CITATION: Becker v. City of Toronto, 2019 ONSC 3912
COURT FILE NO.: CV-11-434394
DATE: 20190628

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

STEPHANIE BECKER, NICOLE BECKER, GERRY BECKER, AND MARCK BECKER Plaintiffs	*Jason F. Katz* and *Ari Singer,* for the Plaintiffs
– and –	
CITY OF TORONTO, JOHN DOE #1 AND JOHN DOE #2 Defendants	*Rebecca L. Bush* and *Ruby Egit*, for the City of Toronto *No one appearing*, for John Doe #1 and John Doe #2
	HEARD: April 1 to 5 and April 8, 2019

J. WILSON J.

Introduction

[1] On September 10, 2009 after school Stephanie Becker, age 14, was hanging out with her friend Sabrina and other teenage friends at the Irving W. Chapley Community Centre near her home. A youth, now known to be Jordon Saulnier, was allowed to use the staff's locked office to phone his girlfriend. He became upset and loud. Stephanie got up from the bench where she was sitting by the office door. Jordon either tripped, or punched the glass office door when Stephanie was close by. Suddenly, without warning, the glass door of the office shattered and a shard of glass became embedded in Stephanie's left eye. The left side of her face was cut and bleeding, requiring stitches. Stephanie has had four surgeries on her eye and is legally blind in that eye. Damages have been settled. This case deals with liability only.

[2] Stephanie sues the City of Toronto in negligence for failing meet the duty and standard of care required as an occupier pursuant to the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 (the Act). The Act partially displaces the common law. An occupier owes a duty to take such care in all the circumstances as are reasonable to ensure a person entering a premise is reasonably safe. The Plaintiff bears the onus of proving that the City has not met its statutory duty.

[3] The Plaintiff pleaded and alleged at the opening of the trial that the breaches of the duty of care were twofold. First, the City staff failed to adequately supervise Jordon in the staff office. Second, counsel alleges that the glass portion of the door in the staff office did not conform to building code requirements and was ordinary "annealed" window glass and not the required tempered safety glass. During argument, Plaintiff's counsel abandoned the negligent supervision argument as a separate cause of action, and now relies only on the allegation that the glass in the office window was not the required tempered safety glass as evidence that the City breached its duty of care. The degree of supervision provided at the recreation centre is part of the factual context to assess the question of foreseeability of the harm.

[4] The Plaintiff alleges that the annealed glass shattering caused the damage to Stephanie's left eye that meets the test for causation. In the circumstances, the Plaintiff argues there was a foreseeable risk of harm and danger to those attending the community centre.

[5] The Defendant takes the position that there has been no breach of the duty of care as the glass was tempered glass, that the test for causation has not been met, and that there was no foreseeable risk of harm.

The Issues

[6] The parties agree that the issues that I must decide are:

1. Has the Plaintiff met the onus of proving that the glass in the door of office 113 is annealed glass and not the required tempered safety glass?

2. If the Plaintiff proves that the glass in the door was annealed glass, did the failure to use safety glass cause the Plaintiff's injuries?

3. Even if the Plaintiff meets the burden of proving that the annealed glass caused her injuries, was injury to the Plaintiff a foreseeable risk in all of the circumstances?

Overview

[7] First, I will provide an overview of the facts and outline the facts that are in dispute. Second, I will assess the evidence, including a review of the expert evidence and make my finding of fact on whether the glass in the window was tempered or annealed glass. I will then consider whether the City breached its duty of care as an occupier. Finally I will apply my findings to the law of negligence to determine if the Plaintiff's claim meets the but for test of causation as well as the test of foreseeability of harm.

Preliminary Concessions

[8] There is no doubt that Stephanie was seriously injured. The Defendant's original Statement of Defence alleged all sorts of behavior or omissions by the Plaintiff causing or contributing to her injuries. At the opening of trial the City filed an amended Statement of Defence on consent that still alleges that Stephanie was partly at fault.

[9] Counsel for the Defence confirmed that the City was not relying on any of the allegations in paragraphs 13 and 14 of the Statement of Defence alleging contributory negligence. Counsel for the City concedes that Stephanie was not in any way responsible for this accident.

Evidentiary Issues

[10] Not surprisingly, some nine and a half years after the accident, the evidence from the various witnesses about the specifics of what happened is inconsistent, with poor memory for detail. The youth in attendance that day were between 13 and 16 years old at the time of the accident.

[11] Given the passage of time, I find with one exception, the contemporaneous notes made by the independent witnesses: the adult Mike Pang, who called the ambulance, the treating paramedic, and the police who investigated, to be helpful and the most reliable evidence as to what happened on September 10, 2009.

[12] Originally, Stephanie and her friends did not identify Jordon as the person in the office during the incident. However, an investigator from the City located Jordon two weeks before this trial. Jordon was known to Stephanie and her friends, but was not identified by Stephanie and her friends at the time of the accident as the person in the office.

Expert Reports

[13] Each party retained a Rule 53 expert report pursuant to *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Their reports were filed as part of their evidence, along with their *viva voce* evidence.

[14] Jeff Archbold, an engineer with Walters Forensic Engineering Inc. was retained as the Rule 53 expert on behalf of the Plaintiff. He filed several reports and opines based upon his understanding of the facts, the architectural door drawings, and his analysis of the forces at play by either a trip or a punch, that the glass in the door was annealed glass, not tempered glass as required by the building code.

[15] Dr. Doug Perovic, Professor and Past Chairman of the Department of Materials Science and Engineering at the University of Toronto, was retained as the Rule 53 expert for the City to respond. In his two reports he disagreed with Mr. Archbold's conclusions. Based upon his understanding of the facts, and the forces at play, he concluded that whether Jordon stumbled or punched the door, the glass in the door was the required tempered glass.

[16] Until Jordon had been located the theories of causation of the shattered glass were that the person in the office ("John Doe #1" in the pleading), had slammed the door, or punched the door from the inside, that something had been thrown at the door, or that Stephanie had slammed the door.

[17] For the first time, two weeks before trial, Jordon gave a videotaped and written statement that he tripped in the office while exiting the office, accidentally breaking the glass in the window as he braced himself as he stumbled. Jordon also testified at the trial. The Plaintiff accepts Jordon's

explanation. The Defence still relies in the alternative on the allegation that Jordon punched the glass door in frustration.

[18] The experts each made factual assumptions that underpin their opinions as to the type of glass that was installed in office 113. I will consider the competing experts' opinions after I outline my findings of fact. The evidence of the youths, Mike Pang, the paramedic, and the evidence of the City employees including Sean is relevant to the factual assumptions made by the experts in reaching their conclusions.

PART ONE: THE FACTS IN DISPUTE

[19] In spite of some of the inconsistencies in the evidence, there are only three issues involving findings of fact for me to decide that impact on whether the glass was tempered glass or annealed glass:

- Did Jordon trip over a phone cord, or did he punch the glass door causing the glass to shatter?

- Was there a loud low-pitched bang as the glass exploded consistent with the sound of tempered glass exploding or did the glass simply shatter without a particular and distinctive sound?

- If the glass in door 113 was tempered glass, and considering the force analysis of the experts would the glass have shattered if Jordon either tripped or punched the glass?

[20] For the reasons that I will outline, and by way of foreshadowing I find:

- It is more probable that Jordon punched the glass in frustration, although it is possible that he tripped.

- There was no distinctive noise when the glass shattered.

- Had the glass in the door of office 113 been tempered glass, I conclude that it would not have shattered, taking into account the facts and the experts' evidence of the forces at play on either available scenario: that is that Jordon stumbled or punched the glass.

The Scene

[21] Irving W. Chapley is one of the smaller community centres in the City of Toronto. It was renovated in 1995, and there were no known replacements to the window in the office 113 door prior to this incident in September 2009.

[22] The centre consists of a central entrance hall depicted in the many photographs, with multiple doors to washrooms and change rooms that must be accessed by the supervisor unlocking the doors. There is a locked common room area for seniors, and another locked common room area for "Tiny Tots" daycare. The daycare is active in the mornings, and the seniors are active in the evenings after 7 pm. There are two locked offices, one for the pool and hockey staff during the

summer and winter seasons, and one for the supervisor: on the day in question Sean was the only staff person on duty at the centre at the time of the accident. He is responsible for cleaning, maintenance, and supervision of the various activities taking place during his shift. The morning shift is from 7 am to 3 pm. The afternoon shift, which was the shift that Sean worked on the day in question, runs from 2 pm until 10 pm. There may well be more staff on duty both during the summer season when the swimming pool is open, and in the winter when the hockey rink is open.

