CITATION: Khelifa v. Sunrise et al., 2015 ONSC 740
COURT FILE NO.: CV-08-00358589
DATE: 20150213

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Faiza Khelifa Plaintiff	*Jeremy Solomon*, for the Plaintiff
– and –	
Ontario Corporation Number 1358584 operating as Gloucester-Church Mansions Limited; Ontario Corporation Number 479405 operating as Sunrise Property Management Limited Defendants	*Greg A. Abogado & Asher Honickman*, for the Defendants
	HEARD: May 12, 13, 14, 15, 16, 20, 21, 22, 23, 28, 29, 30, June 2 & 3, 2014

REASONS FOR JUDGMENT

MADAM JUSTICE D.A. WILSON

BACKGROUND

[1] The Plaintiff, Faiza Khelifa ("Faiza") brings this action for damages against the owners of the apartment building where she resided and the property management company at 592 Church Street in Toronto ("the apartment building" or "592 Church St.") as a result of a fall in which she was involved on February 16, 2007. The fall occurred from the outdoor fire escape on the west side of the third floor of the building, which is located at the corner of Church St. and Gloucester St. in the City of Toronto. This action is framed as a breach of the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 (the "Act") and a breach of the Ontario *Fire Code*, O. Reg. 213/07 [*Fire Code*], a regulation made under the *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4.

[2] The Plaintiff had entered the fire escape to smoke a cigarette and as she turned to go back into the building, she alleges her foot slipped on the ice and snow that had been allowed to accumulate on the landing. As a result, she tumbled down the steps and fell through an opening on the second floor landing, ending up feet first on the ground, sustaining serious personal injuries. The Plaintiff asserts that the fire escape was not inherently dangerous and the Plaintiff was not negligent; rather, it is submitted, the fall occurred because the Defendants were negligent in not removing snow and ice from the fire escape. No issue was taken by the Plaintiff regarding the construction or design of the fire escape.

[3] The Defendants admit ownership of the building and the responsibility for its maintenance, but deny liability. It is the position of the Defendants that the fire escape was not meant to be used for smoking; the Plaintiff entered onto the fire escape voluntarily and in doing so, assumed the risks. Further, the Defendants submit that the Plaintiff has failed to establish the applicable standard of care for a fire escape. There was a reasonable system of maintenance in place at the time and the evidence makes it clear that the Defendants discharged their duty pursuant to the *Occupiers' Liability Act*. The Plaintiff sustained injuries but it was not through the negligence of the Defendants; rather, it was as a result of an attempted suicide or her own negligence. The Defendants argue that the Plaintiff's credibility is seriously in issue and she ought not to be believed on her evidence about how this incident occurred.

[4] As a result of the fall, Faiza sustained a number of injuries including a laceration to the back of her scalp requiring stitches, a mild brain injury, a burst fracture at L3, fractures of both ankles, a fracture at T11, and transverse process fractures in her lumbar spine. As well, she has suffered psychological sequelae and an exacerbation of her pre-existing post-traumatic stress disorder ("PTSD"). While the Defendants do not dispute that the Plaintiff suffered orthopedic injuries in this accident, they submit that the effects of the accident on her pre-existing psychiatric problems were minimal and her current difficulties are attributable to her prior diagnosis of depression and PTSD.

THE EVIDENCE

Faiza Khelifa

[5] Faiza was born in 1973 in Algeria and came to Canada as a refugee when she was 28 years old. She testified that when she was seven, she was sexually molested by two men who lived in her neighbourhood for a couple of years. Although she suffered emotional consequences from this abuse, she did not report it to her family, as women had few rights in Algeria and she feared even her own mother would not believe her.

[6] When she was 25 years old, she was raped by a man who lived in her town. Again, she said nothing to anyone because of the shame associated with rape in a Muslim culture. Another significant incident occurred when she was stopped by a terrorist as she was working selling clothes. He demanded to know why she was not wearing a hijab and warned her that something was going to happen to her. Another day, the same man grabbed her by the hair and told her to wear a hijab. Faiza felt threatened; there were many women who were kidnapped in Algerian towns and made to serve the extremists or be killed.

[7] In 1995, Faiza gave birth to a daughter, Lilia, whose father she had dated for five months. When she discovered she was pregnant, she and the father decided they would go through a religious ceremony to appease Faiza's father, as it was a huge embarrassment to be pregnant and unmarried. The couple divorced three months later.

[8] In 2001, Faiza immigrated to Canada as she felt that she was a target for terrorists in Algeria. When she arrived in Canada as a refugee, she did not disclose to the Canadian officials that she had a daughter because she did not trust the Algerian government. She had left her daughter, who was 5 years of age at the time, with her parents, who subsequently adopted her.

[9] Faiza arrived in Canada in February 2001 and initially lived with her sister. Her English was poor so she took English lessons and applied for social assistance and received payments through Ontario Works. She planned to bring her daughter to Canada and find work, hopefully as a pastry chef. She secured a job for a brief period at Le Petit Gourmet working with the chef and as a cashier. However, her English was limited and she only held the job for a matter of a couple of weeks.

[10] After the terrorist attack on the United States in September 2001, Faiza was terrified and fearful. She became depressed and paranoid and was afraid to leave her apartment. She thought people were hunting her down and feared that terrorists would find her daughter and kill her.

[11] In 2002 she got a job at a fast food restaurant called Fit for Life. She was taking an aesthetician's course in the evenings, but failed the written exam. Work was difficult due to her English and she had problems concentrating. She left Fit for Life after a couple of weeks. From the time she arrived in Canada in 2001 until 2007, she received social service payments from Ontario Works.

[12] In 2002, Faiza met Connie Fonseca ("Connie") in a restaurant and they became friends. In 2003 they became roommates. During this period of time, Faiza was confused about her sexual identity and she hated men. She and Connie developed a sexual relationship and married on September 13, 2003. They encountered many difficulties and eventually they agreed to separate and divorce, but they remained as roommates, which they have continued to do up to the present time. They obtained their divorce in 2010. As roommates, they shared the chores around the apartment. Connie did the groceries and other errands while Faiza did the cleaning and most of the cooking.

[13] Faiza's family doctor was Dr. Vaze, and Faiza admitted that she was not candid with Dr. Vaze about her life. Dr. Vaze diagnosed the Plaintiff with depression and prescribed medication. She referred her to a psychiatrist at St. Michael's Hospital in 2005, Dr. Levy. Faiza started seeing Dr. Levy and over time, she was able to open up to him about her problems. She did not tell him about her daughter because she was afraid she might be deported back to Algeria. He prescribed her anti-depressant medications but when the prescriptions ran out, she turned to street drugs such as Ecstasy, and alcohol. This was her way of avoiding her problems.

[14] Dr. Levy left St. Michael's Hospital in 2005 and her family doctor, Dr. Vaze left her practice which caused Faiza to feel abandoned. She had issues with trusting doctors and being candid about her past. She abused drugs and alcohol again and was consorting with drug dealers. In June 2005, she applied for disability payments through Ontario Disability Support Program ("ODSP"), but her application was denied on March 20, 2006. She appealed this denial. By letter dated April 13, 2006, Faiza wrote that her mental health issues prevented her from working and she asserted that she was disabled.

[15] In 2006, Connie decided she and Faiza needed to move because of the Plaintiff's drug use and the people who were staying in their apartment. Connie found the apartment located at 592 Church St. and they moved in.

[16] After moving into the new apartment, Faiza felt much happier; she stopped using drugs and abusing alcohol. She testified that she was feeling more hopeful about her future; she was no longer hiding in the apartment. She went out to places and generally felt more positive. She was thinking about bringing her daughter to Canada. From her social worker, she learned about a course in pastry making which was offered at the YMCA near her apartment. She enrolled in the course and started it, but in January 2007 she came down with the flu and was sick for two weeks. She testified that she was unable to finish the course.

[17] She hired a lawyer to assist her with the denial of her request for disability benefits. There was a hearing scheduled for February 14, 2007. Faiza did not attend the hearing; she testified this was because she was feeling better and intended on withdrawing her appeal. However, she was successful on the appeal and commenced getting disability benefits in January 2008 instead of social assistance through Ontario Works. She continues to get ODSP in the amount of $679/month.

The Accident

[18] Faiza and Connie shared an apartment at 592 Church St. on the third floor. There is a balcony on that floor but the door was always locked so she never went out on it. There is a fire escape between the second and third floors, which is on the west side of the building overlooking the alley. Faiza had gone out on the fire escape many times prior to the date of the accident, to smoke or get some fresh air. She had never been advised by anyone in the building not to go out on the fire escape.

[19] There is another building next door which contains the laundry facilities. The fire escape is made of metal and is attached to the building. The landings are not solid; they are made of metal grates. The fire escape runs from the third floor to the second floor, and there is an opening in it on the second floor which is intended for a ladder. The Plaintiff used the fire escape in the winter months of 2007 and there was a lot of snow and ice on it. She never saw any salt applied to the landings of the fire escape; she had never fallen prior to the accident.

[20] On February 16, 2007, Faiza was feeling better and was on her prescription medication, Seroquel. She was not feeling depressed and was planning on asking the social worker about taking the pastry course. She had done some cooking and was waiting for Connie to return from doing the groceries. She was dressed in track pants, a blue jacket, and suede moccasins. She agreed that it was not safe to wear moccasins out on the fire escape but it was easier than putting on her boots.

[21] At approximately five o'clock she took a cigarette and walked out the front door of her apartment. She exited the door to the fire escape, placing a stone to hold the door open. She went out onto the fire escape and stood facing north towards Gloucester St., smoking a cigarette with one hand on the railing. This was the usual spot where she stood when she went onto the fire escape to smoke.

[22] She estimated she was on the fire escape for about seven minutes while she smoked her cigarette. She turned towards the door, to her right, and as she did so, there was ice under her heel which caused her to slip. She fell down the stairs, somersaulting, to the second floor, where she went feet first through the hole intended for a ladder. Her last memory is of feeling her feet crack as they struck the ground.

[23] Faiza has no recollection of lying on the ground after the fall or of speaking with anyone at the scene or in the ambulance. Her first memory following the accident is of waking up at St. Michael's Hospital and seeing her sister and Connie. She was shocked; all she knew was that she had fallen. She did not jump off the fire escape and she did not attempt to commit suicide.

Injuries

[24] The Plaintiff remained at St. Michael's Hospital for two weeks where she was diagnosed with a large laceration at the back of her head, a fracture of her left ankle, a more severe fracture of her right ankle, and serious fractures of her spine. Following suturing of the scalp wound and surgery for the fractures, she was transferred to St. John's Hospital for rehabilitation. She had to wear two air casts for five months and a back brace for three months. While at the rehabilitation hospital she had to learn to walk again. She was discharged in a wheelchair.

[25] Faiza and Connie moved to a new apartment on Dalhousie Street, which is wheelchair accessible. She used a walker and canes. She undertook physiotherapy for her legs. She experienced headaches after the fall. Her injuries improved and at the present time Faiza has ongoing pain in her back, feet and legs and is tired and weak. She has headaches two to three times a week for which she takes Tylenol 3 and she continues to take anti-depressant medication. She has problems with balance.

[26] Faiza finds the pain gets worse if she is sitting or walking for more than 45 minutes. She is sad about her physical condition and she worries about her future. She feels that she forgets many things and finds it difficult to concentrate. Most of her time now is spent lying down, watching television or going on the Internet. She prays several times a day and reads the Koran.

