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Occupier's Liability Arises at the Garage Party

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Case Commented On: *Motta v Clark*, 2016 ABQB 211

This recent judgment written by Mr. Justice R.J. Hall caught my attention because the facts are a scenario with which I am familiar and I suspect other readers are as well: The impromptu garage party hosted by a neighbour. While some of us actually park vehicles in our garage, others turn their garage into a very comfortable social venue fully equipped with a state-of-the-art sound system, stocked beer and wine fridge, humidor, gas heating, and possibly even lounge chairs. In these households, the garage takes on the persona of a "man-cave", where neighbours and friends get together for small talk in the surroundings of golf clubs, hockey nets, skis, bikes, tires, wrenches, air compressors, camping gear, dogs and a table saw. On the odd festive occasion, the garage becomes a sort of time vortex where you step in during the early evening and the next thing you remember is walking out the next morning. *Motta v Clark* tells the story of such a garage party gone wrong, and provides a word of caution for those who host such parties. It also reads like a tragedy of sorts, with the downfall of a friendship being played out in cross-examination before Justice Hall at the Court of Queen's Bench.

The story begins innocuously enough, and the facts are set out in the initial paragraphs of Justice Hall's decision (at paras 1 to 10):

> The plaintiff Mr. Motta and the male defendant, Mr. Clark were good friends. Mr. Clark had invited Mr. Motta to come to the Clarks' house on the upcoming Saturday to celebrate Mr. Clark's birthday. However, on Friday night Mr. Clark texted Mr. Motta to say the party would not be happening on Saturday but invited Mr. Motta to come to the Clarks' garage and socialize that night instead.
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> Mr. Clark had five beers in his garage before Mr. Motta got there. Mr. Motta had 6 beers at his home before he walked to a strip mall nearby, picked up a case of beer and walked over to the Clarks' garage at the Clarks' home. This amount of beer drinking was not unusual to either of the men. Neither says the beer affected him, and neither says the other was intoxicated. Given that evidence I attribute no causal relation between the beer drinking and the events that later occurred.
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> Mr. Motta had visited Mr. Clark in his garage on many occasions to drink beer and socialize. When any of the participants needed to urinate, they did so in the backyard. Hence there was usually no need for anyone to enter the house.
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> However, on this occasion after Mr. Motta had arrived and had a beer, he felt in need of a bowel movement. He asked Mr. Clark if he could use a bathroom in the house. Mr. Clark, at the time was on the phone listening to birthday congratulations from a friend. He interrupted his call to tell Mr. Motta he was welcome to enter the house and use a bathroom, and he suggested using the upstairs bathroom.

About one week before these events, Mr. Clark had noted that the light outside the back door to the house was acting up. There were two bulbs attached to a motion detector device, but the device was not working correctly and the light was staying on in the day time. Mr. Clark didn't like the wasted electricity, and so he had commenced the practice of turning off that outside light fixture by use of the switch inside the back door. Indeed, when Mr. Motta approached the back door the switch to the outside light was off, and so the light did not come on to illuminate either the outside, or the inside landing. There were no lights on inside the house.

Mr. Motta opened the screen door, then opened the back door which swung inwards and to his right. He could not see inside the house or on the landing.

He took a step into the house, then reached his right hand across his body to feel for the light switch on the wall to the left of the doorway. He swiped his hand up and down as he reached in but could not feel the light switch. He felt a box on the wall, which proved on later inspection, to be a box for keys that was above the light switch for which he was searching.

Mr. Motta says that he then stepped further into the house and to his left with his right foot.

Where he went to put his foot down there was no landing; the stairwell to the basement was immediately left of the entrance through which he had entered. Mr. Motta fell down the stairs in the dark and injured his wrist and arms in the fall.

The set up of the inside landing was such that, as one entered through the doorway from the outside, there was a strip to the left of the doorway approximately 4 inches wide, then the landing dropped off to the first stair, the stairwell being a left turn from entering the landing. Mr. Motta could not see this in the dark.

The parties agreed on the extent of damages suffered by Mr. Motta, but came before the Court for a determination of liability.