[23] Outside the centre there is a swimming pool used in the summer, and a hockey rink used in the winter. There are also exterior basketball courts.

[24] On September 10, 2009, a large group of youths were playing basketball after school. Jordon was playing basketball with this group. Stephanie and her friend Sabrina Aquino were watching basketball and talking. Their friend Trevon Mattis was also playing basketball.

The Accident

[25] On September 10, 2009, while Jordon was playing basketball, a friend advised Jordon that his girlfriend was cheating on him. Jordon went inside and asked the supervisor, Sean, to have access to the superintendent's office to use the telephone to call his girlfriend. Sean let Jordon use the telephone in the staff office.

[26] Sean testified that Jordon had used the staff phone before without prior problems. Sean from time to time allows the public to use the phone. He left Jordon alone for privacy and went about his duties at the centre.

[27] The wooden door to office room 113 has a large glass panel in the centre measuring 45 cm wide by 165 cm tall. There were closed blinds entirely covering the window preventing visibility to or from the office.

[28] Trevon was tired and thirsty after playing basketball and went inside for a drink of water at the fountain. He came inside with Stephanie and Sabrina as they were chilly on that fall day. The three may have gone inside the centre at the same time or sometime after Jordon went to use the phone.

[29] Jordon stated that he came into the centre with his friend. While Jordon was on the phone Jordon testified that his friend was standing on the bench.

[30] Stephanie, Sabrina, and Trevon were seated at the back bench of the recreation centre by the window overlooking the swimming pool. They did not confirm the presence of another youth standing on the bench.

[31] Mike Pang and his girlfriend were walking in the neighbourhood. They came into the centre as the girlfriend wished to use the washroom. The washrooms were locked. They found Sean and he unlocked the women's washroom. Mike's girlfriend was in the washroom at the time of the accident.

[32] Sabrina went to use the female washroom, and presumably was let inside by Mike's girlfriend. She too was in the washroom at the time of the accident.

[33] Stephanie heard a loud angry voice coming from the office. Trevon did not hear as he was on the phone and had an ear bud in the other ear. Stephanie either walked past the office door, intending to go to the washroom, or went to the office door to see what was happening.

[34] When the accident happened, Mike Pang was sitting on a bench near the entrance waiting for his girlfriend while she was in the washroom.

[35] Jordon testified that while he was talking to his girlfriend by phone he confronted her about going out with his friend. After a loud, emotional conversation Jordon hung up the phone. The phone was located in the middle of the desk in the office. He testified that the desk was in the same place as in the photographs presented at the trial. There are photographs of the phone. There was a receiver attached to the body of the phone by a coiled cord.

[36] According to Jordon, he heard someone trying to get into the office, and thought it must be the superintendent. As he reached to open the door he testified that he tripped over a wire and accidently put his hand through the glass.

[37] He confirmed that he must have tripped over the coiled extension cord connecting the hand-held receiver to the phone. He was located about 2 to 3 feet or 3 to 4 feet from the door. In the step and a half from the office desk to the door he stumbled and unexpectedly his right hand went through the glass in the door making a fist sized hole in the window in the door at eye level. His left hand landed on the wall beside the door.

[38] An alternative theory of the Defence, is that while upset, Jordon punched the glass in frustration causing the glass to shatter. Jordon denied that he punched the glass and testified that he was shocked that the glass broke and that it was thin.

[39] Jordon's fist went through the glass up to mid wrist. Jordon had a couple of cuts and slices but "nothing too serious". He showed a 1 inch curved scar from the incident. He did not fracture any bones and did seek any medical attention.

[40] Jordon could not remember the shape of the hole in the glass that his hand made. He carefully removed his hand from the hole to avoid cutting himself. He described seeing sharp tips of glass in the remaining glass door, and that if he moved his forearm and hand the wrong way he would cut himself.

[41] He saw glass on the floor but did not remember what it looked like.

[42] From Stephanie's perspective on the other side of the door, as she was walking by to join her friend in the washroom, the glass in the door suddenly and unexpectedly shattered. A glass shard became embedded in her left eye. The left side of her face had multiple punctures and abrasions. The left side of her nose was injured. Some of the punctures and cuts required stitches.

[43] Mike testified that he heard glass shattering but did not see it shatter. He describes a scream. He went to investigate and met Stephanie halfway from where he was sitting at the front of the centre as she walked towards him from the back of the centre. He described that glass beads were everywhere on Stephanie's hair, face, and the floor. Blood was flowing everywhere on her face and clothes.

[44] Trevon asked Mike to call 911. Trevon then went into the women's washroom with Stephanie to help her. Sabrina and Mike's girlfriend were already in the washroom.

[45] Mike did not inspect the glass on the floor or the door after the glass had broken.

[46] While in the washroom, Sabrina saw the piece of glass protruding from Stephanie's left eye. Stephanie attempted to remove the glass with her fingers but was unable to do so. Sabrina described the glass as large, sharp and jagged.

[47] When Jordon came out of the office, he did not see Stephanie, but could hear noises from the washroom. Jordon did not see Sean when he came out of the office.

[48] After cleaning the blood from Stephanie's face in the washroom, Mike, his girlfriend, Stephanie, Sabrina, and Trevon left the washroom and waited outside for the paramedics at the front of the centre. They wanted to make sure Stephanie was conscious and that she was safe.

[49] The 911 call was quite lengthy. It began at 6:39.27 pm and ended at 6:45.08 pm.

<u>Evidence of the Paramedic, Police Officers and Mike Pang's incident report</u>

[50] I accept in general the accuracy of the notes made by the independent witnesses at the time.

[51] The paramedic, Ilka Barniske, spoke to Stephanie on September 10, 2009 before she was taken to the hospital for surgery. Stephanie described to the paramedic a person on a cell phone who "was yelling when he suddenly punched the glass wall/door between them" and "the glass shards came hurling toward her face and she was unable to shield herself in time".

[52] I will outline the paramedic's independent observations about the glass protruding from Stephanie's eye when I review the facts underpinning the expert opinions.

[53] The police attended at the hospital to investigate a potential assault, as Stephanie's mother believed that Stephanie may have been injured by a broken bottle. Stephanie advised the police, according to Police Constable Di Nino, that she heard an argument in the "community room" but she could not see inside as the blinds were down. Someone inside the room hit the glass. Sabrina did not witness the event as she was in the washroom. Stephanie did not see who was in the room as after the accident she went to the washroom.

[54] Police Constable Muto had slightly different notations of the same conversation. He confirmed that Stephanie advised them that she heard someone yelling on the phone, she was beside the door listening, and somehow the glass shattered. She did not know if the person yelling had thrown something or punched the glass door. There was no staff on duty, "only a janitor". The

police concluded that there was no evidence of an assault and this was a case of mischief. They closed their investigation.

Findings of Credibility

[55] Counsel for the Plaintiff in his opening suggested that all of the small inconsistencies amongst the youth are background noise, not impacting upon the facts that are important to determine this case. Generally I agree.

[56] A factual issue was whether the youth, and in particular the Plaintiff, knew it was Jordon who had broken the glass.

[57] I find based upon the note taken by Mike Pang, indicating that he heard the Plaintiff or Sabrina say "I will never speak to Jordon again" that on a balance of probabilities the Plaintiff knew Jordon was the person in office 113 who broke the glass. It is possible that Sabrina made this comment, as she was doing most of the talking outside.

[58] The Instagram communication between Jordon and Stephanie two weeks prior to trial also confirms that Stephanie may have known the identity of Jordon as she told him to stop communicating and she would speak with her lawyer. I note that this evidence is more equivocal as the Plaintiff also asks in that communication why Jordon is contacting her, and says that "[he] had nothing to do with it".

[59] Stephanie did make several comments to the police and the paramedic that she did not know who the person was in the office.

[60] If the youth, including the Plaintiff, knew Jordon was the person in the office (which may well be the case from the evidence), perhaps teenage solidarity meant they circled the wagons to avoid their concern of getting Jordon in trouble.

[61] As Defence counsel points out this issue affects credibility. However, none of Stephanie's evidence is controversial and is corroborated by other witnesses Stephanie was seriously injured through no fault of her own.

[62] Whether or not the youths, including Stephanie, knew it was Jordon in the superintendent's office does not impact any issue in the case.

[63] Jordon's evidence must be scrutinized carefully to determine the most probable cause of how the glass broke.

[64] One aspect of Sean's evidence about hearing a bang, must be carefully assessed as this is one of the facts relied upon by Dr. Perovic as important.