[27] If she goes out of the apartment, she must be accompanied by Connie. She is able to stand for a maximum of 20 minutes. She has difficulty lifting things or going up and down the stairs. Some days Connie has to help her get dressed. Faiza no longer does the cleaning of the apartment because she cannot bend or lift. Connie has taken over the cleaning responsibilities.

[28] Faiza is dependent on Connie for everything; she does the groceries, the banking and organizes everything for her. Faiza does not like being left alone in the apartment; if she is, she will call Connie 4-5 times an hour because she is nervous.

[29] In the summer of 2010, Faiza returned to Algeria because she missed her daughter and her family. Connie made all of the travel arrangements and ensured there was a wheelchair for her at the airport. While in Algeria, she stayed with her parents.

[30] She decided to bring her daughter to Canada and retained a lawyer, Jennifer Stone, to assist her. In her materials filed in support of her application she swore, "I am once again feeling strong and hopeful for the future. I am no longer on medications for my mental health. I feel clearer and stronger than I have in years. I sleep well at night. I have recovered from my physical injuries and I have grown and healed from my mental injuries..." By this Faiza meant that she felt improved. No physician had advised her that she had recovered from her injuries.

[31] In November 2013, Faiza was accepted as a landed immigrant and she described this as the "happiest day" of her life. Her daughter Lilia came to Canada on February 3, 2014 and came to live with her and Connie. She attends grade 10 and is happy in Canada.

[32] Faiza admitted she was not truthful about her past to people, including doctors and experts who examined her for this litigation. She is ashamed about her lesbian relationship with Connie. She did not admit that she had a daughter because she was afraid of being deported since she had not revealed that information to the immigration department. In addition, she believes people judge her unfairly.

Credibility

[33] Faiza's credibility was seriously challenged during cross examination. She agreed that she did not tell her family doctor, Dr. Vaze, about her sexual assaults in Algeria, even when she was referring her to a psychiatrist for treatment of her emotional problems. She failed to tell her treating psychiatrist about her daughter in Algeria; her explanation for this was that she was concerned about her safety. She agreed, however, that her daughter's situation was the cause of a great deal of stress and anxiety for her.

[34] Faiza testified that she did not recall three suicide attempts: November 2005 when she cut her wrists; and twice in December 2005 when she cut herself and slashed her wrists with a knife and was hospitalized at St. Michael's Hospital for three days.

[35] Her evidence about her relationship with Connie is contradictory. For example, she misrepresented her relationship with Connie in her application for Ontario Works [exhibit 1, page 298]. She stated Connie was her roommate and denied she was married, which was untrue at the time. She has told some physicians that they were roommates only; and has told others

that they were in a lesbian relationship for three years; and she told other doctors that they were sisters. She testified that she and Connie have not lived apart since they moved in together yet there is reference in the records to separations and as well, there is mention of the Plaintiff being involved in another same sex relationship which was described as abusive. At trial, she portrayed Connie as a supportive partner without whom she could not live; yet in the medical records there is reference to Connie being abusive and controlling. While I accept that there were times the Plaintiff may have misrepresented the nature of her relationship with Connie because of embarrassment, there were many inconsistencies in her evidence at trial compared to histories provided to doctors.

[36] In a similar vein, to most of her doctors, the Plaintiff denied she had a child and only recently did she acknowledge the existence of her daughter. She explained this at trial by saying she feared for her daughter's safety. The Plaintiff testified at trial that she signed up for a pastry course but was unable to take it in January 2007 because she was ill; to some of her assessors, she advised that she attended the pastry course. At trial she was unable to produce any documentation to confirm her enrolment at this course. She professed no recollection of being hospitalized after trying to commit suicide in 2005, testimony which cannot possibly be true.

[37] In her application for ODSP [exhibit 6, page 48] she indicated her mental health issues prevented her from working and that she had depression which affected her ability to concentrate and to sleep. When her application was denied, she appealed, insisting she was disabled. That hearing was scheduled for February 14, 2007, just shortly before her fall. At trial, the Plaintiff testified that prior to the accident she was feeling much better, was optimistic about her future, and had returned to school, taking a course in pastry making.

[38] She acknowledged that the records from St. Michael's Hospital indicate that she advised them on the day of the fall she was in the process of taking out the garbage when she fell on the fire escape. She stated that she had no recollection of making these statements and denied their accuracy.

[39] At trial, the Plaintiff swore that just prior to her fall, she was functioning well and was feeling optimistic about her future. Yet her application and appeal to ODSP just prior to the fall contains her statement that she needed disability payments because she was totally disabled from working as a result of her psychiatric illnesses.

[40] It was difficult at times to determine what portion of the Plaintiff's evidence was truthful. Overall, I did not find Faiza to be a credible witness whose testimony could be relied upon. When confronted with patent inconsistencies between her trial testimony and that contained in the various records, she would profess not to understand or not to remember. She may have had her own reasons for her deceit; perhaps her concern about her daughter's safety in Algeria was reasonable. Her embarrassment about the true nature of her relationship with Connie may be explained through cultural prohibitions. However, it is problematic that these falsehoods exist in different aspects of her evidence and are present in virtually all of the histories given to various physicians and other health care providers. As a result, where the evidence of the Plaintiff conflicts with that of other witnesses, I place more reliance on the other witnesses and on the documentary evidence.

Jennifer Collins

[41] Jennifer Collins ("Ms. Collins") has lived on the second floor in the apartment building on Church St. since 2004. She described it as a three storey building with no elevators. There are two buildings at this location, both owned by the same landlord. They are separated by an alley which is about four to six feet wide, which runs in a north/south direction. The other building houses the laundry facilities and this area is accessed through the rear door.

[42] Ms. Collins testified that Bill Gorbett ("Mr. Gorbett") was the superintendent and if something needed repair, she would call him. He was good at responding to her calls and she was satisfied with the maintenance of the building. She noted there are two balconies located at the front of the building but she did not know if the doors to the balconies were locked or unlocked in the period of time between March 2006 and February 16, 2007.

[43] On February 16, 2007 Ms. Collins was in her apartment doing some work as she had a friend coming later that evening for the weekend. Her apartment overlooks the alley between the two buildings and her windows are right beside the fire escape. Ms. Collins testified that she heard one "thump" sound and the building shook; her apartment building is close to the stairs and she did not hear the sound of a person falling down the stairs.

[44] Ms. Collins went to do her laundry sometime after 5:00 p.m. She was going down the back stairs and she saw someone crawling along the wall of the opposite building. She testified that the Plaintiff was facing away from her along the wall of the opposite building. Ms. Collins saw her pulling herself along toward Gloucester St., in a northerly direction. The Plaintiff was a few metres away from the access hole which runs from the second floor to the ground. She heard the Plaintiff call for help and noticed there was blood on the pavement outside the rear door so she returned to her apartment and called the superintendent.

[45] She heard Mr. Gorbett out in the alley on his cellphone within 10 minutes. She could not recall the condition of the fire escape that evening because she did not pay much attention to it as she never went out on it. Ms. Collins thought the fire escape was to be used in emergencies, not for socializing or smoking. She had never seen anything unusual on the fire escape and could not recall seeing any ice buildup on it. She could not recall anyone clearing snow or ice form the fire escape during the winter of 2006-2007. Generally, she looked at the state of the alley because she used it, and she never had any concerns about the condition of the alley between the buildings. She could not recall what the alley was like on the evening of February 16, 2007.

[46] I found Ms. Collins to be an honest witness who gave her evidence in a forthright fashion. She was credible in her recollection of the events of February 16, 2007.

Diane Surk

[47] Diane Surk ("Ms. Surk") lived at the apartment building for about 13 years, until 2009. She lived on the main floor, next to the front door. In approximately February 2007, she commenced working as an assistant superintendent in the building. She helped Mr. Gorbett every other weekend and did some cleaning.

[48] On February 16, 2007 she returned to the apartment at approximately 5:30 p.m., entering through the back door. About 10 minutes later, she brought her garbage out through the rear door. She saw the Plaintiff lying on the ground underneath the fire escape near the back door; she knew her as a tenant but she did not know her name.

[49] The Plaintiff was bleeding from her ear and her shoe was above her head. She seemed to be in a lot of pain and asked for a cigarette so Ms. Surk gave her one. She called Mr. Gorbett who came quickly with some towels. Ms. Surk denied that the Plaintiff told her she had fallen from the fire escape; she was mumbling but was incoherent. The ambulance was called and it arrived fairly quickly and took the Plaintiff away.

[50] Ms. Surk testified that the fire escape was usually in the sun, so to the best of her recollection, she had never seen snow or ice on it in the 13 years that she lived there. On the evening of the accident she looked at the fire escape and noted there wasn't any snow or ice on it. Ms. Surk provided a written statement on the night of the accident at the request of Mr. Gorbett.

[51] The following morning, Ms. Surk was called by Connie who indicated that she did not know what had happened to Faiza, but she had broken her back and was undergoing surgery.

Jules Paolozza

[52] Jules Paolozza ("Mr. Paolozza") is the property manager for the defendant Sunrise Property Management Limited, a position he has held since 1981. At the time of these events, Sunrise owned a number of buildings in the Church/Gloucester area and it had managed the apartment at 592 Church St. since 1999 and continues to do so.

[53] Mr. Paolozza's duties included overseeing the operation of the property, ensuring the tenants were happy and that the units were kept in proper condition and rented. The superintendents of the buildings reported to him. The building at 592 Church St. had 12 apartments and was managed by Mr. Gorbett, who lived in the adjacent building at 50 Gloucester St.

[54] Mr. Gorbett's duties as superintendent included collecting rents, showing units to prospective tenants, attending to repairs and maintaining the building. The maintenance included outside work, snow shoveling, washing windows, clearing sidewalks, applying salt and ensuring the fire escapes were clear.

[55] Mr. Gorbett was expected to check the buildings daily in the winter. If necessary, he was to clear the walkways and alleys of snow and to shovel the porch. For the building at 592 Church St., he had to maintain the steps of the entrance to ensure they were cleared of snow, and salt was applied if necessary. There was an alley at the back of 592 Church St., under the fire escape. The tenants used the alley to access the garbage containers so it had to be cleared of snow and ice.

[56] Mr. Paolozza testified that it was Mr. Gorbett's responsibility to ensure that the fire escapes were checked during periods of adverse weather with snow and ice to ensure that if they had to be used during an emergency, they would not be slippery. He thought the fire escapes were the original ones that had been built when the building was constructed and are likely 85-90 years old. Mr. Paolozza did not think there had been any changes to the fire escapes since they were constructed. Keeping the fire escapes clear of snow, however, was not difficult because the stairs were constructed of metal strips which were welded together about an inch apart.

[57] The superintendent was instructed on what was expected of him in his role. He was told that snow had to be removed in a reasonable period of time, what type of salt needed to be put down and what sort of shovel to use. Mr. Paolozza was not aware of any issues with respect to the clearing of snow and ice from the walkways, alleys and fire escapes at 592 Church St. prior to February 2007.

[58] In February 2007, Ms. Surk was working as the assistant superintendent for the various buildings. She relieved Mr. Gorbett at 592 Church St. every other weekend and assisted him with cleaning and other maintenance.

[59] Mr. Paolozza learned about the Plaintiff's fall from Mr. Gorbett when he received a telephone call either Friday evening or Saturday morning advising that someone had fallen from the fire escape and was seriously hurt. He was told that the police had done an investigation. He may have spoken to Mr. Gorbett on both days, he was not certain. He told Mr. Gorbett to fill out an incident report which is done whenever something unusual happens at a property. He also advised him to take photos of the area where the fall occurred.

