely. It does have a sharp end, and could perhaps do some damage to a tire if driven over in precisely the right (or wrong) way. It is however quite short, and would barely go beyond the tread of a reasonably new tire. The rivet, on the other hand, barely stands on its head - indeed it wobbles. The slightest motion

causes it to fall over. And the other end is not at all sharp. It is not pointed. It could hardly be capable of puncturing anything.

[37] I conclude that the rivet posed no threat to a vehicle tire whatsoever, while the screw posed a very minor threat.

[38] Considering that there is not a particle of actual evidence to implicate the Defendant in placing these objects, I can only conclude that the Claimants became hyper-vigilant (after the alleged intrusion and Ms. T's undoubted serious reaction to what she perceived) and started drawing unsupportable conclusions out of highly equivocal events, and attributing malign motives to the Defendant with respect to all of his actions.

The later encounter with Mr. C and other events

[39] On July 24, 2013, some six days after the alleged intrusion, and the same day when he found the screw and rivet, Mr. C. encountered the Defendant early in the morning near the parking garage. The Defendant was vacuuming a carpet at the same time and Mr. C. was heading to his car. Some words were exchanged. Mr. C. claims that the Defendant insisted on telling him that Ms. T was "lying" and says that he was verbally threatened with some type of unspecified consequences. Mr. C says that he warned the Defendant not to vacuum in front of his unit, because it would be intimidating to Ms. T.

[40] The Defendant's version is a bit different. He says that this was the first time he had seen Mr. C since learning of the accusation two days earlier, and that he just wanted to talk to Mr. C about it to assure him that nothing had

actually occurred. He says that Mr. C shot back an angry “don’t you talk to me.” He says that he did not issue any threats.

[41] It does appear that later that same day, the Defendant did do some vacuuming near the Claimants’ unit, and at some point he slipped an envelope under the door advising Ms. T that she was behind in her payments for her parking space. He says that his job is to clean the entire building, and that he saw no reason why he should bypass the Claimants’ unit and leave that carpet dirty. As for the envelope under the door, he testified that part of his job is to deliver sealed envelopes prepared by the property manager, and that he does not know what is in them and has no discretion to leave them undelivered.

[42] The Claimants regard these incidents as deliberate provocations and intimidation tactics. This makes no sense. The Defendant had nothing to gain by inflaming the Claimants. Even had he been guilty of what he was accused of doing, which I have found not to have been proved to my satisfaction, the normal response would have been to avoid further confrontation in the hope that it would all blow over. I am more inclined to believe that the Defendant was, at most, unaware of the extent of Ms. T’s emotional state and did not appreciate that his very presence anywhere near the Claimants was problematic, per se.

[43] The extent of the Claimants’ willingness to vilify the Defendant can be illustrated by another of their complaints. July 24 was also a day when routine window washing was to take place. This is a job contracted out to a team of two men who start at the top of the building and rappel down with ropes, following a systematic approach to make sure that the whole building is done. Their cleaning schedules are partly dependent on good weather.

[44] The two men showed up and reported in to the Defendant, who was their contact at the building. During the course of the day, they cleaned the windows to the unit occupied by the Claimants.

[45] It is the position of the Claimants that the Defendant ought to have instructed these men not to clean the windows of the Claimants' unit, and that he deliberately chose not to do so as a further provocation.

[46] I find that this accusation is also unfounded. It is my finding that the Claimants are attributing malign motives to every routine or innocent action, or omission, of the Defendant.

The Claimants' decision to leave the building

[47] The Claimants made a hasty decision to vacate their apartment, because Ms. T no longer felt safe there. Indeed, after the events of July 24 the Claimants essentially stopped living in the apartment. They stayed a few days with Ms. T's mother and spent one night in a hotel, for which they seek reimbursement as part of the damages claimed. They hastily started looking for a comparable unit to rent, and because of the limited supply of rentals on short notice they ended up renting a smaller unit at a rent that was higher than they had been paying. They have claimed for moving costs, the cost of an additional storage unit for some of their furniture, as well as the extra rent that they will be paying for the first year. This adds up to many thousands of dollars.

[48] Ms. T also spent a day or more attending a medical appointment in Hamilton, Ontario, and Mr. C made the last-minute decision to accompany her

because of a concern that she should not have to undertake the trip alone. He seeks recovery of the cost of his air ticket as part of the damages.

[49] They also seek to recover the cost of further counselling sessions that Ms. T arranged to deal with her distress following the alleged event.

[50] The last alleged transgression by the Defendant occurred on August 7.

[51] The owner of the unit, Mr. L, had emailed the Defendant (in his role as building superintendent) to inform him that the Claimants were vacating the building “on August 6" and asking him to make sure that one of elevators was available for their use.

[52] The Defendant did as he was asked.

[53] Early the next morning, he deactivated the electronic FOB that gave the Claimants access to the building. He testified that he did so as a routine security matter as there should not be entry devices in circulation that were not needed. As it turned out, Mr. C was not entirely finished his move. He had indeed supervised the moving of all of the large items on the 6th, but planned to move out some personal items on the 7th and also had planned to do a thorough cleaning of the apartment that day.