[65] Plaintiff's counsel argues that Jordon was an independent credible witness and that his evidence as to how the glass shattered should be accepted as proving that he stumbled and broke the glass in the door.

[66] Defence counsel argued that Jordon's evidence was not credible or reliable and did not make sense, and that he was angry and upset and punched the window in frustration.

[67] Jordon was jumpy and nervous when he gave his evidence. He clearly just wanted to finish his evidence as quickly as possible and leave the courtroom. He testified that when the glass broke, he was afraid that he would get into trouble. I accept that he felt terrible about Stephanie's accident.

[68] I accept Mike Pang's evidence that after the accident, Jordon bolted out of the office and left the scene. Jordon said he was heartbroken and sad in the telephone conversation with his girlfriend, but that he was not angry. I accept that Stephanie heard loud voices coming from the office consistent with Jordon being not only upset but angry. I do not accept Jordon's evidence that he stayed around and went up to the roof of the centre, feeling sad that his girlfriend was cheating on him.

Fact in Dispute: Did Jordon break the glass by a stumble or a punch?

[69] Jordon testified that he tripped on a wire and stumbled as he was leaving the office. He was close to the door when this happened: 2 to 3 feet or 3 to 4 feet from the door (there were two different distances given in his statements and evidence). As he stumbled forward, his right hand palm at eye level went through the glass in the door. His left hand braced his fall immediately afterwards by making contact with the wall beside the door. Jordon denied that he punched the glass door.

[70] Sean in his evidence confirmed that all of the connecting wires to the phone jack were out of sight behind the desk. This makes sense. Jordon suggested in cross-examination that he tripped over the coiled extension cord that connects the hand held part of the phone to the receiver. He also confirmed that he had hung up the phone.

[71] It is hard to visualize a trip in these circumstances, although it is possible if one is upset.

[72] I find the more likely scenario was that in frustration while close to the door, on his way out, Jordon punched the door at eye level, not intending to break the glass. I accept he was shocked that the glass broke with the impact and that he was surprised that the glass was so thin.

[73] As I will outline in my conclusions when I review the expert evidence and the force analysis, it does not matter which scenario applies, as in all probability the force imposed by Jordon's hand, be it a punch at close range in frustration or a stumble, would not exceed the required energy level of 205 joules sufficient to break the glass in the office door in room 113 had it been tempered glass.

Fact in dispute: Was Sean mistaken about hearing a "bang" as he was doing his rounds and was not in the vicinity at the time of the accident?

[74] Sean testified that while letting Mike Pang's girlfriend into the washroom he heard a loud bang and screaming, and then saw Stephanie with blood on her face. Sean stated that he then saw Stephanie and her friends running quickly outside the centre. Simply put, this is not the sequence of events that happened.

[75] I do not accept Sean's evidence that he was letting Mike Pang's girlfriend into the washroom when the accident happened. This does not accord with Mike Pang's *viva voce* evidence and the evidence of the other witnesses.

[76] Sean asked Mike, as witness, to fill out the City's Minor Incident Report. Mike was filling out the report while he was sitting with Stephanie and her friends outside waiting for the ambulance.

[77] His description is as follows:

> I came in to use washroom, female girl "Stephanie" walked in front of staff office, seconds later glass door shattered into "Stephanie's" face. I stand and watched this happen, I called 911 immediately, 2-3 black kids were in hallway when this happened. One kid was in the office using staff phone. "Sean" Staff was letting my girlfriend into a locked washroom when this happened. I was on the phone w/ems as "Stephanie" ran into washroom from shock. When "Stephanie" came into my sight, I asked her to sit as per ems, she finally sat on the picnic table outside the centre. This is where she sat while waiting for ems. She said she will never speak to "Jordan" again. This is when I got Stephanie's name.
>
> All 3 black kids fled the scene right after that happened.
>
> If there are any questions, please feel free to call.
>
> Mike Pang

[78] The only part of the note of Mike that I do not accept, as it conflicts with his *viva voce* evidence, and the evidence of the other witnesses is that at the moment of the accident, Sean was opening the washroom door for his girlfriend.

[79] Sabrina and Mike's girlfriend were already in the washroom at the time of the accident. After the accident, all witnesses confirmed that Stephanie and Trevon immediately went into the girl's washroom to attend to Stephanie's injuries while Mike, at Trevon's request, called 911.

[80] I accept the evidence of Mike that the supervisor Sean at the time of the accident had "disappeared, doing his rounds or whatever he needs to do". I accept the evidence of Mike that later Sean came back to the lobby area while Mike was on the 911 call and asked if everything was alright. Jordon also confirmed that Sean was nowhere in sight when he came out of the office before he left the centre.

[81] After the accident, Mike observed a black youth, now identified as Jordon, "bolt" from the office. Jordon ran outside and disappeared.

[82] The only part of the incident report that Sean filled in was the first page, which stated "Stephanie stood by office & seconds later glass from the door shattered into Stephanie's face. From a person using the phone in the office who may have been a friend".

[83] In another "Participant Minor Injury/Incident Report" Sean stated:

> Person asked to used phone in office slammed door and window broke girl outside office door got cut on her face EMS was call by witness name Mark.

[84] I find that at the time of the accident Sean was some distance from the office and lobby area doing his regular rounds, probably according to his evidence cleaning the Tiny Tots room. In these circumstances he could not have heard a bang. In any event, Sean does not describe in any detail what he allegedly heard. His evidence, even if accepted about a bang, without more information is not indicative of tempered glass breaking. I accept the rest of Sean's evidence.

[85] All other witnesses describe hearing the glass shattering, not any sort of distinctive bang.

Fact in dispute: Was the glass in the door of office 113 the required tempered glass, or was it ordinary annealed glass?

[86] I will first examine the background of the experts. Second, I will outline the discrepancy in the documents that were submitted for tender. Third, I will outline the characteristics of tempered glass and annealed glass. Then, I will outline my findings of fact from the various witnesses relevant to whether the glass was annealed or tempered glass. Finally, I will then consider the experts' force analyses in light of my findings of fact and will summarize my conclusions.

The Experts

[87] Jeff Archbold, retained by the Plaintiff, has a masters in engineering. He works with Walters Forensic Engineering and was qualified as an expert in human factors, fracture mechanics, and material engineering science. He acknowledged that he did not have training in fractography of glass, and that the majority of his expertise was in metals, with a lesser emphasis on glass.

[88] He was of the opinion, based upon the evidence, that the glass in door 113 was annealed glass, not the required tempered glass.

[89] Dr. Doug Perovic, retained by the Defence, has more experience in glass failure cases than Mr. Archbold. He is a standing member of the Canadian Committee of Glass. He has published widely. He was qualified as an expert to opine on material science and engineering, and in particular concerning the type of glass based upon fracture patterns, fracture mechanics, and the force required to break tempered glass.

[90] Dr. Perovic expressed the view based upon the facts he relied upon, that the glass in door 113 was the required tempered glass.

[91] Both experts have significant experience as an expert witness retained by both plaintiffs and defendants in various fact situations involving engineering issues. They have been qualified many times as expert witnesses in Canada and in the United States.

[92] Mr. Archbold does not have the same in depth experience as Dr. Perovic with glass. He does have significant experience with body mechanics and force analysis related to his master's thesis dealing with prosthetics. Mr. Archbold also has extensive experience with assessing failures due to construction issues, and where shortcuts may be taken by contractors in the bidding process. He was a practical straight-forward witness and answered freely and candidly in cross-examination.

[93] Dr. Perovic is a renowned expert in glass. He is a very experienced academic and has published broadly. He was a careful, perhaps overly suspicious witness in cross-examination. For example, counsel for the Plaintiff put to him statements that came from his report that he would not agree to until he was taken to the entry and shown that the statements were his own words. He tended towards advocacy tenaciously holding to his opinion, and by being very resistant to acknowledge that his opinions would change if the facts underpinning his opinion that he relied upon were different.

[94] The conclusions of any expert depend on the factual assumptions made giving rise to their opinion. I accept all that Dr. Perovic had to say about types of glass and the methodology of the calculations. As I will outline, I do not accept some of the factual assumptions Dr. Perovic made that were important in his force analysis and conclusions. Therefore, based upon the facts as I find them to be, I do not accept Dr. Perovic's conclusion that the glass in question was tempered glass.

Discrepancy in the tender documents for door type 6

[95] Jeff Archbold, for the Plaintiff, pointed out that there was a discrepancy in the tender documents concerning the type of glass to be used in the office door at room 113, which was a type 6 door.