[60] He received a fax from Mr. Gorbett [exhibit 33] on February 18, 2007. Mr. Paolozza made notes on the fax on February 19, 2007 indicating that he had called the police. He was not able to get any information, however, because the detective was still trying to determine the cause of the fall. Mr. Paolozza received the incident report prepared by Mr. Gorbett [exhibit 31] on February 19, 2007. Mr. Gorbett sent a fax February 20, 2007 detailing his conversation with Connie on that day. Connie told him at that time that Faiza fell down the stairs of the fire escape due to the ice on the stairs. Mr. Gorbett noted that the photos he had taken did not show any ice on the stairs of the fire escape.

[61] On February 20, 2007 Mr. Paolozza called Connie to find out what had happened and the extent of the Plaintiff's injuries. His notes from this conversation were filed as exhibit 36. Connie said that she was not home when the Plaintiff fell and she did not know why Faiza was out on the fire escape and that she was still in the hospital.

[62] Mr. Paolozza went to the scene of the fall a few days after it occurred, perhaps four days later. At some point he received the photos that he had instructed Mr. Gorbett to take of the scene. They were developed on February 17, 2007 [exhibit 35].

[63] I found Mr. Paolozza to be a credible witness whose evidence was not contradicted on cross examination.

Bill Gorbett

[64] Mr. Gorbett was the superintendent of the apartment building at 592 Church St. at the time of the fall. Gorbett lived in the building at 50 Gloucester St. and had worked as an assistant superintendent for a year or so until he assumed the role of the superintendent of the four buildings at the corner of Church St. and Gloucester St. which were managed by Sunrise Property Management, a position he held until 2008 when he moved to Owen Sound.

[65] Mr. Gorbett was hired by Mr. Paolozza, the property manager at Sunrise and he received on-the-job training from the prior superintendent. At the time of these events, he had Ms. Surk assisting him with cleaning and she relieved him every other weekend. He was responsible for collecting the rents, assisting tenants with complaints and renting the apartments. He estimated that he took care of 90 per cent of the maintenance around the building: painting; lawn care, snow removal; plumbing; electrical; and general repairs. If there was a larger job, such as fixing the roof, he would advise Mr. Paolozza.

[66] With respect to winter maintenance, Mr. Gorbett testified that he would check the snowfall on a daily basis and if snow needed to be cleared, he would use the snow blower and/or a shovel and spread salt if it was slippery. There was no manual that was kept. He was responsible for the walkways in front of the buildings, any stairs, the alleys and the fire escapes.

[67] The fire escape on the north side of 592 Church St. used to get ice buildup from the leaky downspout so he would have to remove the ice. The fire escape on the west side was exposed to the sun and there was no downspout so it did not require maintenance. Mr. Gorbett testified that he always had to chip ice out of the alley on the north side at 592 Church St. and put down salt because of the leaking from the downspout; this was an ongoing problem. However, the downspout did not affect the alley on the west side of the building.

[68] Mr. Gorbett testified that the alleys had to be maintained vigilantly because the tenants from 592 Church St. had to use the alley to get to the laundry facilities located at 67 Gloucester St. In addition, that is where the garbage area was located. The alley on the west side required much less maintenance because of the exposure to the sun and the fact that the water from the downspout did not accumulate there. Mr. Gorbett had no concerns about the fire escape on the west side of the building but he did worry about the north fire escape because of the potential for ice. He always had to chip the ice out by hand and apply salt. He agreed the leaky downspout was an ongoing problem which took a fair bit of his time to attend to. He had reported it to Mr. Paolozza and also told him that the workload of maintaining the buildings was too much; that was why the assistant Ms. Surk was hired.

[69] Mr. Gorbett learned of the incident involving the Plaintiff from a telephone call from a tenant, Ms. Collins, at around 6:00 p.m. on February 16, 2007. He went to the rear of the building at 592 Church St. and saw the Plaintiff lying on her back near the back door. One of her shoes was off. She told him she slipped and fell and asked him to call 911 so he did. Mr. Gorbett assumed she fell when she exited the back door to the building at 592 Church St. He looked at the door but there was no ice around it. This was the first time anyone had been involved in an accident since he had become the superintendent of the buildings.

[70] Ms. Surk came outside and stayed with the Plaintiff and Mr. Gorbett went to the front of the building to wait for the ambulance.

[71] Mr. Gorbett reported the incident to his boss, Jules Paolozza, who instructed him to take photos of the scene and to prepare a report, which he did. His incident report was filed as exhibit 31. The following morning, he purchased a disposable camera. Ms. Surk called him and said she had spoken to Connie who told her the Plaintiff had fallen off the fire escape. As a result, Mr. Gorbett went to the rear of the building and took photos of the ground and of the fire escape. He had the photographs developed and gave them to Mr. Paolozza. This series of 16 photographs was marked as exhibit 30.

[72] Mr. Gorbett did not think he did any maintenance on the apartment building at 592 Church St. that Saturday morning although he conceded he did not remember for certain. A couple of days later, on February 20, 2007 he ran into Connie outside of the apartment building and she told him Faiza fell down the stairs of the fire escape because of ice on the stairs. Mr. Gorbett never spoke to the Plaintiff about the accident apart from the night of the incident.

[73] Mr. Gorbett stated that he regularly posted notices indicating that smoking was not permitted on the fire escapes, but they were always torn down. He was aware that some tenants used the fire escapes to smoke and he did not notify management of this problem because he had posted the signs.

[74] In my view, Mr. Gorbett was an honest, straightforward witness whose testimony was credible. He no longer works for the Defendants and he had no reason to assist them with his evidence.

Alan Morris

[75] Alan Morris ("Dr. Morris") is a professional engineer who was qualified as an expert entitled to give opinion evidence in the field of biomechanical engineering. Dr. Morris has a Master's degree in Mechanical/Biomedical engineering which is the use of mechanical engineering principles applied to muscle movement. He secured his doctorate in 2006 in movement disorders and has worked at the human movement lab at the Hospital for Sick Children as well as at Bloorview Macmillan for 15 years. Dr. Morris was retained by the solicitor for the Plaintiff to investigate the physical circumstances surrounding the fall of the Plaintiff on February 16, 2007 and to determine if it was plausible that if the Plaintiff slipped and fell down the stairs, she could have fallen through the access hole in the fire escape.

[76] Dr. Morris went to the apartment building on June 24, 2010. He took some measurements and used software to create a 3-dimensional model of the fire escape and he also created a human model using the height and weight of the Plaintiff. Dr. Ross then used ten different scenarios to determine how the Plaintiff could have gotten to the bottom of the fire escape.

[77] Dr. Morris reviewed medical documentation to learn the nature of the injuries sustained by the Plaintiff in the fall, most significantly the bilateral comminuted fractures of the ankles. He assumed the fire escape was covered with snow and ice and concluded that it was likely very slippery. He also considered the blood stains which are shown in the photographs. In order to calculate the load on the ankles, he considered the height of the fall and the deceleration rate.

[78] Dr. Morris determined that she did not fall from the third floor because if she had, he would have expected fractures of the femurs. Rather, in his opinion, the Plaintiff's injuries were consistent with a fall from the second floor platform, which is where the hole was located for the use of a ladder. He concluded that due to the icy condition of the fire escape landing where the Plaintiff was smoking, she lost traction and fell, somersaulting down the stairs to the second level, where she ended up on her back with her feet up. She then attempted to move her feet down and in doing so, she fell feet first through the hole and landed with significant force on her feet, which resulted in the fractures of the ankles and vertebrae.

[79] In cross examination Dr. Morris acknowledged that the software he used for the simulations had not been validated for a slip and fall. The only physical evidence he relied on in coming to his opinion was the fire escape. He did not rely on the witness statements; he did not do a slip test. Rather, he assumed that she slipped because of icy conditions on the fire escape.

[80] Dr. Morris agreed that the 10 hypothetical simulations that he did demonstrated what could have happened, not what probably happened – they were possible outcomes. More importantly, however, he agreed that he relied on the Plaintiff's evidence that she fell down the stairs and then fell feet first through an access hole at the second level of the platform, and struck the ground feet first.

[81] It is significant, in my opinion, that in none of the 10 simulations did the mannequin fall in the manner the Plaintiff described. To put it another way, in none of the testing that Dr. Morris undertook did the mannequin fall through the hole in the manner described by the Plaintiff. He agreed that while the Plaintiff may have fallen through the hole, he did not conclude based on his simulations that she went through the hole ankles first.

Connie Fonseca

[82] Connie met Faiza in the summer of 2002 and they became romantically involved a few months later. The moved in together and married in September 2003. They ceased having a physical relationship in 2004 although they have continued living together as roommates up to the present time. Connie did not know much about Faiza's life in Algeria because she did not like to discuss it. Connie learned the Plaintiff had a daughter only after they were married.

[83] Connie and Faiza moved to the apartment on Church St. at the beginning of 2006. Connie wanted to get Faiza away from the people she was socializing with at the apartment on Dundonald because these individuals were contributing to Faiza's drug abuse.

[84] Connie testified that prior to the fall, they shared the duties around the apartment including groceries, cleaning and laundry. Faiza had difficulties with depression but by the summer of 2006 Connie noted a significant improvement in the Plaintiff's condition. She was more willing to go out and participate in activities and her depression was less. She was planning on taking a course in pastry offered at the YMCA but she became ill and did not start the course; she was planning on taking it when it was next offered.

[85] The apartment at 592 Church St. had a bin for garbage that was located in an alley which separated the building from the one next door, where the laundry facilities were housed. During the winter of 2006-2007, this alley had snow and ice on it. Connie never saw Mr. Gorbett shovel snow or clear ice in the alley that winter.

[86] Connie was able to see the fire escape through the door that led to it from the apartment building. During that winter, the fire escape was icy and covered with snow from the top to the bottom. Connie testified that the door to the balcony on the third floor was kept locked, as was the door to the second floor balcony, except for a few specific occasions. As a result, Connie often saw people smoking or drinking and socializing out on the fire escape. She was never told by management that tenants were not allowed to go out onto the fire escape.

[87] On February 16, 2007, Connie went to do groceries sometime after 4:00 p.m. When she returned at approximately 6:00 p.m., the door to the apartment was not locked, which was odd. There was no sign of the Plaintiff, who was supposed to make dinner that night. Connie looked around the apartment for Faiza but did not see her; she did not look out on the fire escape. She waited for the Plaintiff to return but as time passed, she became worried and called the police at approximately 10:00 p.m.

[88] A police officer arrived an hour later and told Connie that Faiza was at St. Michael's Hospital because she had injured herself in an accident. Connie went to the hospital but was not allowed to see her friend because she was undergoing surgery.

[89] The following morning at approximately 8:00 a.m., Connie heard loud noises outside the apartment. She looked out the living room window and saw the superintendent Mr. Gorbett breaking up the ice in the alley that runs east/west between 592 Church St. and 67 Gloucester St. This was not the alley where the Plaintiff had fallen. She went to the alley to find Mr. Gorbett but he was gone. She saw chunks of ice and there was salt that had been spread around. Connie had never seen salt in the alley prior to that time. Connie went to her apartment to get her camera and she took some photos of the alley and the fire escape that morning. These photos were marked as exhibit 20. While Connie conceded that she knew nothing about how the Plaintiff had fallen at that point, she nonetheless took photos because she saw the superintendent breaking up ice and applying salt which she had never seen him do prior to that time. She agreed that she did not see Mr. Gorbett clearing ice or putting down salt in the alley on the west side of the building on the morning after the Plaintiff fell.

[90] Connie and Faiza moved out of the apartment soon after the fall and moved to an apartment on Dalhousie St. where they continue to reside.

