

Occupy Queen Street:
Musselman v. 875667 Ontario Inc. and the Impact of the Ontario Occupier's
Liability Act on Landlords and Tenants

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The control and operation of a building or commercial centre is one of the key issues that landlords and tenants will consider at the outset of any lease negotiation. The obligations to repair, replace and maintain the building or commercial centre carry significant financial implications and, more importantly, may impose onerous liability and legal consequences. These responsibilities and obligations will be governed by the type of lease the parties enter into and the negotiated provisions contained therein.

Occupiers' Liability

Regarding liability and legal responsibility, legislation has been enacted in order to provide protection to any visitors, invitees or trespassers to a building or property. In Ontario, the *Occupiers' Liability Act*, RSO 1990 (the "Act") was instituted in order to replace the old common statutory duty of care, which was viewed as complex, arcane and inadequate in dealing with the liability of occupiers of property where trespassers, licensees and invitees were concerned. The common law rules of negligence imposed certain liability upon landlords and tenants of properties and differentiated between invitees and trespassers, where the Act is intended to expand the liability of owners and landlords in appropriate ways depending on the circumstances. Under common law, a landlord could lease a defective or unsafe property without incurring liability to the tenant or a third party. With the expanded liability found in the Act, a landlord may be found liable when deemed an "occupier" under the Act.

Under Section 1 of the Act, an "occupier" includes a person in physical possession of the premises, or a person who has responsibility for and control over the condition of the premises and the activities carried out therein. Pursuant to Section 3(1) of the Act,

“an occupier 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.” In addition, Section 8(1) of the Act provides that where a landlord is responsible for repair and maintenance of the property, it shall be deemed an occupier.

Musselman v. 875667 Ontario Inc.

The case of *Musselman v. 875667 Ontario Inc.*, 2012 ONCA 41, [2012] O.J. No. 649 (Ont. C.A.) (“*Musselman*”) provides a relevant case example of what circumstances will be considered by the judiciary in determining whether a landlord will be considered an “occupier” under the Act.

On February 10, 2004, the plaintiff, Ms. Gloria Musselman (the “Plaintiff”), was dining at a restaurant called “Cities Bistro” located at 859 Queen Street West, Toronto, Ontario, with her husband and two children. Following the meal, the Plaintiff visited the ladies room in the basement of the restaurant. The construction of the staircase leading to the basement was such that it required the Plaintiff to descend down eight risers, turn ninety degrees and descend two further risers to reach the basement floor. At the time, there were no guards, no wall and no handrail on the west side of the staircase. As the Plaintiff ascended the staircase to return to the restaurant she lost her balance and fell backwards down the stairs.

As a result of the fall, the Plaintiff was rendered quadriplegic. The Plaintiff spent several months in hospital, followed by a lengthy recovery at a rehabilitation facility. It was determined that the Plaintiff would require constant professional health care for the remainder of her life. The Plaintiff sued the restaurant, its proprietor and the landlord, as well as the City of Toronto for negligence in ensuring that the stairs were constructed in a manner that would provide for safe use.

The “Cities Bistro” restaurant had been operated by Brian Heasman through a shell company (the “Tenant”) since 1990. Fred Dominelli (the “Landlord”) owned the property where “Cities Bistro” was being operated. On December 30, 1999 the Landlord and the Tenant entered into a lease (the “Lease”), which governed the tenancy at the time of the Plaintiff’s accident. The Lease was a “completely care-free net lease” and the Tenant was

responsible for all expenses and charges related to utilities, property tax, etc. In particular, Section 6 of the Lease provided that the Tenant would be responsible for all maintenance. The Landlord was entitled to enter the premises to check the state of repair and take any necessary steps required to maintain the premises in a state of good repair.

Decision of the Trial Judge

As a result of her injuries and medical expenses, the Plaintiff was awarded \$3,243,349.48 in damages. The trial judge found the proprietor and the city jointly and severally liable for the Plaintiff's damages, but found that the landlord was not an "occupier" for the purposes of the Act. In coming to this conclusion, the trial judge specifically noted that the operative provisions of the Lease allocated complete responsibility for maintenance and repair of the premises to the Tenant. In addition to the relevant lease provisions, the court examined the conduct and the relationship of the parties and other relevant circumstances to determine if the Landlord was an "occupier" within the meaning of the Act. The court found that the Landlord had limited knowledge of and no input or control over the construction and renovation conducted on the basement stairway and the Tenant had undertaken all the work and construction processes related to the basement stairway under its own initiative.

The trial judge concluded that the Landlord had no responsibility for or control over the activities that occurred on the premises or the persons that were allowed to enter the premises. Therefore, the Landlord owed no duty to the Plaintiff or its invitees under the Act as it could not be classified as an "occupier".

Court of Appeal

The Plaintiff appealed the ruling, which was dismissed by the Ontario Court of Appeal. The interpretation of the operative terms of the Lease at trial were deemed accurate, and it was determined that the trial judge correctly allocated responsibility for repair and maintenance of the premises to the Tenant, and that the Landlord was appropriately determined not to be an "occupier" within the meaning of the Act.

Conclusion

Despite the intended purpose of the Act, it is only in rare and exceptional cases that liability will be found against an owner or a landlord who is not an "occupier". In

determining whether an owner or a landlord is an “occupier” within the meaning of the Act, the court will examine the totality of the circumstances involved in each individual case, including the operating provisions of the lease, the conduct and relationship of the parties and other relevant circumstances. The lesson to be learned from *Musselman* is that both landlords and tenants should endeavor to conduct themselves in strict compliance with the lease and avoid actions which may be in conflict with their expansive obligations and responsibilities.

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