[96] The Architectural and Structural specifications in Reference 1.02 confirms reference standards conforming with the building code as:

CAN/CGSB-12.1-M-90, tempered or laminated safety glass

CAN/CGSB-12.3- M-91 Flat Clear Float Glass

[97] Clearly in the Door and Frame Schedule Chart at page 2 the glass required in the door for office 113 is "TG" or Tempered Glass.

[98] However the third page of that chart shows illustrations of the various types of doors. Office room 113 was a type 6 door. The illustration of the type 6 door does not indicate the requirement of it being made with TG (tempered glass). All the other illustrations of the other doors stipulate "TG" for tempered glass.

[99] Mr. Pecchia confirmed that the drawing of door 6, if considered alone, does not mandate tempered glass.

[100] He testified however that the specifications in the chart (which did require TG or tempered glass) trump the diagrams in the City contracts. No changes requests were made, nor would they

have been granted to allow annealed glass to be placed in the door of office 113 as it would not comply with the minimum building code standards.

[101] Jeff Archbold, expert for the Plaintiff, was concerned about the conflict in the documentation sent out for tender. He was of the view that contractors relying on the drawing of door 6, rather that the schedule could well have used ordinary annealed glass, as it is cheaper, rather that the tempered glass conforming with minimum standards. He has considerable experience as an expert witness dealing with contractor errors.

[102] I conclude that Mr. Archbold's theory raises a valid concern. It appears that there was a specification error in the door drawings sent out to tender. The contractors may well have relied on the specific door drawings for door type 6, which did not call for tempered glass, rather than the schedule. Therefore the contractor may have installed annealed glass, rather than the minimum standard tempered glass. The discrepancy between the schedule and the drawings raises an issue as to how this error may have taken place, but clearly does not prove that the glass installed was annealed glass.

[103] A close consideration of the evidence of the witnesses and the expert opinions, along with the force analysis is necessary to determine whether the glass in door 113 was annealed glass or tempered safety glass.

The characteristics of tempered glass

[104] The Canada General Standards Board (the CGSB) sets minimum prescribed standards that are incorporated into the Ontario Building Code. The building code that was in effect at the time of this accident was the 1990 Ontario Building Code.[1] The code was changed in 1997 but there were no changes with respect to safety glass requirements.

[105] The size of the glass in this case was .72 metres. The mandatory CAN/CGSB-12.1-M-90 requirements of tempered glass for measurements less than .8 metres require the glass to meet the 205 Joule impact energy test. A size of glass greater than .8 metres must meet the 540 J impact energy test.

[106] Dr. Perovic confirms at page 7 of his first report:

> The standardized impact test procedure was developed to simulate human behavior and the test represent body impacts at two kinetic energies. The 205 J impact energy test (Category 1) was established to represent situations involving limited acceleration such that the individual does not develop their full impact potential. The 205 J impact energy test was intended to represent hand/ arm impact by adults. The 540 J impact energy test (Category

---

[1] *Building Code*, O. Reg 413/90.

2) was intended to represent full body contact with the glass plate corresponding to most adult male lower extremity, torso and arm impact.

[107] Dr. Perovic confirms that the minimum strength levels for tempered glass are higher in Europe.

[108] Tempered glass consists of three layers: an internal component to the glass that is under pressure creating internal tensile strength sandwiched between the two stable external layers that are under compression.

[109] For it to be considered safety glass, the surface compression giving strength should exceed 70 to 100 megapascals. The strength of annealed glass at the upper end is 25 megapascals.

[110] Tempered glass requires significantly more impact energy than annealed glass to break.

[111] The experts are in agreement about the fracture characteristics and patterns of glass panels that break.

[112] Annealed glass is stress free and has a residual stress of zero. When it breaks it forms irregular sharp pieces, often referred to as shards with sharp edges. Exhibit 6 of Dr. Perovic's second report illustrates patterns of breakage for annealed glass.

[113] The general description of tempered glass as a type of safety glass is that it breaks in a particular way to avoid injury. If tempered glass breaks, the fragment particles size should be small enough to not exceed a defined mass. They are more regular in shape described as kernels or dice, although the size and shape is not always consistent.

[114] Mr. Archbold described multiple cracks in tempered glass, and that the glass shatters in pieces or in small chunks. This is illustrated in the drawings on Exhibit 6 - lower row of broken tempered glass.

[115] Dr. Perovic confirmed that tempered glass can have sharp edges, although annealed glass has lance like pieces with a much higher propensity for injury.

The City's Witnesses

[116] Frank Belyk, the supervisor, came to the centre during the evening of September 10, 2009 after Sean reported the incident. He ordered replacement glass. The replacement glass that was installed by the City was wired safety glass, which conformed with the building code in place at the time, although Dr. Perovic confirmed it would not comply today. Wired glass has the same strength as annealed glass, but if broken the embedded wire contains the glass and prevents displacement of the glass. Today wired glass is used for fire walls.

[117] Mr. Belyk did not inspect the glass from the door that was stored in the Zamboni storage room.

[118] He confirmed that injuries take place fairly frequently at recreation centres, and that there are lawsuits from time to time.

[119] Mr. Belyk made inquiries through the City staff to see if the glass in the door had been replaced from the time of building the centre in 1995 and this accident in 2009. He was unable to locate any records of glass replacement for office door 113.

[120] Mario Pecchia testified. He was the supervisor of capital projects for the City, and the project manager for the renovation of the Irving W. Chapley Centre in 1995.

The evidence of the witnesses relevant to the type of glass

[121] The experts faced a number of challenges. First, they had no physical evidence to examine as the glass from the office window 113 had been thrown away. Second, there were no photos taken of the window after the glass broke, and no photos of the glass on the floor. Third, the memory of the witnesses some nine and a half years after the accident with respect to describing the glass was limited and at times inconsistent.

[122] In assessing whether the glass in the door was tempered or annealed glass, the experts considered the following descriptions given by the witnesses:

- that Sean heard a bang.
- that there was a fist-size hole in the glass, but the rest of the glass panel was intact.
- Jordon's description of removing his hand from the hole and his injuries.
- the quantity of glass that fell to the floor by the office door was a relatively small amount.
- the description by Sean of removing the remaining glass from the door using a hammer to break the glass.
- the description of the piece of glass in Stephanie's eye.
- the description of Stephanie's other injuries.

[123] In assessing the three alternative force scenarios the experts considered the evidence including the statements made by the witnesses:

- that Stephanie was in close proximity to the door.
- that there was a fist-sized hole in the glass at eye level, but the rest of the glass panel was intact.

- in assessing the forces, the distance that Jordon was from the door in the case of a stumble.

- that Jordon was 16 years old, 5' 6" tall and weighed between 150 to 160 lbs in 2009.

- the nature and extent of Jordon's injuries.

[124] The experts confirm that a fist-sized hole may be consistent with both tempered and annealed glass, although one could not generate a circular hole with annealed glass.

Sound of the glass shattering

[125] Dr. Perovic testified that due to the layering, and the internal tensile strength of tempered glass, a distinctive sound happens when tempered glass is brought to failure. He describes a loud lower frequency bang or boom indicative of an explosive event when the internal tensile pressure of the tempered glass is released.

[126] He confirmed that annealed glass breaks at a higher frequency sound, and a lower sound volume.

[127] Dr. Perovic relies on Sean's evidence that he heard a "bang" in support of his conclusion that this was tempered glass breaking in a distinctive low frequency or boom.

[128] Sean was minimalist in all of his evidence and did not say anything more than a "bang". This word, without more, does not support a finding that the glass was tempered glass.

[129] In any event, for the reasons that I have outlined I find that Sean was not in the immediate vicinity of the accident when it occurred.

[130] None of the witnesses described this distinctive sound of a low distinctive boom or bang.

[131] Mike Pang described hearing the glass shattering, (he did not describe a bang or any sort of distinctive sound). Then he heard Stephanie screaming. He stated that "the glass door shattered everywhere, that there was glass in her hair on her face and on the floor. Blood was flowing everywhere. There were little beads of glass in her hair".

[132] Stephanie, who was closest to the event, did not describe any noise, but testified that as she was by the door, the glass shattered and came unexpectedly hurling toward the left side of her face. Had there been a distinctive sound, she would have remembered it.

[133] I conclude that Sean's evidence does not support the conclusion of Dr. Perovic that the sound made when the glass shattered was consistent with the sort of distinctive sound made when tempered glass is brought to the point of failure.