[91] Since her fall, Faiza is very limited in terms of her activities; she has problems standing for a long time, walking, bending or sitting. She needs help in the shower. Faiza does very little around the apartment and Connie has had to do it all. She also has problems concentrating and often forgets things. Connie has to organize her and assist her with all of her needs.

[92] Connie is not employed; she described herself as the "personal support worker for Faiza" although she does not get paid for it. She has not worked since 2006 and is on welfare.

[93] Connie was not a credible witness in my view. Some of her testimony was contradicted by other records. For example, she denied that her relationship with the Plaintiff was tumultuous or that it caused Faiza to attempt suicide in December of 2005, despite the reference to this in the St. Michael's Hospital records. She also denied the reference in the notes of Dr. Tugg that she, Connie, was an alcoholic who cheated on Faiza and that they used drugs together. She denied that she and the Plaintiff had a difficult relationship or that the police were called because of their fighting, despite the reference to this in the psychiatrist's notes.

[94] Connie's description of the events following the fall was difficult to accept. She testified that when she was told by the police that Faiza had been in an accident and was undergoing surgery, she had no particulars about how Faiza had injured herself. Notwithstanding this, after she heard Mr. Gorbett breaking up the ice the next morning, she went and took photos of the alley and the fire escape. Her explanation for this was that she had never seen Mr. Gorbett clear snow or apply salt before that morning and she found it suspicious, so she took photographs. Furthermore, she took photos of the fire escape even though she did not know the Plaintiff had fallen from the fire escape the prior evening. She did so because she was "concerned." Connie's evidence on this point is not credible and it defies logic. I do not accept Connie's evidence that in the time that she and Faiza had been living at the apartment on Church St. prior to the fall she had never seen the superintendent clearing snow or applying salt, which was a significant part of his job in the winter months.

Sam Kodsi

[95] Sam Kodsi ("Mr. Kodsi") is an engineer and he was qualified as an expert by the court, entitled to offer an opinion on engineering and biomechanical issues with respect to the Plaintiff's fall.

[96] Mr. Kodsi was retained by counsel for the Defendants and asked to comment on the fire escape platform and the plausibility of the various scenarios put forth by the engineer retained by the Plaintiff. He was provided with the statements of Mr. Gorbett, Ms. Collins, and Ms. Surk as well as the discovery evidence of the Plaintiff and Mr. Paolozza and the photographs. Mr. Kodsi attended the scene of the fall on October 11, 2013. He took photographs and measured the fire escape, including the stairs and the access hole. Mr. Kodsi used an Excel Tribometer, a device that measures the slip index of a surface. This machine simulates a foot on a surface, either wet or dry.

[97] Mr. Kodsi's examination of the surface of the stairs of the fire escape revealed that it was in good condition even under wet conditions. He observed that the surface consisted of slats and it would be unlikely that snow would accumulate on the grated surface and water would not remain there long enough to freeze.

[98] Mr. Kodsi expressed the opinion that the software used By Dr. Morris for the simulations was not capable of accurately predicting the movement of a human body in any reliable way. Furthermore, the simulations used by Dr. Morris were limited, and were completely hypothetical. Perhaps more problematic is the fact that none of the simulations used were based on the Plaintiff's description of how the incident occurred as stated in her discovery evidence.

[99] Mr. Kodsi testified that in his opinion, if the Plaintiff slipped on the platform on the third floor, she likely would have landed at the bottom of the steps and away from the access hole. The location of the blood stains does not accord with Faiza falling through the access hole; rather, it is consistent with the information from Ms. Surk, Mr. Collins and Mr. Gorbett which suggests that the Plaintiff was lying near the back door, which is about 12 feet from the access hole.

DAMAGES EVIDENCE

Ryan Willis

[100] Ryan Willis ("Mr. Willis") is a paramedic who was called to the scene of the accident, arriving at 5:50 p.m. He does not currently have a complete recollection of the events of that evening. The Plaintiff was lying on her right side, with a laceration on the back of her scalp, on the left side. She was confused with a Glasgow Coma Scale of 14. The area of the alley where the Plaintiff was lying was completely iced over.

[101] Mr. Willis did not note anything about the mechanism of injury; he thought perhaps she had fallen. He did not look at the fire escape. His focus was on transporting Faiza to the hospital.

Dr. Douglas Chisholm

[102] Dr. Chisholm was on call in the emergency room on February 16, 2007 when the Plaintiff was brought in. She had a large laceration on her scalp and had a decreased level of consciousness. She was referred to the trauma team.

Dr. Daniel Whelan

[103] Dr. Whelan is an orthopedic surgeon and was working on call at St. Michael's Hospital when the Plaintiff arrived. He examined her and found that she had a comminuted fracture of the left ankle and a more severe fracture of her right ankle. There was damage to the articular cartilage, which is a permanent injury.

[104] Dr. Whelan performed a closed reduction on the left side and placed it in a cast. He did a closed reduction and external fixation through the calcaneus on the right side to hold the bones together in the proper position. Dr. Whelan did a second surgery on February 28, 2007. He inserted a plate and screws into the left ankle to hold the bones and fragments in place. On the

right side, the fracture was more extensive and required additional fixation. He was unable to restore it to perfect anatomical position due to the extent of the injury.

[105] Dr. Whelan last saw the Plaintiff in October 2012. At that time, there were osteophytes present on x-ray which occurs when the body tries to distribute the load it is carrying on a damaged joint. There are various modalities of treatment for arthritis, depending on the symptoms: anti-inflammatory medication; orthotics; removal of hardware; fusion of the joint or replacement. He did not know the current condition of the Plaintiff as he had not seen her for quite some time.

Dr. Henry Ahn

[106] Dr. Ahn is an orthopedic surgeon who specializes in spinal and trauma surgery. He became involved in the care of the Plaintiff after her admission to hospital. She had a burst fracture of her spine at L3 and incomplete *cauda equina* syndrome which impacts the nerves in the legs. It was necessary to do surgery as it was a severe injury to the spine.

[107] The CT scan indicated the fracture at L3 was very comminuted with multiple pieces of bone in the spinal canal. The structural integrity of the spinal column had been compromised and the discs were damaged. The surgery involved decompression of the canal to relieve the pressure on the nerves and removal of the foreign body. Dr. Ahn inserted a metal replacement for the bone that was damaged at L3 and fused it to L2 and L4 with screws.

[108] The surgery provided stability to the area of the spine that was damaged but left Faiza with an area without motion. She has been left with a stiff spinal column, scarring on her abdomen but the outcome is quite good. Over time, there is a concern about the development of arthritis and pain and it may be necessary to have further surgery in the form of a revision to the fusion or decompression.

Dr. Susan Shepherd

[109] Dr. Shepherd has been the family doctor for the Plaintiff since 2005. She works at a family practice at St. Michael's Hospital and Faiza became her patient after the resident, Dr. Vaze, left in 2005. Prior to the fall, most of the attendances were for depression and anxiety and she prescribed Faiza medication. On December 21, 2005 the Plaintiff was at St. Michael's Hospital due to a suicide attempt. In 2006 she was depressed and Dr. Shepherd prescribed Effexor and Seroquel and told her to continue with treatment from her psychiatrist.

[110] Since the accident Faiza's mood has been fairly stable and most of the appointments have been to address physical problems stemming from her back and ankle injuries. Dr. Shepherd has not sent the Plaintiff for any treatment for her head injury.

Dr. Matthew Levy

[111] Dr. Levy is a staff psychiatrist at St. Michael's Hospital and commenced treating the Plaintiff when he was still a resident in 2005. At that time, his supervisor was Dr. Tugg. His first appointment with Faiza was February 1, 2005 at which time he made a diagnosis of PTSD

stemming from the events she experienced in Algeria, including the rape and the threats from terrorists. They discussed her sexuality and her wish to have a good future with her wife, perhaps have a child. She was abusing alcohol and Dr. Levy recommended that she decrease her alcohol consumption and take anti-depressant medication.

[112] Dr. Levy saw the Plaintiff a few more times and there was improvement in her mood. At the end of June 2005, his rotation ended so he no longer saw her as his patient. At this time, she had run out of her Effexor and had been using alcohol again, which is not unusual. He referred her to the psychiatrist who was starting his rotation at the hospital.

[113] Dr. Levy noted that Faiza never told him that she had a daughter. He thought she was hopeful about her future, which was a positive sign.

Dr. Shree Bhalerao

[114] Dr. Bhalerao is a staff psychiatrist at St. Michael's Hospital and the Plaintiff was referred to him February 19, 2005. He was advised the Plaintiff had been found at the bottom of stairs and was asked whether it was likely she had attempted to commit suicide. Faiza was interviewed by the clerk and Dr. Bhalerao reviewed it. They discussed the case and drafted a report.

[115] Dr. Bhalerao was told that the Plaintiff had fallen on ice while she was taking the garbage out. He agreed that is was important that Faiza was honest with him; he was given a history by her that she had a good childhood with no sexual or physical abuse. He was also told that she had no prior psychiatric history apart perhaps from one prior suicide attempt. Dr. Bhalerao understood from speaking to Connie that the Plaintiff had not attempted suicide prior to her fall. He also was told that Faiza and Connie were getting along well in their relationship and it was not of an abusive nature. It was Dr. Bhalerao's understanding that the Plaintiff had attempted suicide by slashing her wrists as a result of a tumultuous relationship with a former partner from whom she had separated in 2005.

[116] Dr. Bhalerao determined that the Plaintiff had minimal risk factors for suicide; rather she was hopeful about her future, was shocked about what had happened to her and did not appear to be depressed or anxious. He found no suicidal ideations.

[117] Dr. Bhalerao assessed Faiza again on February 20, 2007. She scored in the normal range for functioning. Dr. Bhalerao's working diagnosis was that she had a history of compulsive behaviour secondary to various stressors; there was no significant psychiatric diagnosis and he was uncertain as to why she was taking anti-psychotic medication but thought perhaps it was to calm her down when she was admitted to the hospital. He did not believe there had been a change in her mental status but rather that she had long-standing character logical issues and difficulty coping with stress. He did not feel there were any acute concerns about her safety and his conclusion was that the Plaintiff's fall was not a suicide attempt. Dr. Bhalerao was an honest witness who gave his evidence in an impartial fashion.

Dr. Feinstein

[118] Dr. Feinstein is a psychiatrist who specializes in neuropsychiatry, which is the science of the behavioural consequences of neurological disease. He was qualified as an expert entitled to provide evidence in the area of neuropsychiatry and in brain injuries as well as PTSD. Dr. Feinstein explained that PTSD is an anxiety disorder which arises after a person undergoes or witnesses a life threatening stressor and there are a grouping of symptoms associated with the disorder. The cardinal feature of PTSD is that the person relives the trauma and avoids thinking about it. PTSD interferes with an individual's ability to function.

[119] Dr. Feinstein assessed the Plaintiff in November 2009 and took a history that she fell on the fire escape and had no memory of the following two days. Dr. Feinstein was of the opinion that the Plaintiff had a mild traumatic brain injury. He was advised that she had been sexually molested as a child and had difficulty coping after the 9-11 attack. He was not told she had a daughter.

[120] Dr. Feinstein spoke to the Plaintiff's partner, Connie, who advised that Faiza was in robust health before the fall and was able to do all of her activities. He diagnosed major depression, PTSD and persistent post-concussion disorder related to the mild traumatic brain injury; he noted the depression and PTSD were present before the fall and likely worsened as a result of it. He recommended on-going psychiatric care.