[54] He arrived on the 7th and discovered that his FOB did not work. Believing that the Defendant had deliberately done this as a further provocation, and not wishing to have any possible encounter with the Defendant, he left. As a direct result, the task of cleaning the apartment and removing the remaining items did

not get done until the next day, and it was done by the unit owners themselves who issued a bill to the Claimants for several hundred dollars to do so.

[55] It strains incredulity to understand how Mr. C can place blame on the Defendant for this event. His only problem on the 7th was his inability to get into the building. While I appreciate that he specifically did not want to confront the Defendant, he had numerous other options. He could have called the property manager, Ms. S, or someone in her office, to gain access. He could have rung the doorbell of another unit owner (someone with whom he was friendly, perhaps?) and asked to be let in. He could have contacted Mr. or Ms. L, to ask for their immediate intervention. Worst come to worst, he could have buzzed the Defendant and simply insisted that he be let in, which would not have necessitated any direct contact.

[56] The fact that he chose to walk away and create further expense and troubles for himself and Ms. T speaks to his state of mind, but does not give rise to any rights when viewed objectively. Even if the Defendant had been responsible legally for the action complained of, the Claimants would have been under a legal obligation to mitigate (minimize) the damage suffered by taking the least expensive course. Instead Mr. C took the most expensive course of action.

Ms. T's psychological difficulties

[57] What cannot be denied is that these events, real or imagined, have had a real and devastating effect on Ms. T's psychological well-being.

[58] The Claimants have put forward a theory that everything was fine until the intrusion of the Defendant triggered a reaction, which Ms. T's psychologist called

a “fight or flight response.” My understanding is that this is similar to post traumatic stress disorder (PTSD).

[59] My view is that things were not so fine. Ms. T was at the time on disability from her job as a flight attendant, because of a significant physical illness. She was already engaged in psychological counselling for what appear to have been mood issues. And she was, quite clearly, in a vulnerable state because of the sexual assaults that she had endured.

[60] Even if the intrusion into her private space would have been proved to my satisfaction, she would have faced the argument that the consequences that she has suffered are out of all proportion to the event.

[61] The concept has been expressed in various ways by courts. One of the terms used is remoteness. Damages are not recoverable if the claim is too remotely connected to the event. Another term is foreseeability. Damages are only recoverable if an objective person could have foreseen that such damages might occur.

[62] Another concept, which may be just as apt in this case, if that of the “thin-skulled” Plaintiff vs. the “crumbling skull” Plaintiff. These terms find their origins in old cases where someone suffered a brain injury after an accident. The so-called thin-skulled Plaintiff is eligible to receive full damages, because it is foreseeable that some people might be more susceptible than others and the Defendant “must take his victim as he finds him.” However, a so-called crumbling-skull Plaintiff cannot hold the Defendant responsible if his skull was already in a state of deterioration. As explained in the case of *Saskatchewan*

Government Insurance v. Steinhauer 2006 CarswellSask 11, 2006 SKCA 1, 275 Sask. R. 59, 28 M.V.R. (5th) 1, 32 C.C.L.I. (4th) 31, 365 W.A.C. 59:

> 13 The "thin skull" rule makes the tortfeasor liable for injuries caused to the plaintiff even if those injuries are unexpectedly severe due to a pre-existing vulnerability or condition. As indicated in *Athey v. Leonati*[1] at para. [34] "The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person."
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> 14 The "crumbling skull" rule was explained by Major J. in *Athey v. Leonati* at para [35]:
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> > The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: [References deleted] Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: [References deleted] This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[63] In my view, being as objective as I can be, the conclusion is easily drawn that what Ms. T has experienced is a result of her condition, and not a direct result of anything unlawful that the Defendant has done. Even if the Defendant had done what he is alleged to have done, it is difficult to regard that transgression as anything other than an incidental trigger that caused her underlying pathology to manifest.

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[1] [1996] 3 S.C.R. 458

Conclusions

[64] There are a number of points that I believe are important.

[65] I do not question that Ms. T is suffering as a result of what she believes happened. However, the effects described are out of all proportion to the act complained of. Even if the Defendant had been so indiscreet and bold as to take an unnecessary peek into the Claimants' closet and bathroom, absent any special knowledge that Ms. T was a particularly vulnerable person, no one could objectively have predicted where this would all lead. The most that one could have predicted would have been mild annoyance.

[66] I am not even convinced that the law would recognize the alleged act of snooping as an actionable matter. I doubt that it rises to the level of a trespass. The developing tort of infringement of privacy - nominally attractive though it may seem - appears to be focussed on intrusions into personal and private information such as medical records or financial affairs. I do not believe that the event complained of would fit within any such framework.

[67] In the end, the Claimants have not made out a case for recovery, and the claim must be dismissed.

Eric K. Slone, Adjudicator