Description by Jordon of removing his hand

[134] Jordon describes taking his hand out of the hole as follows:

- His hand, wrist and forearm were through the glass half-way up his lower arm.
- There were sharp tips of glass around the hole so he was afraid he could cut himself if he moved the wrong way.
- He had a couple of slices caused by the glass, but "nothing serious". He received no medical care. He did have a one inch scar that he showed me.
- He was shocked that the glass shattered with the minor impact.

[135] Jordon's description of the glass is consistent with broken annealed glass, rather than the dice or kernels that would be expected of broken tempered glass.

Small amount of glass at the door

[136] Dr. Perovic relied on the relatively small amount of glass in support of his finding that the glass in the window was tempered glass.

[137] In my view, the problem with his reliance on the small amount of glass is that Dr. Perovic did not take into account the location of the broken glass.

[138] Dr. Perovic described the explosive force that is unleashed when tempered glass is brought to its failure point and breaks, making not only a distinctive boom noise, but shattering the entirety of the glass. He confirmed that when tempered glass breaks it is propelled faster and further than annealed glass, as the energy released during fragmentation is higher.

[139] Dr. Perovic's description of the explosive projectile force when tempered glass is brought to failure, and the resulting scattering of tempered glass is inconsistent with Sean's evidence.

[140] While the group was waiting outside for the ambulance, Sean cleaned up the glass. I accept his evidence about what he did. He used a broom and dust pan to gather the broken glass on the floor. It was easy to clean up. There was not a large quantity of glass on the floor by the door. Sean did not describe cleaning up widely scattered glass fragments, as would be expected following the explosive event of tempered glass breaking.

[141] Sean's description of a small amount of broken glass falling by the door is consistent with annealed glass breaking. Annealed glass has no internal force and is not explosively propelled forward when it breaks.

[142] The description by Sean of cleaning up the glass is consistent with the glass being annealed glass, rather than tempered glass.

<u>Tempered glass results in the entire glass structure breaking into pieces</u>

[143] Another important fact is Sean's description of how he removed the remaining glass in the window.

[144] Tempered glass is known as safety glass because the size of its broken fragments should not exceed a defined mass, which reduces its chances of causing injury. Hence the description of kernels or dice-sized fragments.

[145] When tempered glass breaks, it breaks more evenly, and more completely, into smaller pieces than annealed glass. For 3 mm tempered glass, which is the least expensive and the thinnest tempered glass option for the window at room 113, the average maximum mass of the ten <u>largest</u> pieces must not exceed 4.9 grams. This translates to the average size of the ten largest pieces being no bigger than one inch by one inch.

[146] Dr. Perovic referred on several occasions during his evidence to the diagram at Appendix 6 of his second report. This diagram confirms that when tempered glass is brought to failure, the entirety of the glass breaks or cracks into relatively small, relatively uniform sized pieces, as compared to irregular shards when annealed glass breaks. It is the uniform breakage pattern into small pieces that makes tempered glass safety glass, to reduce chance of injury.

[147] As illustrated by the diagram at the bottom of Figure 4.17, tempered glass pieces can be longer and thinner, and need not be square, but are relatively uniform in size, with the entire glass structure cracking.

[148] When annealed glass breaks, the pattern of breakage is irregular and involves shards and cracks.

<u>After sweeping up the glass, Sean broke the remaining glass with a hammer</u>

[149] Sean reported the accident to his supervisor, Frank Belyk, who attended later that evening at the centre. Frank did not inspect the glass.

[150] Sean testified that he carefully removed the remaining glass that was in the broken window, using gloves to avoid being cut. He said the broken glass was not like a mirror, and more like a door. He made no other observations and has no recollection of seeing the broken glass. No photographs were taken.

[151] Sean described removing the larger pieces of glass, carefully as not to cut himself, then using a hammer to break them up to place them in bins located in the Zamboni room.

[152] I accept Dr. Perovic's evidence that one can be cut while removing safety glass, although safety glass is designed to have blunt regular edges to cause much less injury when it breaks.

[153] Dr. Perovic confirmed the specifications of tempered glass in this case, such that he would expect the tempered glass to have broken into multiple relatively similar sized pieces when the

inner tensile pressure was released. The ten largest pieces of broken tempered glass should weigh an average maximum of 4.9 grams and be no bigger than one inch square, on average.

[154] If the glass had fractured in the manner predicted for tempered glass, in accordance with the diagram, I find that it would not have been necessary for Sean to hit the glass with a hammer to break up the larger pieces in order to be able to put the glass in a bin.

[155] Having regard to the diagrams of glass attached to Dr. Perovic's report, and his evidence, Sean's description of what was required to remove the remaining glass from the window is not consistent with the appearance and quality of tempered glass.

Description of glass in Stephanie's eye

[156] An important fact is the description of the glass shard embedded in Stephanie's eye, and in particular the description of the paramedic.

[157] The piece of glass in Stephanie's eye, measured 1 ½ cm from her iris to under her brow and protruded 1 cm, is considerably less than the average maximum size of the ten largest pieces of broken tempered glass (2.5 cm square). It also likely weighed less than the average maximum mass of the ten largest pieces, 4.9 grams. Hence the mass and dimensions of the piece of glass in Stephanie's eye do not assist in determining whether the glass is tempered glass or annealed glass.

[158] The paramedic did say that based upon her experience with other eye injuries, an object need not be sharp to pierce an eyeball.

[159] The paramedic had a present memory of this event. She described the "glass shard impaled in left eye" as clear, protruding half a centimetre from Stephanie's eye, with a sharp jagged edge. The glass was not round and could not be described as a kernel of corn, or like dice.

[160] Stephanie described the protruding piece of glass as sharp, and jagged.

[161] Dr. Perovic confirmed that broken tempered glass is discoloured at the edges, not clear.

[162] This independent description given by the paramedic that the protruding edge of the glass was sharp, jagged and clear is important, objective evidence that confirms that the glass shard was annealed glass, not discolored tempered glass.

Beads of Glass in Hair

[163] Immediately after the accident, Mike describes blood flowing everywhere and of beads of glass in Stephanie's hair. The description of beads may be consistent with tempered glass. He was not questioned on this description. The balance of Mike's description is consistent with annealed glass. Mike's notes made at the time did not contain any reference to beads of glass.

[164] I conclude that the strong preponderance of consistent evidence of the witnesses, not primed for a specific scenario, overwhelmingly confirms that the glass that shattered in office 113 was annealed glass.

Expert Force Analysis

[165] In the force analysis, the experts considered the interaction between three elements: the speed of the object hitting the glass, its weight, and its size or mass to determine if the glass was tempered glass and whether the threshold of 205 joules of energy to cause failure would be reached in various fact scenarios.

[166] Most of the force analysis in the trial involved analyzing Jordon's evidence that he stumbled into the door.

[167] Mr. Archbold did not do a failure analysis using the force of a punch, but rather analyzed the scenario based on Jordon's stumble/ trip evidence. Dr. Perovic did a limited punch analysis.

[168] The experts conducted an analysis of the forces at play and whether the glass could break based upon the application of those forces if it was tempered glass using three possible scenarios:

1. Scenario 1: That Jordon was ten feet from the door when he stumbled (this was Dr. Perovic's analysis only and does not accord with the facts).

2. Scenario 2: That Jordon was two to three feet or three to four feet from the door when he stumbled, in accordance with the evidence.

3. Scenario 3: That Jordon deliberately punched the door and that he did not stumble.

Scenario 1

[169] There was some conflicting evidence as to where the desk in the office was located, and whether the filing cabinet shown in the pictures was present in September 2009. Whether or not the filing cabinet was in its present location or not, I accept the evidence of Jordon that the phone was in the middle of the desk, that he was sitting and standing during the conversation, and that he was a maximum distance of three to four feet from the door, and perhaps two to three feet when he either stumbled or punched the door.

[170] First and contrary to Jordon's evidence, in scenario 1, Dr. Perovic performed an analysis assuming that Jordon began to move toward the door when he was ten feet away from the door and at that point he began to stumble, and that he was falling downward.

[171] Dr. Perovic had him moving, almost hurling through the room at a speed of three metres per second, corrected to be 2.4 metres per second.

[172] The room was only 10 feet 3 inches wide. I conclude that the scenario considered by Dr. Perovic suggesting that the stumble occurred beginning three inches from the far wall, and the following analysis is a complete non-starter as it is not supported by any of the facts.

Scenario 2

[173] Second, Dr. Perovic and Mr. Archbold did an analysis in accordance with Jordon's evidence that he was three to four feet from the door when he stumbled, with his right hand going through the glass at eye level and his left hand immediately thereafter bracing the wall to support him.