[121] Dr. Feinstein reassessed the Plaintiff in February 2014, at which time her daughter had arrived from Algeria. She indicated she was feeling better as a result of having her daughter with her. Dr. Feinstein was of the view that her depression was in remission and while she still had symptoms of PTSD, they were not as prominent as they had been. She still had persistent post-concussion disorder and was left with significant emotional problems which limited her function. Dr. Feinstein was focused on her physical symptoms, particularly her physical pain and fatigue.

[122] Dr. Feinstein conceded that the Plaintiff had not provided him with an accurate history but explained this by saying she was avoidant about events in her past which is typical of patients with PTSD. He agreed the transfer summary from the hospital made no diagnosis of traumatic brain injury, and that the trauma team at St. Michael's Hospital did not treat the Plaintiff as a patient with a brain injury. He acknowledged he didn't have the notes of Dr. Levy when he assessed the Plaintiff and consequently, he was unaware of the suicide attempts in November and December of 2005. He had believed that she had no ongoing symptoms from depression prior to the accident. Dr. Feinstein agreed that the integrity of his opinion is based on the credibility of the history provided but he would not concede that his opinion was incorrect.

Dr. Berbrayer

[123] Dr. Berbrayer was qualified as an expert in physiatry and he assessed the Plaintiff in August 2009. He had the medical records, and Connie filled in gaps in the history as Faiza had difficulty providing it. He diagnosed a closed head injury, a burst fracture at L3; multiple transverse process fractures of the back, bilateral ankle fractures and multiple fractured ribs. He felt her prognosis was guarded and she would never achieve a full recovery from the serious

physical injuries she sustained. He is of the opinion that the Plaintiff will continue to have ongoing problems with her back, ankles, walking and balance. In addition she had cognitive issues related to her mild traumatic brain injury. He felt she needed assistance with housekeeping, and that her ability to work had been adversely affected.

[124] In my view, Dr. Berbrayer was defensive when cross examined. For example, he refused to concede that Dr. Whelan, the Plaintiff's treating orthopedic surgeon who specializes in lower extremities, was in a better position to opine on the likelihood of the Plaintiff requiring an arthroplasty or fusion in the future. Dr. Berbrayer was hired by the solicitor for the Plaintiff to perform an assessment of the Plaintiff for use in this lawsuit. The court demands that experts who are qualified before the court and have delivered reports in accordance with the requirements of Rule 53 of the *Rules of Civil Procedure* are not advocates; rather, they are expected to assist the court with their expertise. Their role is not to defend their own expertise nor to assist the party who retained them; rather, it is to provide impartial, objective evidence based on their area of expertise. Since 2010, experts have been required to sign an "Acknowledgement of Expert's Duty" which sets out this requirement. Experts who come to court and refuse to make reasonable concessions and instead, are unwilling to move off their stated opinion are of little assistance to the court.

[125] While Dr. Berbrayer expressed the opinion that the future care items set out in the report of Galit Liffshiz (an occupational therapist) were both reasonable and necessary, he clearly had not done an analysis of the various items that were recommended and had not considered whether or not they were, in reality, necessary. For example, he did not know that the Plaintiff had not taken any physiotherapy since the year of the accident; yet he agreed that she needed physiotherapy for a period of 20 years. Similarly, he agreed with the recommendation for a speech language pathologist despite the fact that there was no opinion from a doctor indicating this was necessary as a result of her brain injury. Dr. Berbrayer's opinion on the various future care items was of no assistance to the court. He had simply endorsed the report of Ms. Liffshiz without any scrutiny of the items recommended or whether they were necessary from a medical perspective in light of the injuries she sustained. To say this is disappointing is an understatement; the court expects and indeed, demands more from the experts it qualifies to provide opinion evidence.

Dr. Douglas Salmon

[126] Dr. Salmon was qualified as an expert in the field of neuropsychology, with a special interest in vocational rehabilitation. He assessed the Plaintiff in November 2010 at the request of her solicitor to determine her likely career path pre-accident and post-accident along with the associated earnings. He reviewed the medical records, both pre and post-accident and interviewed Faiza. He was aware of the suicide attempts and psychiatric issues pre-accident.

[127] Dr. Salmon understood that prior to the fall, the Plaintiff was feeling better and was taking a course in pastry and was fully independent. He administered some vocational tests and she did poorly. On the test to measure depression, she scored in the severe range. Dr. Salmon stated that she had a number of barriers to rehabilitation including physical restrictions, emotional difficulties, and executive functioning problems. While she had PTSD and depression

before her fall, they were exacerbated by it. Dr. Salmon is of the opinion that prior to the fall, she would likely have worked earning minimum wage probably in the food preparation environment. Now, he believes that she has no realistic prospect of ever working on a competitive basis because of her serious orthopedic injuries combined with her traumatic brain injury and her psychological problems.

[128] It was clear that Dr. Salmon was not provided with an accurate history from the Plaintiff or Connie, who he interviewed as well. He did not know the Plaintiff had a daughter she left in Algeria. He was told she had a higher level of education than she did. He was advised that she had been working for a number of years prior to her fall. In addition, the Plaintiff told him that she had commenced taking the course in pastry prior to the accident, which was not accurate. Dr. Salmon, in my view, minimized the importance of the inaccuracies in the history that he was provided with and refused to concede that it might influence his opinion. Furthermore, Dr. Salmon did not give the Plaintiff the Weschler test, which is a test that measures IQ. He acknowledged measuring a person's IQ is absolutely critical in determining whether that person is employable.

[129] I found Dr. Salmon was reluctant to concede matters that he perceived might impact his opinions. For example, he testified that prior to the fall the Plaintiff was in the process of getting her life together and she had motivation and ambition. He acknowledged that he was not told that she had attempted suicide three times in 2005 and when asked whether that was an indication of mental instability, he replied that while the probability of the person being mentally stable was low, it was not impossible. In a similar vein, when he was confronted with evidence that the Plaintiff applied for disability payments before the fall on the basis that she was disabled due to PTSD and depression, he stated that the Plaintiff's level of functioning had improved and she likely did not have major depression or PTSD in the time leading up to the accident. It was clear to me that Dr. Salmon had not reviewed all of the pre-accident medical and employment information that might have been relevant to his opinion on the issue of the Plaintiff's employability. His reluctance to concede that this information might have changed his opinion was surprising and I attribute this response to a lack of impartiality on his part and consequently, I attach little weight to his opinion.

Dr. Zohar Waisman

[130] Dr. Waisman is a psychiatrist who was retained by the defence and did an assessment of the Plaintiff in December 2011. His opinion was that she had a long standing chronic history of serious psychiatric problems and at the time of the fall, she had issues with PTSD and depression. The fall exacerbated these pre-existing issues and the Plaintiff had not taken much treatment and Dr. Waisman was of the view that she needed active rehabilitation and to be placed on anti-depressant medication. He noted that she had been non-compliant with the treatment recommended and she did not take her medication regularly. He did not agree that she suffered post-concussion syndrome, although he agreed she sustained a head injury. He believed she needed further investigation including neuro-psychological testing, to determine if the diagnosis of post-concussion syndrome was applicable.

[131] I found Dr. Waisman to be impartial and he was measured and fair in his evidence.

Galit Liffshiz

[132] Ms. Liffshiz is an occupational therapist who was retained by the solicitor for the Plaintiff to do an assessment of the current and future needs of the Plaintiff that are medically necessary as a result of the injuries she sustained in the fall. She interviewed the Plaintiff in her home on June 6, 2011 and took a history from her. She met with her again in April 2014. Her report dated August 25, 2011 and the updated report dated May 5, 2014 were filed as exhibit 26. These reports detail the various items that Ms. Liffshiz believes the Plaintiff requires to maximize her function and improve the quality of her life.

[133] Ms. Liffshiz is of the opinion that Faiza requires physiotherapy, psychological treatment and assistance with self-care for 16 hours a day, to assist with bathing, cooking, cleaning, and other self-care activities. Ms. Liffshiz is of the view that the Plaintiff cannot be left alone during the day due to her physical and emotional issues. She notes that the Plaintiff ought to move out of the two bedroom Ontario Housing apartment to a condo, as the apartment cannot be renovated for her needs. If she moves to a condo, she will need to renovate the kitchen so that everything is accessible through pull out drawers.

[134] In cross examination, Ms. Liffshiz conceded that she made her recommendations for future needs without support from medical doctors for many of the items. For example, she supported payment of a speech language pathologist despite the fact that no physician made such a recommendation and some of the doctors noted she was articulate. She felt the Plaintiff needed treatment from a psychologist even though, since the accident, she has never been referred to a psychologist. She recommended provision of a walker and a wheelchair although none of the doctors have said these items are needed. She stated it was necessary for the Plaintiff to have care 24 hours/day every day although no physician or other professional has made this recommendation.

ANALYSIS

Liability

[135] The Plaintiff alleges she slipped on ice on the third floor fire escape of the apartment building where she lived. She asserts the ice was present due to the negligence of the Defendants who failed to maintain it properly to ensure it was safe. This is denied by the Defendants. It is not disputed that the Defendants were occupiers of the area where the Plaintiff alleges she fell. What is "reasonable" depends on the facts of a particular situation.

What is the proper standard of care?

[136] The *Fire Code* requires that fire escapes in occupied buildings shall be maintained in good repair and operational, and kept free of snow and ice accumulations.

[137] Counsel were unable to refer me to any cases directly on point where the court considered the proper standard of care for the maintenance of a fire escape. The engineer called by the Defendants, Mr. Kodsi, stated that a fire escape is not intended for regular use but rather for emergency use and consequently, the same standards that apply for regular stairs cannot be

used for a fire escape. Mr. Kodsi was qualified as an expert in the field of forensic engineering. In my view, that does not entitle him to express an opinion on the proper standard of care for the maintenance of a fire escape. No evidence was led by the Plaintiff to establish the standard maintenance practices for fire escapes on older buildings in Toronto. I am left, therefore, to make the determination of whether the maintenance of the fire escapes at 592 Church St. was appropriate through a review of the jurisprudence which considers the obligations of occupiers under the *Occupiers' Liability Act.*

[138] Fire escapes are meant to be used in emergency situations. The *Fire Code* specifies that accumulations of snow and ice must not be permitted on the stairs of a fire escape. This suggests that, as opposed to requiring a lesser standard of care than other stairs at an apartment building, the stairs of a fire escape must be kept in a safe condition for users who are going to utilize them under emergency conditions. For example, if emergency medical personnel had to use the fire escape stairs to rescue people trapped inside the building due to a fire, the stairs must be safe for their use and not icy or with large amounts of snow, as that would impede their ability to attend to the emergency situation. What maintenance must be done to ensure that accumulations of snow and ice do not build up would depend on the facts.

[139] In *Waldick v. Malcolm*, [1991] 2 S.C.R. 456, the Supreme Court of Canada pronounced on the nature and extent of the duty of care under the Act[1]. The court affirmed the decisions of the Ontario Court of Appeal and the Superior Court of Justice.

[140] Justice Blair, writing for the Court of Appeal ((1989), 70 O.R. (2d) 717), described the duty of reasonable care at para. 19:

> All 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. Occupiers are also not liable in cases where the risk of injury is "willingly assumed" by persons entering the premises or to the extent that such persons are negligent. (emphasis added).

[141] At para. 33, Iacobucci J. writing for the Supreme Court of Canada stated:

> [...] [the statutory duty on occupiers] is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the

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[1] Though this case was decided under the previous version of the *Occupiers' Liability Act*, R.S.O. 1980, c. 322, the wording of s. 3 and 4 of the current version of the Act is the same.

> factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation – thus the proviso "such care as in all circumstances of the case is reasonable." (emphasis added).