Liability in this case was governed by the *Occupiers' Liability Act*, RSA 2000, c O-4. In particular, section 5 of the Act establishes the legal duty of an occupier of premises to ensure the premises are reasonably safe for visitors. The Act defines 'occupier' in section 1 as a person who has physical possession of the premises or control over the premises, and there doesn't appear to be any doubt that this includes the owner(s). The Alberta Court of Appeal set out and interpreted the test for occupiers' liability in *Wood v Ward*, 2009 ABCA 325 (at paras 6-7):

The Duty of an Occupier

The *Act* provides as follows:

> 5. An occupier of premises owes a duty to every visitor on the occupier's premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there.

> The effect of the *Act* is to modify the duty of care owed by the occupier to a visitor at common law. At common law the occupier only had a duty to protect the visitor from unusual dangers of which he was aware or ought to have been aware, and he could discharge his duty by warning of the unusual danger. As the Court stated in *Preston v. Canadian Legion Kingsway Branch* (1981), 1981 ABCA 105 (CanLII), 123 D.L.R. (3d) 645, 29 A.R. 532 (C.A.) at p. 536:
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> > This change is most marked because it does away with the old common law position that an occupier was only liable for unusual dangers of which he was aware or ought to have been aware. Under the old law the occupier could escape liability by giving notice. Now, the occupier has to make the premises reasonably safe. That does not absolve the visitor of his duty to take reasonable care but does place an affirmative duty on each and every occupier to make the premises reasonably safe.
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> If a risk of injury to a visitor is reasonably foreseeable, the occupier will owe a duty of care to prevent visitors from being injured. Under s. 5 the occupier must take reasonable care, which is the ordinary common law standard in tort, meaning that the occupier must keep the premises reasonably safe.
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> It does not follow that the occupier is automatically liable for any injury suffered as a result of a foreseeable risk. Foreseeability of the risk creates a duty to the visitor, but it is still necessary to show negligence on the part of the occupier to impose liability. The *Act* does not intend to create no fault liability. Further, the fact that the risk is foreseeable by the occupier, or that the occupier is negligent in failing to protect the visitor from the risk, does not mean that the visitor has no duty to have regard for his own safety. A duty or negligence by the occupier does not foreclose contributory negligence on the part of the visitor: *Preston* at p. 536; *Lorenz v Ed-Mon Developments Ltd.* (1991), 1991 ABCA 82 (CanLII), 118 A.R. 201, 79 Alta. L.R. (2d) 193 (C.A.) at p. 194. It follows that the duty of the occupier is not only to protect the reasonably diligent visitor, but also to be aware that some visitors might themselves be careless, that is, contributorily negligent. The occupier's duty ends only when either the risk on the premises or the conduct of the visitor becomes reasonably unforeseeable.

Essentially then, the owner of premises has a statutory duty to prevent visitors from suffering reasonably foreseeable injury while on the premises, even if that visitor fails to exercise ordinary diligence or is otherwise careless. As the Court of Appeal states in *Wood*, the occupier's duty ends only when either the risk on the premises or the conduct of the visitor becomes reasonably unforeseeable. For more on occupier's liability on ABlawg see David Laidlaw's 2012 discussion in the context of urban gardens here.

In this case Justice Hall concluded that Mr. Clark owed Mr. Motta a duty of care because it was reasonably foreseeable that someone who left the garage and entered the house in the dark would be unable to find the light switch and may fall down the stairs, and that he was negligent in directing Mr. Motta to the unlit doorway and exposed staircase without taking steps to either

ensure the lights were on or otherwise accompany Mr. Motta to help him navigate the entrance to the house (at paras 21 to 31). However, Justice Hall also found on the evidence that Mr. Motta contributed to his injuries, by failing to use the flashlight on his phone or otherwise failing to seek assistance to find the light switch knowing the staircase was nearby (at paras 32 – 37). Justice Hall thus ruled that Mr. Motta was contributorily negligent pursuant to section 15 of the *Occupiers' Liability Act* and the *Contributory Negligence Act*, RSA 2000, c C-27, and he apportioned the liability for Mr. Motta's injuries as 2/3 to Mr. Clark and 1/3 to Mr. Motta.