[174] Jordon was five feet six inches tall and weighed between 150 to 160 pounds.

[175] Mr. Archbold concluded that the forces at play in this scenario could not come close to the threshold of 205 joules required to break tempered glass. He estimated Jordon's speed moving forward as .85 metres per second, which is a walking speed. Given Jordon's weight and height at this speed he would not surpass the 205 joules threshold. I accept his evidence.

[176] Mr. Archbold did not take downward acceleration into account in his force analysis due to the short distance involved between the stumble and the door, and given that the hand went through the glass at eye level.

[177] Dr. Perovic testified that if the downward acceleration of a trip was taken into account then it was "possible" based upon the downward acceleration forces at play that the 205 joules threshold could be exceeded and that the tempered glass could have broken. He then corrected his evidence to state it may be "probable".

[178] On this issue I accept the evidence of Mr. Archbold that the downward acceleration forces did not come into play given the short distance from the desk to the door, and the undisputed fact that the hole where the hand went through the glass was at eye level. Jordon could not be falling downwards and have his hand go through the glass at eye level. The analysis of Mr. Archbold makes sense and accords with the physical evidence of the location of the hole in the glass.

[179] Dr. Perovic reluctantly acknowledged that if the downward acceleration force was taken out of his calculation, the 205 joule threshold to break tempered glass from a stumble at three to four feet or 1.25 metres would not be met.

Scenario 3

[180] The third scenario is that Jordon did not stumble, but punched the glass as he was leaving the office.

[181] Dr. Perovic confirmed that if one intended to break the glass, it was possible that the tempered glass would break (he later corrected himself, stating it was "probable" that the tempered glass would break). Mr. Archbold also confirmed that it was possible to break tempered glass with a punch at high speed. He gave the example of a professional boxer wearing a glove, that was not relevant to these facts.

[182] Dr. Perovic stated that it would take "significant hand arm impact force to import the required kinetic energy to exceed 205 joules." Jordon was 16 years old, and relatively small five foot six inches tall and between 150 and 160 pounds.

[183] Whether it was a trip or a punch, I accept that Jordon was shocked and surprised that the glass broke,. stating it was very thin.

[184] In cross-examination Dr. Perovic confirmed that, in order to for a punch by Jordon to break 3 mm tempered glass, the hand would need to be travelling more than 10.1 metres per second, or 36 km per hour, which seemed unlikely.

[185] Jordon confirmed that he was not seriously injured in the incident except for a few slices. He showed a scar on his wrist. He testified that after his hand went through the glass up to mid-wrist, he carefully avoided further injury from the sharp glass pieces when he withdrew his hand.

[186] Mr. Archbold confirmed that had Jordon punched and broken tempered glass, he would have "broken his hand" with serious injuries including probable fractures, contusions, swelling, and bruising. Jordon had no such injuries.

[187] Dr. Perovic declined to opine on the injuries that would result from a punch that could break tempered glass as he stated he was not an orthopedic surgeon. Although he declined to offer an opinion on the degree of injury Jordon would have experienced had the glass been tempered glass in the punch scenario, which would have been helpful to the Plaintiff, I note that he was quite prepared to offer an opinion about the degree of injury to Stephanie based upon his conclusion that the glass in her eye was tempered glass.

[188] Although it would be possible to punch and break tempered glass, I conclude that on a balance of probabilities Jordon would not exceed the 205 joules required to break the tempered glass if in fact he punched the glass in frustration. He was shocked when the glass broke.

[189] His injuries of a few cuts or slices are consistent with injury from sharp shards of annealed glass. I reach this conclusion without considering Mr. Archbold's evidence that Jordon's injuries would have been much more serious and of a different nature had he punched tempered glass, as Dr. Perovic declined to answer this question, stating it was beyond his expertise.

Conclusion that Annealed Glass had been installed in office door 113

[190] Based upon the analysis of the forces, along with my findings of fact from the various witnesses, be it scenario two with a stumble three to four feet from the door and the hand going through the glass at eye level, or perhaps a punch by a frustrated young man, I conclude that the glass would not have shattered had it been the minimum thickness of the required tempered glass.

[191] I accept the evidence of Mr. Archbold that the error in the type of glass installed in office 113 probably originated in the plans that were presented to the contractors to bid on the renovation project. I conclude that in all of the circumstances, the contractors probably followed the diagram of door 6, which did not call for tempered glass, and therefore installed the less costly annealed glass. In all probability the contractors did not cross reference the document with the schedule that called for tempered glass, and the error of the type of glass installed was not caught in the final inspection.

The Law

[192] I will first outline the principles of the *Occupiers Liability Act*, R.S.O. 1990, c. O.2, before considering whether the duty of care has been breached, followed by an analysis of the questions of causation and foreseeability.

1. Duty of Care

[193] The *Occupiers Liability Act* imposes a duty of care on an occupier to take reasonable care to ensure that the premises are reasonably safe for use by other persons.

[194] The Act describes the legal duty an occupier of premises has towards another person who comes onto those premises. Section 1 of the Act defines an occupier:

> 1 In this Act,
> "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")
> "premises" means lands and structures, or either of them, and includes,
> > (a) water,
> > (b) ships and vessels,
> > (c) trailers and portable structures designed or used for residence, business or shelter,
> > (d) trains, railway cars, vehicles and aircraft, except while in operation. ("lieux") R.S.O. 1990, c. O.2, s. 1.

[195] The City of Toronto acknowledges that it is an occupier of the community centre.

[196] The City of Toronto disputes that it breached its duty of care, as it claims that the glass installed in office 113 was the required tempered glass.

[197] The Act partially displaces the common law in respect of the duty of care in s. 2 and s. 3:

> 2 Subject to section 9, this Act applies in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining the occupier's liability in law in respect of dangers to persons entering on the premises or the property brought on the premises by those persons.
>
> 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 the premises.

[198] An occupiers' duty to protect extends only to foreseeable harm. A municipality is not an insurer against all possible risks on its property.[2] In *Waldick v. Malcolm* (1989), 70 O.R. (2d) 717 (C.A.), at para. 19, aff'd [1991] 2 S.C.R. 456, the Supreme Court of Canada confirmed the limits of responsibility imposed by section 3(1) of the Act:

> ...[a]ll courts have agreed that the section imposes on occupiers an affirmative duty to make the premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm. The section assimilates occupiers' liability with the modern law of negligence. The duty is not absolute, and occupiers are not insurers liable for any damages suffered by persons entering their premises. Their responsibility is only to take "such care as in all the circumstances of the case is reasonable." The trier of fact in every case must determine what standard of care is reasonable and whether it has been met.

[199] In *Alchimowicz*, the plaintiff, while "grossly intoxicated", dove from the railing of a dock into shallow water, leading to severe injuries. He brought an action against the City of Windsor which owned and operated the park where the dock was located. In dismissing the action, the Court of Appeal explained, at para. 13:

> In fulfilling its duty as an occupier, it was not incumbent upon Windsor to guard against every possible accident that might occur. Windsor was only required to exercise care against dangers that were sufficiently probable to be included in the category of contingencies normally to be foreseen. In our view, an adult diving off the dock at night into shallow water was not one of these contingencies. To exact a standard as suggested by the appellant would effectively make Windsor an insurer against all possible risks. The law imposes no such duty. [citations omitted.]

[200] The Plaintiff bears the onus to show on a balance of probabilities that the Defendant occupier did not take such care as would have been reasonable in all the circumstances and therefore breached its duty of care under the Act.[3] Section 3(1) of the Act provides that the standard of care requires that in all the circumstances of the case the occupier must see that persons entering on the premises are reasonably safe while on the premises.[4]

---

[2] *Alchimowicz v. Schram*, 1999 CarswellOnt 83, at para. 13 [*Alchimowicz*].

[3] *Tondat v. Hudson's Bay Company*, 2018 ONCA 302, at paras. 5-6; *Turner v. Oakville*, 2018 ONSC 5647, at para. 27; *Mirsoltani v. Canadian Memorian Chiropractic College*, 2018 ONSC 5639, at paras. 17-19; *Goody v. Costco Wholesale Corp.*, 2009 CarswellOnt 4260, at para. 24.

[4] *Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 313, at para. 25.

Conclusion that Duty of Care has been breached

[201] I conclude that the glass in door 113 was annealed glass, and not the required tempered glass. To have architectural specifications that are inconsistent is a recipe for an error by a contractor when a project is put out to tender.