Is the duty of care limited or altered because the Plaintiff was smoking in an area that was "off limits"?

[142] It can be the case that where an occupier has designated an area one that is not to be used, the duty of care set out in the *Occupiers' Liability Act* is restricted. In the case before me, the Defendants testified that the fire escape was not supposed to be used by the tenants for smoking. There were balconies on the second and third floors but the evidence is that the access doors to these balconies were often locked. This issue of an area being designated as off limits was dealt with by the Supreme Court of Canada in *Waldick,* where Justice Iacobucci noted at para. 45,

> The goals of the Act are to promote, and indeed, require where circumstances warrant, positive action on the part of occupiers to make their premises reasonably safe. The occupier may, however, wish to put part of his property "off limits" rather than to make it safe, and in certain circumstances that might be considered reasonable. Where no such effort has been made, as in the case at bar, the exceptions to the statutory duty of care will be few and narrow.

[143] The evidence from the Plaintiff is that she regularly used the fire escape to smoke because the balconies were locked. She said she saw others do the same and she had never been told by anyone on behalf of the building that she could not smoke on the fire escape.

[144] Connie testified she often saw people out on the fire escape drinking or smoking because the balconies were usually locked. She stated that she was never told by anyone at the building that she was not allowed to use the fire escape and there were no signs posted prohibiting such use.

[145] Mr. Gorbett confirmed there were no signs at the building advising that tenants could not go out on the fire escape on the day of the fall. He had regularly posted such notices but they were always torn down. He was aware that tenants used the fire escapes to smoke and in his words, it was a "constant battle" to try and prevent this activity.

[146] In my view, the Defendant cannot be found to have designated the fire escapes "off limits" such that there was no requirement to ensure they were safe, as contemplated in *Waldick.* Mr. Gorbett and Mr. Paolozza were aware that the tenants used the fire escapes for smoking and did nothing further to stop this use, apart from posting signs which were quickly removed. If the Defendants had wished to designate the fire escapes "off limits" they would have had to take further steps to enforce this designation.

What constitutes "reasonable care" on the facts of this case?

[147] The question to be determined is what was the duty on the owners of the apartment building at 592 Church St. with respect to the fire escapes to ensure they were reasonably safe for people using them? This is a question that must be determined based on the specific facts of a

situation. In *Kerr v. Loblaws Inc.*, 2007 ONCA 371, (2007) 157 A.C.W.S. (3d) 877 [*Kerr*], the Court of Appeal considered the nature of the duty of care. At para. 19, Cronk J.A. stated, "[...] [the standard of reasonableness] requires neither perfection nor unrealistic or impractical precautions against known risks."

[148] What constitutes "reasonable care" and in determining whether that standard has been met, the court will consider the jurisprudence, but as noted by Justice Cronk at para. 27 in *Kerr*, citing the Nova Scotia Court of Appeal's comments in *Marche v. Empire Co. and Sobeys Inc.* (2001), 193 N.S.R. (2d) 132 at paras. 30 and 31,

> Case law provides valuable assistance to a judge in determining whether the standard of care has been met. However, as is apparent from the jurisprudence, what is required to meet the reasonableness standard will vary from case to case. What meets the reasonableness standard in one situation may fall short in another.

[149] In this case, the fire escape at 592 Church St. was intended for emergency use and consequently, there was a duty on the property manager to ensure that it could be navigated safely. This would include ensuring that it was free from icy conditions which would adversely affect the ability of users of the fire escape to ascend and descend it. Thus, when Mr. Gorbett checked the condition of the pathways, sidewalks, and stairs of the buildings for snow and ice on a daily basis, he was also required to check the state of the fire escapes to ensure they were free from snow and ice. In essence, it is the same standard to be applied whether for emergency use or otherwise because a fire escape needs to always be readily accessible for emergencies. The standard of frequency of inspection for exterior stairs and the fire escape would be the same, in my view. It would be unsafe for the fire escapes to have snow and ice on them which could negatively impact their use as emergency access areas. Also, since there was some evidence that tenants use the fire escapes intermittently, they must be safe for that use. It is understandable, however, that the areas that are used by pedestrians on a regular basis, such as the alleys, stairs, and sidewalks would have a higher priority of attention so that maintenance on these areas would be done before maintenance on the fire escapes.

[150] There is a case from the Alberta Court of Queen's Bench which makes some useful comments regarding fire escapes. In *Anderson v. L.J. Ryder Investments Ltd.*, 2000 ABQB 134, (2000) 95 A.C.W.S. (3d) 746 [*Anderson*], the Plaintiff brought an action for damages for personal injuries sustained when he went to the fire escape to smoke a cigarette. The doors leading to the fire escape indicated it was an emergency exit to be used at the person's own risk. The evidence was that occupants of the commercial building regularly used the fire escapes to smoke.

[151] The Plaintiff and his partner were smoking on the fire escape when the wind blew the door shut so they descended the fire escape stairs. At the second level, there was a ladder that descended to the alley below, which had to be accessed through a trap door. While trying to operate the ladder, the mechanism of the ladder released and catapulted the Plaintiff to the ground where he suffered serious injuries.

[152] In finding the building owner liable to the Plaintiff for breach of duty to take reasonable care for the safety of tenants on the premises, Justice Mason found that that there was a reasonably foreseeable risk and therefore a duty to address the danger. In an emergency situation, a tenant may not know how to operate the fire escape, which could lead to an injury. While inspections of the fire escapes had found no overtly unsafe conditions, the court found that there was an obligation on the owners of the building to ensure that in an emergency situation a tenant would know how to operate the fire escape. Specifically, no direction had been given regarding the use and operation of the fire escape and thus, when the Plaintiff was forced to use the fire escape, he did not know how to operate the sliding ladder and this caused a serious injury. The court found that this was a reasonably foreseeable danger that was not addressed and thus, there was a finding of liability for the breach of the duty to take reasonable care for the safety of tenants.

[153] Similarly, on the facts of the case before me, it was reasonably foreseeable to the owners and property managers of the building that if the fire escapes were not inspected for snow and ice conditions, the users of the fire escapes, both tenants and emergency crews, could encounter unsafe conditions and sustain injury. Thus, that danger had to be addressed by regular and proper inspections of the conditions of the fire escape. In the winter season, that meant checks to ensure that snow and/or ice had accumulated on the fire escapes.

Did the Defendants meet the onus under the *Occupiers' Liability Act* to ensure that the fire escapes were reasonably safe for those entering onto them?

[154] The evidence in this case concerning the maintenance of the fire escape was disparate and, at times, contradictory.

[155] Mr. Paolozza, the property manager for the buildings, testified about the management of the properties. He stated that Mr. Gorbett was instructed to inspect the buildings on a daily basis, which was not difficult since he lived at the premises. Mr. Gorbett was aware that it was his responsibility to check for snow and ice and, if slippery, to put down salt.

[156] With respect to the fire escapes, Mr. Gorbett was instructed to check them during periods of adverse weather and ensure that if they were used during an emergency, no one would slip.

[157] Mr. Gorbett testified about the system of maintenance that he followed for the fire escapes. He lived on the premises and he checked the weather conditions on a daily basis and addressed them as required. He regularly had to remove ice from the stairs of the north side of the building because of the leaky downspout. For the fire escape that the Plaintiff used, on the west side of the building, Mr. Gorbett testified it required little maintenance because it was not affected by the leaky downspout and it faced the sun so any snow on it would melt.

[158] There was evidence about what Mr. Gorbett was required to do to ensure the steps, walkways and alleys were free of snow and ice. Briefly put, he checked the conditions on a daily basis and as required, he would use a snow blower and/or a shovel to remove snow. He would spread salt which was kept on site to ensure it was not slippery.

[159] I found Mr. Gorbett to be a credible witness and I accept his evidence about what steps he took to ensure that the premises at 592 Church St. were cleared of snow and ice in the winter time. I find that there was a reasonable system of maintenance in place for tenants and visitors at the building. It was not a perfect system; for example, the existence of the leaky downspout ought not to have continued, given that it led to icy conditions in the alley. However, an occupier is not held to a standard of perfection; the duty is to take reasonable care in the circumstances to ensure safety for those persons on the property.

[160] Counsel for the Plaintiff urges me to find that "relying on the sun to melt the snow and ice" on the fire escape does not satisfy the onus under the Act. I reject this submission for two reasons. First, that was not the evidence about what steps were taken to ensure the fire escapes were safe. Mr. Gorbett testified about the different steps he had to take for the north fire escape as opposed to the west fire escape; the maintenance for the north one was more work because of the propensity for ice to build up.

[161] Second, Mr. Gorbett was clear that he visually inspected the fire escapes when he did his daily checks; he did not "rely" on the sun to melt snow and ice on the west fire escape. He said, and this evidence was corroborated by the tenants Ms. Collins and Ms. Surk, that ice and snow did not build up on the stairs of that particular fire escape because of its location and its construction. It is noteworthy that the flat portions of the fire escapes were not the usual flat surfaces one expects on stairs; rather, they were grids, with many holes, which make it less likely for snow to accumulate.

[162] It is submitted by the Plaintiff that the fire escape was unsafe and posed a hazard for those who used it. Engineering evidence was called to determine how the Plaintiff might have fallen down the stairs. The engineer called by the defence, Mr. Kodsi, measured the slip index of the stairs for the fire escape and concluded that it was quite good, even under wet conditions. He noted that the presence of the grid made it unlikely that snow would accumulate on the grid surface and water would not remain there long enough to freeze. While the Plaintiff and Connie testified that ice and snow were present on the fire escape on a constant basis and they never saw any maintenance being done by Mr. Gorbett, I cannot accept that evidence as accurate. If that were the case, I would have expected to hear evidence from other tenants about the lack of winter maintenance that was performed. The two tenants who testified, Ms. Surk and Ms. Collins, disputed the evidence of the Plaintiff and Connie. Furthermore, there was no evidence of any complaints made to the property managers prior to the fall and certainly neither the Plaintiff nor Connie ever complained about the condition of the fire escape.

[163] I find on the facts that the Defendants had a reasonable system in place to address winter maintenance at the building at 592 Church St. which included the fire escapes and the duty as set out in the Act has been met.

What was the condition of the fire escape on the evening of February 16, 2007 and what caused the Plaintiff to fall?

[164] I have found the Defendants had a reasonable system of winter maintenance in place for the apartment building at the time, and I turn now to a consideration of whether on the evening

of the accident, the onus under the Act was met. The evidence on this issue is inconsistent and, at times, contradictory.

[165] The tenant Ms. Collins testified that she really didn't pay much attention to the condition of the fire escape because she did not use it; but overall she had no concerns about the winter maintenance of the building. Connie said the fire escape consistently was covered with ice and snow from the top to the bottom in the winter of 2006-2007.

[166] Ms. Surk testified that the fire escape where the Plaintiff was smoking never had snow or ice build-up on it, which she attributed to its location and the fact that it received the sun regularly. On the evening of the accident when she found the Plaintiff lying on the ground, she looked up at the fire escape and saw no snow or ice.

[167] I found Ms. Surk to be a credible witness. She no longer lives at the building and attended court pursuant to a subpoena; she had no reason to fabricate evidence to assist the Defendants.

[168] The Plaintiff testified that in the months of January and February of 2007 when she went out to smoke, there was a lot of snow and ice on the fire escape, both on the landings and on the stairs, although she never slipped as a result of the conditions, nor did she complain to the landlord about the state of the fire escape.

[169] The Plaintiff did not say she had any difficulty walking out onto the fire escape on February 16, 2007 or that she saw any snow or ice on the fire escape earlier that day or when she entered it to have a cigarette.