[202] Installing glass that does not meet minimum public safety standards in an office door in the lobby of a busy public community recreation centre consistently full of tiny tots, and their caregivers, seniors and adolescents meets the test for a breach of the standard of care to ensure persons entering the premises are safe. Hence I conclude that the Plaintiff has proved that the City breached its duty of care.

[203] Confirming the duty of care has been breached is the first step in the inquiry. The Plaintiff must also meet the onus to prove causation and foreseeability in the facts of this case.

2. The But For Test of Causation Applies

[204] The test for evaluating causation remains the "but for" test.

[205] The Plaintiff must show that, "but for" the negligent acts or omissions of each defendant, the injury would not have occurred. To prove causation, a plaintiff must show that the breach of the standard of care caused the plaintiff's harm in fact. This requirement applies equally to claims for negligence pursuant to the Act. The Supreme Court of Canada clearly set out the principles of the test in *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333, at paras. 20-23:

> Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.
>
> First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.
>
> This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, *per* Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant". Similarly, as I noted in *Blackwater v. Plint*, at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."
>
> The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's

> conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, *per* Sopinka J.

[206] The necessary link between the alleged negligent act and the injury suffered is further emphasized in *Baltadjian v. The Roman Catholic Episcopal Corporation for the Diocese of Alexandria*, 2017 ONSC 61, at para. 30, citing the seminal case *McGrath v. The Toronto Transportation Commission*, 1946 CarswellOnt 344, at para. 5:

> It is elementary law that the negligence of a defendant will not make him liable in an action for injuries sustained by a plaintiff, unless there is a direct connection found, with evidence to sustain it, between the injuries suffered and the negligence which has been found. It is not sufficient for the plaintiff to prove merely the accident and the negligent act on the part of the defendant. He must further prove clearly that the accident was due to the negligent act with which such defendant is charged, and the connection between the alleged negligence and the injury suffered must be made out by evidence and not left to the conjecture or speculation of the jury … (emphasis added)

Conclusion that causation has been proved

[207] A plaintiff bears the onus of proof of causation applying the but for test. He or she must illustrate that the defendant's breach of the standard of care caused the plaintiff's harm in fact.

[208] I accept the conclusions of the Plaintiff's expert that if the glass in office door 113 had been the required safety glass, it would not have broken, whether Jordon tripped or punched the glass. Hence Stephanie would not have been injured if the required tempered glass had been installed. In these circumstances, the but for test is met.

3. Test of Foreseeability

[209] The Plaintiff also bears the onus to prove on a balance of probabilities that the Plaintiff's injury was a result of a reasonably foreseeable risk of harm that was created by the act or omission of the Defendant.[5] Foreseeability asks whether the risk of harm is in law reasonably foreseeable.[6] If the Plaintiff cannot discharge this onus, the negligence claim will fail as the injury suffered is too remote to the wrongful conduct to hold the Defendant fairly liable.[7]

---

[5] *Saadati v. Moorhead*, 2017 SCC 28, at para. 20 [*Saadati*]; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at para. 18 [*Mustapha*]; *Resurfice Corp. v. Hanke*, [2007] 1 SCR 333, at para. 6; *Tonizzo v. Moysa*, 2007 ABQB 245, at para. 184.
[6] *Mustapha*, *supra* note 5 at paras. 11-12.
[7] *Saadati*, *supra* note 5 at para. 34; *Mustapha*, *supra* note 5 at para. 12.

[210] Determining whether a risk of harm is reasonably foreseeable requires a look at the probability of the harm. The Supreme Court in *Mustapha* has stated that a harm that is a "real risk" or "one which would occur to the mind of a reasonable man in the position of the defendant... and which he would not brush aside as far-fetched" can satisfy the probability requirement for a reasonably foreseeable harm.[8]

[211] It is not required to foresee the exact manner in which the harm occurred to meet the test of a reasonably foreseeable risk of harm (*Millar v. Waring*, 2009 CanLII 22799 (Ont. S.C.)). In *Millar* the plaintiff was injured when he was attacked by a sledgehammer while intervening in a dispute amongst neighbours. The Court confirmed foreseeability in that case in relation to the neighbor who called the plaintiff to intervene in the dispute. The Court addressed the parameters of reasonable foreseeability at para. 232:

> [232] It is not necessary that the precise sequence of events and the nature and severity of the injury be foreseen by the defendant to attract liability. In *Ontario v. Cote*, 1974 CanLII 31 (SCC), [1976] 1 S.C.R. 595, Dickson C.J writing for the Supreme Court articulated the principle as follows in considering the issue of negligence of the parties in a motor vehicle accident which occurred on an icy stretch of a provincial highway:
>
>> *It would seem to me that a reasonable person, familiar with Canadian winters, should have anticipated a vehicle collision or collisions as the natural, and indeed probable, result of such a condition of manifest danger. It is not necessary that one foresee the "precise concatenation of events"; it is enough to fix liability if one can foresee in a general way the class or character of injury which occurred: Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (Wagon Mound No. 2)* [[1967] 1 A.C. 617]; School Division of Assiniboine South No. 3 v. Hoffer [1971 CanLII 959 (MB CA), [1971] 4 W.W.R. 746, appeal dismissed, [1973] S.C.R. vi.], appeal to this Court dismissed. (Emphasis added)

[212] The Defendant relied on two cases involving injuries from broken glass in support of its argument that the Plaintiff has not met the test of reasonably foreseeable risk of harm in this case. I conclude that both of these decisions are distinguishable.

[213] In *Lavallee v. The Bank of Nova Scotia*, 2003 MBQB 204, the plaintiff attended the defendant bank's office. As she left the office, her hand went through the office's glass door and she sustained injuries. There was evidence that she was upset when leaving the bank and smacked

---

[8] *Mustapha, supra* note 5 at para. 13, quoting *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Propriety Ltd.* (1966), [1967] 1 A.C. 617 (New South Wales P.C.), at p. 643.

or forcefully hit the door. She sued the bank for negligence, alleging that the bank failed to install tempered glass in the door as required by the relevant building code.

[214] The defendant brought a motion for summary judgment. Sharp M. granted the summary judgment motion and dismissed the plaintiff's claim. The plaintiff failed to produce sufficient evidence to prove that the glass was not the type of glass required by the building code. The plaintiff did not tender expert evidence, instead relying solely on her own affidavit (at para. 14).

[215] When discussing Manitoba's occupier liability legislation, Master Sharp M., at para. 8, quoted *LeClerc v. Westfair Foods Ltd.* (1999), 140 Man. R. (2d) 88 (Man. Q.B.), at para. 22, stating that "[i]t is not sufficient to establish a remote possibility of injury occurring. There must be sufficient probability to lead a reasonable person to anticipate it. The existence of some risk is an ordinary incident of life <u>even when all due care has been taken</u>." [Emphasis added.]

[216] *Lavallee* is distinguishable, and does not assist the Defendant as a precedent on the issue of foreseeability. The Plaintiff has proved in this case that the City failed to install the minimum standard of safety glass required in this public building. In this case, by not installing the required safety glass, the Defendant has not met its duty of care.

[217] The Defendant also cited *Mott v. Brantford (City)*, 2008 CarswellOnt 283, as an example of a broken glass case where risk of harm was found to be too remote and not foreseeable. The foreseeability analysis in *Mott* focused on whether the defendant ought to have known that glass which was safer than the minimum building code requirements was needed to protect against children breaking the glass, and risk of harm.

[218] The glass in *Mott* met building code requirements.[9] At para. 52, Milanetti J. confirmed that simply complying with the governing building code may not enough for a defendant to escape liability. Lack J. made a similar observation in *Baker v. York (Regional Municipality)* (2006), 84 O.R. (3d) 279, at para. 23, stating that building codes only set minimum requirements, compliance with which does not extinguish an occupier's duty to take reasonable care for those it permits on its premises.

[219] In *Mott* the Court concluded that there was not enough evidence to show that the municipality had been put on notice that the glass installed, which complied with the minimum building code requirements, was not sufficient to prevent a risk of harm.[10] The municipality had no evidence that the glass had previously broken in a dangerous manner. Further, the plaintiff led no evidence of safer glass used in other public buildings in the municipality. The Court also noted that there was no clear expert evidence confirming the arguments of the plaintiff that enhanced safety glass should have been installed. In the circumstances, the Court concluded that it was too

---

[9] *Mott v. Brantford (City)*, 2008 CarswellOnt 283, at para. 52.
[10] *Mott*, *supra* note 9 at para. 60.

remote to expect the municipality to foresee a risk of harm that the municipality was required to take steps to prevent.[11]

[220] Again, *Mott* is clearly distinguishable from the facts of this case, as the Plaintiff has proved in this case that the City failed to comply with the minimum building code standards requiring safety glass to be installed in the window of office 113.