[170] On the evening of February 16, 2007 she estimated she was on the fire escape for seven minutes smoking. During that time, it would be odd if she remained standing in a fixed position without moving so if the platform of the third floor fire escape was ice covered, one would have thought that would have become apparent to her. The Plaintiff did not describe the amount of ice on the fire escape or the location of it; she said simply that as she turned to go back into the apartment building, her foot slipped and she somersaulted down the steps, through the access hole on the second floor, landing on the ground. The evidence of the Plaintiff on the state of the fire escape at the time she fell is of little assistance to the court in determining whether the Defendants kept the fire escape free of snow and ice.

[171] The Plaintiff has given different renditions of how she fell at various times, to various individuals. The records from St. Michael's Hospital [exhibit 7, page 57] indicate she told the nurse that she was in the process of taking out the garbage when she slipped and fell. She told the clinical clerk at the hospital that she fell down a flight of stairs while she was taking out the trash [exhibit 7, page 93]. These discrepancies in the Plaintiff's evidence are significant; this fall was a very serious incident, which resulted in life altering injuries. Falling down a flight of stairs while taking out the garbage is a very different story than slipping on the landing of a fire escape while smoking.

[172] The Plaintiff is not a reliable historian and her credibility was seriously undermined by numerous falsehoods that she provided to different organizations and physicians both before and after the accident. The numerous discrepancies in the evidence of the Plaintiff cannot be explained through reference to her difficult past nor to her PTSD. The contradictions in evidence are in different areas: her relationship with Connie; the existence of her daughter; her ability to work; her emotional health; how the fall occurred; her level of education and whether she actually attended the pastry course. It was difficult, at times, to determine what evidence was truthful and what was not. The credibility of the Plaintiff was the subject of much dispute during the trial.

[173] On the issue of liability, there were no witnesses to the fall of the Plaintiff. Her own evidence about how she fell has not been consistent. As a result, other evidence must be considered in order to determine what the condition was of the fire escape on the night of the fall and whether the provisions of the *Occupiers' Liability Act* were complied with.

[174] I turn first to the photos taken of the area on February 17, 2007, the day after the fall. Connie took photos the morning after the Plaintiff fell and they were marked as exhibit 20. Mr. Gorbett took photos at the same time and they were marked as exhibit 30. In Connie's photos, the alley between 592 Church St. and the next apartment building has snow in places, other parts are bare and there are some portions with what appears to be ice or at least an accumulation of snow. The landing of the fire escape does not have ice on it in these photographs.

[175] In the pictures taken by Mr. Gorbett similar conditions are shown. His photos clearly depict the landing of the third floor fire escape with its grilled floor—that is to say, the flat portion of the landing is not a solid surface; it is a grill with open areas. In his photographs, there is no ice on the landings and around the edges of the landing, there is a small amount of snow which appears to have settled into the frame of the landing, which is not an area that would be walked on.

[176] While the solicitor for the Plaintiff submits that Mr. Gorbett ought not to be believed about the time his photographs were taken because of the difference in what is depicted in terms of the snow and ice, I do not accept this submission. When photo P taken by Connie showing the rear exit door and the patch of blood is compared to Mr. Gorbett's photo showing the same area, there is little difference. The area in front of the rear door is free of ice in both photos and there is what can be described as "old snow" on either side of the door.

[177] There is no evidence and no suggestion that the Plaintiff fell in the alley between the two buildings. While witnesses were asked about the condition and maintenance of the alley, in my view, this is of no particular assistance on the issue of whether the maintenance of the fire escape was appropriate. The condition of the alley may go to the maintenance of the apartment building generally, but the question for determination is whether the fire escape on the west side of the building was properly maintained by the Defendants or whether it was not reasonably safe.

[178] The photographs taken by both Connie and Mr. Gorbett do not show any ice on the fire escape. While photo E in Connie's batch depicts the third floor landing looking from the ground up and she testified there was snow identifiable in that picture, it is not clear that is the case.

Even if it is, it is impossible to determine the amount of snow, or whether it was in an area that the Plaintiff would have walked on to return to her apartment. In any event, even on the Plaintiff's own evidence, as she turned, her foot slipped on ice which caused her to fall – she made no mention of snow being present. There is no evidence from these two sets of photographs that there was ice present on the fire escape at the time of the Plaintiff's fall and there is no evidence that there was a buildup of snow on the structure. At most, there was a small amount of snow that had settled into the frame of the landing but its location would not have impeded a person walking on the landing.

[179] The solicitor for the Plaintiff in his written submissions makes repeated reference to the accumulation of ice and/or snow on the fire escape and in my view, there is a paucity of evidence to support this contention, apart from the broad statements of the Plaintiff and Connie that the fire escape was covered from top to bottom with snow and ice. The photographs contradict this evidence, even those taken by Connie the morning after the fall. The obligation rests with the Plaintiff to demonstrate on a balance of probabilities that the Defendants breached the duty of care imposed on them under the Act. The Plaintiff has failed to do so.

[180] As I have indicated, different versions of what caused the Plaintiff to fall have been given by Faiza at various times. The Defendants argue that the Plaintiff jumped from the fire escape in a suicide attempt, which is consistent with her prior attempts that are documented. This theory was supported by the engineer called by the Defendants, Mr. Kodsi. There are numerous possible explanations as to what caused the Plaintiff to fall. It is not necessary for me to determine why the Plaintiff fell since I have found there was no breach of the standard of care. I do not find that the Plaintiff fell because she slipped on ice that was on the third floor landing of the fire escape. However, given that at trial there was expert evidence called on the mechanism of the Plaintiff's fall and whether it was an attempt to kill herself, I state that I am not persuaded on the evidence that the fall was an attempt at suicide.

[181] Despite having found that the Plaintiff failed to demonstrate on a balance of probabilities that the Defendants breached the duty of care imposed on them under the Act, I will nevertheless canvass the issue of damages.

DAMAGES

General Damages

[182] The Plaintiff sustained serious orthopedic injuries as a result of her fall. She suffered a comminuted fracture of her left ankle and a more severe fracture of her right ankle, involving damage to the articular cartilage. The evidence of the treating orthopedic surgeon for the ankle injuries, Dr. Whelan, was of great assistance to me. I found Dr. Whelan to be a knowledgeable witness who gave his evidence in an impartial way and I place much reliance on his evidence.

[183] He did two surgeries on the Plaintiff's ankles and testified that the fracture to the right ankle was more extensive and even with the external fixation, he was unable to restore it to a proper anatomical position because of the extent of the injury. When he last examined Faiza, there was evidence of arthritis in the joint. He testified that there are various modalities of

treatment for these types of injuries ranging from medication to fusion of the joint or even joint replacement. It is unfortunate that Dr. Whelan had not examined the Plaintiff since 2012 and therefore, he was unable to comment on her current medical condition. He was not asked to offer an opinion on the future course of the ankle injuries or the likelihood of a fusion or joint replacement, but his notes indicate that in late 2012, there were already changes evident on the x-rays, indicative of the presence of arthritis. The Plaintiff is a young woman; as she ages, the natural course is that the arthritis will progress, resulting in increased pain and limitation of movement. As Dr. Whelan described, the modalities of treatment depend on the severity of the complaints.

[184] As well, the Plaintiff suffered a burst fracture of her spine at L3 which was very comminuted, with numerous pieces of bone having settled in the spinal canal, There was damage to the vertebral discs and the structural integrity of the spinal column was compromised, according to Dr. Ahn, the orthopedic surgeon who specializes in spinal and trauma surgery and who operated on the Plaintiff. I found Dr. Ahn to be an impressive witness who was candid in his evidence and properly viewed his role to be one of assisting the court and not advocating for the party who called him at trial.

[185] Dr. Ahn performed a decompression of the canal and inserted a metal replacement for the bone that was damaged at L3 and then he fused it to L2 and L4 to provide stability. Dr. Ahn testified that the Plaintiff's spine is now stable but she has been left with a stiff spinal column and scarring. There is concern that as time progresses, the Plaintiff may develop arthritis and the associated pain and it may be necessary to undergo further surgery. Dr. Ahn has not examined the Plaintiff since approximately two months after her surgery so he could not comment on how her back is at the present time. He was not asked to opine on the likelihood of deterioration in the future or further surgery. I am satisfied on the evidence that the Plaintiff has been left with a back that is stable but is the source of ongoing pain and restriction of movement and there is no prospect of any improvement in the future. Faiza's back problems affect her on a daily basis.

[186] The orthopedic surgeon Dr. Martin Roscoe was retained by the defence to assess the Plaintiff in December 2011. His report was filed as exhibit 37 and he agrees that the Plaintiff sustained serious orthopedic injuries when she fell in 2007. She was treated in an "expert manner" by the trauma surgeons and has done well. He felt that she should continue to do strengthening exercises and to walk to improve her flexibility. He did not feel any further physiotherapy was indicated and he deemed it "unlikely" that she will require further surgery in the future.

[187] At the scene of the fall, the Plaintiff had a large laceration on her scalp and there was evidence of an altered level of consciousness. I accept the evidence of Dr. Feinstein that Faiza suffered a mild head injury as a result of the fall. However, I am not persuaded on the evidence that the Plaintiff has sustained significant cognitive deficits as a result. It is notable that the Plaintiff has not been referred for treatment of her head injury. In my view, it is important that at St. Michael's Hospital, which is a trauma centre, when the Plaintiff was transferred for rehabilitation, there was no diagnosis of traumatic brain injury and she had not been treated as such while at the hospital.

[188] Rather, there was much evidence about the nature of the emotional sequelae the Plaintiff suffered as a result of her fall, mostly from experts. The role of the fall in the Plaintiff's current state of emotional health was the subject of much dispute at trial. Because of the lack of candor of the Plaintiff to her treating doctors about the nature of her emotional issues before the fall combined with the contradictory evidence contained in the ODSP file compared to the testimony of the Plaintiff at trial, it is exceedingly difficult to determine the impact of the fall on the Plaintiff from a psychiatric perspective.

[189] The evidence makes it clear that prior to this fall, the Plaintiff had significant and serious issues with depression and PTSD which had been diagnosed by Dr. Levy in February 2005. Dr. Levy testified that the PTSD was caused by the events the Plaintiff experienced while she lived in Algeria, including the sexual molestation, rape and the terrorist threats. She had attempted suicide prior to the accident and had been prescribed anti-depressant medication.

[190] While the Plaintiff testified that prior to her fall in February 2007, she felt more positive and was planning for her future including returning to the workforce, I do not accept this as an accurate statement of her pre-accident functioning. She had appealed the denial of her ODSP application, asserting that her psychiatric problems prevented her from working in any capacity. She was unable to provide any evidence that she was enrolled in the pastry course. She had made no application for employment nor had she taken any steps to change her life and there was no evidence from any medical practitioner to suggest that there had been any significant improvement in her serious psychiatric problems which were attributable to her life in Algeria. The Plaintiff testified that following the accident she became more anxious and depressed and I accept this evidence, given the nature of the accident and the serious injuries she sustained. However, the extent of the exacerbation of her depression caused by the fall is not clear.

[191] The evidence from the medical doctors was disparate. Her family physician, Dr. Shepherd, testified that since the accident the Plaintiff's mood has been fairly stable and most of the appointments have been for issues stemming from her orthopedic injuries. Dr. Feinstein who conducted two medico-legal assessments testified that Faiza's PTSD and depression were exacerbated as a result of the fall and she required on-going treatment. However, he conceded that he was not provided with a proper history from the Plaintiff about her prior psychiatric difficulties.