Facts concerning foreseeability

[221] Is it foreseeable that installing annealed glass that was not the minimum safety standard of tempered glass in the office located in a public area would result in an injury to a member of the public, given the circumstances of the supervision in place at the centre?

[222] The design of the window in question was mostly glass. There was a significant amount of glass in the office window: measuring 45 cm by 162 cm, translating to .72 metres of glass. The large glass portion of the window was covered with a retractable blind, so that no one could see in or out of the office.

[223] The evidence of the Defendant was that based on a search of the records there was no prior record of the glass in office 113 breaking and being replaced from the date of the renovations in 1995 to the date of this incident in 2009.

[224] However I note that the Defendant's record-keeping for repairs was less than stellar. The Defendant, based upon its record of repairs, only confirmed two weeks before the trial who had installed the replacement glass in office 113 after the accident. The replacement had been done internally. Until two weeks before the trial, counsel thought that a third party completed the repairs.

[225] The replacement glass installed in office 113 was not tempered glass, but was wired safety glass, which was a different type of safety glass than tempered glass.

[226] At the time of this accident in 2009 wired safety glass, often used in school buildings, met the minimum building code requirements as a safety glass. Wired safety glass has the same strength as annealed glass, and hence is not as strong as tempered glass, but does not shatter if broken, as the glass is held in place by the wire infrastructure. Dr. Perovic confirmed that the building code requirements changed two years ago, and today wired glass would not meet the minimum building code requirements of a safety glass. Wired glass is now used primarily as a fire wall glass to prevent fire from spreading.

[227] There was one staff member, Sean, on duty at the centre on the day in question.

---

[11] *Ibid.*

[228] His union job profile description confirms under major responsibilities "Performs tasks required for the safe and proper operation of a facility that may include arenas, pools, community centres, and surrounding grounds."

[229] Having one staff member on duty at the centre was the norm in the September season. Presumably during the hockey season and the summer there are other staff present and the second office is used by hockey and swimming staff.

[230] Sean is more of a maintenance person than a supervisor. He was referred to by the witnesses as a janitor. His log book (some portions of which I could not read) on the day in question confirms the manual nature of his work:

> Emptied garbage where needed
>
> ....washroom with t Paper
>
> Clean out.... room sink toilet etc
>
> Dust and mopped lobby hallway etc.
>
> Mopped out senior room
>
> Glass broken on office door etc ....
>
> Assist permit holder and public
>
> All regular duties etc
>
> Check all door's
>
> light out

Suzan

[231] The programs offered at the centre on September 10, 2009 were multi-generational, including the Tiny Tots daycare in the morning and the senior card game in the evening starting at 7 pm. During the summer, and after school hours, the centre was a regular meeting place for youth. That afternoon going into the evening, there was a pick-up basketball game going on outside with enough youth to field two teams. Stephanie estimated 24 youth in attendance, Jordon estimated that there were at least enough young people at the centre for two teams plus spectators. Most of the group was outside on this September day.

[232] Counsel for the Plaintiff withdrew their claim that inadequate supervision was a stand-alone basis for negligence. I have not considered the case law on inadequate supervision, nor were

these arguments canvassed before me. However, the undisputed facts about the level of supervision in place provides factual context relevant to assessing the question of foreseeability of risk of harm.

[233] Sean, the only staff person on site, allowed Jordon the privilege of using the staff phone to speak to his girlfriend. He left Jordon alone in the locked staff office. Blinds covered the glass in the door preventing anyone from seeing into the office from the outside.

[234] During the phone call, Sean did not wait in the near vicinity, but rather in Mike's words "disappeared" doing his rounds. It appears that at the time of the accident he was cleaning the Tiny Tots room. Sean had allowed Jordon to use the phone in the past and had not had trouble with him.

[235] Office 113 is located in the lobby area of the busy community centre with frequent public traffic passing by.

[236] In the interior of the lobby area near the staff office where the accident took place there is a "No loitering" sign. It is not clear whether that sign was present at the time of the accident. Sean confirmed that the sign was there as the lobby area had to be kept clear of rambunctious teenagers to ensure the safety of the seniors and Tiny Tots participants. The young people were not allowed to hang around that area, according to Sean, to avoid them getting into trouble and misbehaving.

[237] At the time of the accident there were three or four youths sitting on the bench at the far end of the lobby overlooking the outdoor pool and close to office 113. Mike confirmed there were two female and two male youths at the location. Jordon suggested that his friend was standing on the bench, not sitting quietly, although that fact was not confirmed by anyone else.

[238] Sean confirmed that sitting on the bench by the office reading was not considered loitering. Mike confirmed that prior to the accident he had no concerns about the youths' behavior, although he was not in the immediate vicinity at the time of the accident.

Conclusion that injury was foreseeable

[239] It is not necessary that the Defendant foresee the exact sequence of events that transpired: i.e. leaving a youth unsupervised for a telephone call with his girlfriend, who becomes upset and breaks the glass in the office door by either a punch or stumbling, resulting in a piece of the broken glass embedding into the eye of a bystander.

[240] Youth were frequently in attendance at the centre and the supervision was minimal. Sean confirmed that youth could disturb the seniors and the Tiny Tots programs. A "no loitering" sign clearly would not deter rambunctious youth horsing around when the lone supervisor was absent performing other duties.

[241] The design of the door itself is relevant. It was mostly glass: .72 metres of glass with a wooden frame surrounding the glass. The extent of the glass in the door was presumably to allow the supervisor in the office to see what was going on in the lobby area. However, the photos confirm that then and now the entire glass portion of the window was covered by a blind preventing any visibility through the office window.

[242] Youth do not always act predictably. By way of example, Jordon confirmed that his friend was standing on the bench by the office, not sitting quietly. Sean confirmed that the youth would horse around. Jordon also testified that somehow he had gained access to the roof of the centre, and at times would sit on the roof. I use these factual examples to illustrate that with the minimal supervision on site it was in my view foreseeable some sort of accident would take place involving the large office window for room 113 in the lobby of the recreation centre that did not comply with the minimal requirements of the building code, probably involving unpredictable youth.

[243] The facts of this case are easily distinguishable from the cases *Mott* and *Lavallee*, relied upon by the Defendant. In both cases the minimum standard of glass had been installed, and there was no expert evidence supporting the plaintiffs' arguments as to breach of duty as an occupier.

[244] In the facts and circumstances of this case, I conclude that it was reasonably foreseeable that not using tempered glass (or other safety glass) in this large glass window in office 113 could lead to an injury to a person at the recreation centre caused by the annealed glass breaking, by one means or another, probably associated with the behavior of rambunctious youth who attend the centre on a daily basis. I accept the clear and convincing evidence of Mr. Archibald, called on behalf of the Plaintiff, that had the correct and required minimum safety glass been installed, the Plaintiff would not have been injured.

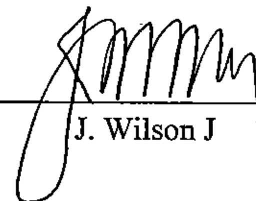
Conclusion that the Plaintiff has proved negligence

[245] The Defendant is liable for the Plaintiff's injuries in negligence. The parties have resolved the quantum of the damages.

[246] First, the City as occupier owed the Plaintiff a duty of care, which it breached by installing annealed glass, and not tempered glass in the door window of office 113. Second, causation has been proved as the failure to use the required safety glass caused the Plaintiff's injuries. Finally, I conclude that the Plaintiff's injury was a reasonably foreseeable risk of harm in all of the circumstances of this case.

Costs

[247] The parties have provided to me their respective Bills of Costs, and any offers to settle, which are sealed. If the parties are unable to resolve the question of costs, I request short written submissions, not to exceed five pages to be filed within 30 days of the release of this decision.



J. Wilson J

Released: June 28 2019

CITATION: Becker v. City of Toronto, 2019 ONSC 3912
COURT FILE NO.: CV-11-434394
DATE: 20190628

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

STEPHANIE BECKER, NICOLE BECKER, GERRY BECKER, AND MARCK BECKER

Plaintiffs

– and –

CITY OF TORONTO, JOHN DOE #1 AND JOHN DOE #2

Defendants

REASONS FOR JUDGMENT

J. Wilson J.

Released: June 28, 2019