[192] While Dr. Feinstein stated the Plaintiff has significant emotional problems, he conceded that her mental state improved after her daughter arrived in Canada. Dr. Feinstein expressed the view that the Plaintiff continues to be significantly disabled by her emotional problems which he attributes to the accident. I do not accept this view because Dr. Feinstein did not have a proper, accurate history and he relied on both the Plaintiff's description of her functioning and that of Connie, neither of whom were candid about the extent of Faiza's pre-accident problems.

[193] I found the evidence of the psychiatrist Dr. Waisman to be more reliable than that of Dr. Feinstein. Dr. Waisman assessed the Plaintiff in 2011 and agreed that the fall worsened the pre-existing PTSD and depression but he was of the opinion that she needed active treatment and to be compliant with her medication.

[194] As I have noted, it is difficult based on the evidence to determine with any precision the role of the fall in the Plaintiff's current emotional state. The Plaintiff's own evidence was far from consistent. The treating physicians of the Plaintiff make it clear that she has not been compliant with treatment recommendations

[195] The fall was a serious one, one which was life threatening and left Faiza with permanent injuries which continue to affect her on a daily basis. As a result, I have no doubt that for a period of time her PTSD was aggravated as were her depression and anxiety. However, I do not find, when considering the evidence as a whole, that the fall has resulted in a significant, ongoing exacerbation of the Plaintiff's PTSD; rather, its role was of a temporary worsening. It is clear from the evidence that the mood of Faiza has been much improved since her daughter arrived to live with her in February 2014.

[196] Taking all of these factors into consideration, I assess the general damages for pain and suffering and the loss of enjoyment of life of the Plaintiff at $175,000.

Loss of Income

[197] The Plaintiff has the burden of proof to establish past pecuniary losses on a balance of probabilities. The onus rests with the Plaintiff to satisfy the court that there is a real and substantial risk of future pecuniary loss: *Schrump et al. v. Koot et al.*, (1977) 18 O.R. (2d) 337 (C.A.). The Plaintiff submits that but for the fall she would have secured work at entry level positions. Ian Wollach, the Plaintiff's accountant expert, has calculated the loss of income under different scenarios assuming the Plaintiff would have worked 20 hours a week or alternatively, 40 hours a week and that the Plaintiff is now precluded from any form of employment. The past income loss ranges from $65,231 to $148,386 while the future losses are quantified at between $255,689 and $697,320.

[198] The Plaintiff has no real work history since coming to Canada in 2001. She worked for a week or two at a pastry shop and for another couple of weeks at a fast food restaurant, but there was no evidence of any other employment or attempts to look for work before the fall six years later. She was in receipt of social assistance benefits initially and subsequently applied for ODSP in 2005, stating she was completely disabled from working due to psychological disabilities. When that application was denied, she appealed the decision and this was shortly before she fell in 2007.

[199] While she testified at trial that she was feeling positive about her future and had taken a course in pastry, there was no reliable evidence to support this contention as I have noted elsewhere in these reasons. Furthermore, there was no evidence that in the six years before the fall she had taken any steps towards securing employment. To the contrary, the evidence is clear that she had applied for disability benefits and was pursuing an appeal of the rejection of her application.

[200] The evidence of the Plaintiff's vocational expert, Dr. Salmon, was of little assistance on the issue of the Plaintiff's likely employment situation had the accident not occurred because he was provided with inaccurate employment, medical and educational history. In addition, he

clearly had not reviewed all of the pre-accident medical and employment documentation which would have been relevant to his opinion. For reasons already expressed, I attach little weight to the opinions of Dr. Salmon.

[201] Because of the numerous inaccuracies in the records which the Plaintiff acknowledges for various reasons, coupled with the contradictory evidence at trial, it is difficult to determine with any precision the state of the Plaintiff's mental health just prior to her fall. The records of the treating doctors, as well as the expert opinions, make it clear that she was struggling with depression and PTSD in February 2007 and that she continues to do so.

[202] I am not persuaded on the evidence that the Plaintiff was in the process of turning her life around and finding a job. Rather, the evidence supports the view that she had decided she was not able to work and therefore she needed payment of disability benefits. That is why she appealed the denial of her application for ODSP. There is no evidence to suggest that the Plaintiff was likely to return to the work force, even on a part time basis. The suggestion that she would have worked full time hours is nothing more than speculation, without any evidentiary foundation.

[203] It is beyond dispute, however, that the Plaintiff has physical limitations as a result of the injuries to her ankles and back suffered in the fall. Dr. Roscoe in his report opined that she has been left with some permanent physical impairments which affect her ability to do physical tasks. He stated that any jobs that require her to stand for long periods of time or bend or lift are not appropriate. In my view, these are serious injuries that will not improve over the course of time but will in all likelihood deteriorate and cause her additional pain and restrictions. Even if she had undertaken and completed the course in pastry, because of her education, lack of facility with English and lack of employment experience, the Plaintiff would have been relegated to jobs which paid minimum wage and had a physical component to them, such as standing, lifting or sitting for long periods of time.

[204] I find that the likelihood of Faiza working on a competitive basis is remote but I make this finding based on her orthopedic injuries. The exacerbation of her pre-accident depression and PTSD has not assisted the situation but that in isolation does not render the Plaintiff unemployable. As a result of her orthopedic injuries, I am of the view that the Plaintiff has suffered a loss of competitive advantage because certain types of occupations, those which involve significant standing, sitting, lifting or walking, are no longer viable options for her, and but for the injuries they are jobs which she most likely would have been able to secure if she decided to join the workforce. The treating orthopedic surgeons, Drs. Whelan and Ahn, testified that as a result of her fractures, she has been left with limitations, pain and various restrictions. None of the doctors have suggested that there is any hope for improvement in Faiza's symptoms. Given her lack of education and the language barriers, the types of jobs that the Plaintiff could have secured would be entry level, those with a significant component of standing or sitting, such as the two jobs in the food industry that she worked at for very short periods after coming to Canada. I assess the loss of economic advantage at $125,000 which I view to be a fair and reasonable award taking into account all of the circumstances of the case.

Future Care Costs

[205] I turn now to the claim for future care costs and housekeeping. The report of the occupational therapist Ms. Liffshiz dated August 25, 2011 was filed by the Plaintiff as exhibit 26. It details the cost of care into the future for the needs of the Plaintiff as a result of her fall. I did not find the report of Ms. Liffshiz nor her testimony under cross examination to be of much assistance to me in determining what the reasonable and necessary costs are that the Plaintiff will incur in the future as a result of her injuries from the fall. Ms. Liffshiz admitted that there were numerous mistakes in her report and that she did not consult with treatment providers or physicians about the items she included in her report. For example, she included physiotherapy as a necessary cost the Plaintiff will incur in the future but she agreed that none of the orthopedic surgeons suggested this would be necessary for Faiza. In fact, Dr. Roscoe stated in his report that physiotherapy in the future is not indicated, nor is surgery. She recommended the purchase of a wheelchair and walker in the future even though none of her doctors said these items were necessary.

[206] Perhaps the most offensive item identified by Ms. Liffshiz was her opinion that the Plaintiff required 24 hour care and could not be left alone. While she reduced in her supplementary report to care being provided for 16 hours a day, in my view this is still simply something on Ms. Liffshiz's wish list as opposed to an item that she in her professional capacity views as being reasonable and necessary as a result of the injuries from the fall.

[207] I pause to note that experts are granted a special kind of status as witnesses because of their expertise – they are permitted to express an opinion to the court upon which reliance can be placed. They are entitled to do so as a result of their expertise in a certain area and the fact that the court needs that expertise to come to a proper determination of the issues in a particular case. It is of no assistance to the court if an expert does not critically assess the evidence and come to an impartial opinion based on the evidence. For a health care practitioner to attend court, be qualified as an expert and then to offer testimony, as Ms. Liffshiz did, as to what the injured Plaintiff needs based on what that person tells the expert is of little or no assistance to the court in its determination of what constitutes proper and reasonable items of future care.

[208] Occupational therapists such as Ms. Liffshiz are familiar with rehabilitation needs and the court expects that witnesses who are qualified by the court to provide expert opinion shall do so in an effort to assist the court with their specialized knowledge. I would have expected that Ms. Liffshiz would have consulted with the treating doctors of the Plaintiff including the orthopedic surgeons and psychiatrists when compiling her list of what items are reasonable and necessary for the Plaintiff, particularly in light of the significant pre-accident psychiatric history of the Plaintiff. This was not done and in my view, this suggests that Ms. Liffshiz does not understand the role of an expert who has been qualified to give opinion evidence. I attach little weight to the opinions expressed by Ms. Liffshiz.

[209] Dr. Berbrayer the physiatrist who was qualified as an expert, broadly endorsed the report of Ms. Liffshiz. I find this to be of little persuasive value because he failed to carefully consider the recommendations contained in the report and instead, he defended it and refused to concede items that were not appropriate. For example, speech language pathology was costed for ten

years when there isn't a single doctor saying this treatment is necessary for the Plaintiff. Similarly, there is no doctor who says the Plaintiff needs attendant care 24 hours a day or even 16 hours a day as a result of her injuries from the fall and there was no evidence that any attendant care was ever provided since the accident.

[210] The treating orthopedic surgeons, Drs. Whelan and Ahn, have not examined the Plaintiff in a long time and they were not asked to opine on the area of future care costs. Dr. Roscoe in his report states that the Plaintiff does have some ongoing impairments which will affect her ability to do physically demanding tasks of daily living and housekeeping and in my view, this is reasonable given the nature of her injuries.

[211] The Plaintiff has taken very little treatment as a result of her injuries. The doctors concur that depression is highly treatable and the Plaintiff has been non-compliant with at least some of the treatment recommendations. I am of the view that the Plaintiff will need treatment in the future for her depression and PTSD. She needs to exercise to maintain her flexibility. I am persuaded that as a result of her injuries, the Plaintiff requires assistance with some of the heavier household duties.

[212] Some of the items in the Liffshiz report are reasonable and necessary, such as a membership at Variety Village, aqua therapy, psychological treatment, a stationary bike, medications and an adjustable bed. This is not an exhaustive list. After considering the items that are reasonable and necessary as a result of the Plaintiff's injuries as well as the prices in the Liffshiz report and the frequency of need, I assess the present value of future care costs at $100,000. In my view, this is a reasonable sum which provides a proper award for this head of damage.

[213] I am advised that the OHIP subrogated claim stands at $79,697.52 and that amount is not in dispute.

CONCLUSION

[214] The Plaintiff has failed to prove on a balance of probabilities that she fell on February 16, 2007 as a result of the negligence of the Defendants. She has failed to demonstrate that there was a breach of the *Occupiers' Liability Act* and accordingly, her action is dismissed.

[215] I assess her damages as follows:

General Damages: $175,000

Loss of Competitive Advantage: $125,000

Future Care Costs: $100,000

OHIP Subrogated Claim: $79,697.52

[216] If the parties are unable to agree on costs, I may be contacted. I would be remiss if I did not extend my thanks to counsel for their excellent advocacy on behalf of their clients, their co-operation throughout the course of this long and difficult trial and their unfailing courtesy to the court.

D. A. Wilson J.

Released: February 13, 2015

CITATION: Khelifa v. Sunrise et al., 2015 ONSC 740
COURT FILE NO.: CV-08-00358589
DATE: 20150213

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Faiza Khelifa

Plaintiff

– and –

Ontario Corporation Number 1358584 operating as Gloucester-Church Mansions Limited; Ontario Corporation Number 479405 operating as Sunrise Property Management Limited

Defendants

REASONS FOR JUDGMENT

D.A. Wilson J.

Released: February 13, 2015