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| IN THE COUNTY COURT OF VICTORIAAT MelbourneCOMMON LAW DIVISION | ANONYMISED AND ADAPTED FOR EDUCATIONAL PURPOSES  |

 General List

Case No. CI-14-07978

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| SAVANNAH MALEY (a pseudonym) | Plaintiff |
|  |  |
| v |  |
|  |  |
| OLIVER O’SHANE (a pseudonym) | Defendant |
|  |  |
| and |  |
|  |  |
| KEITH WILLIAMS ESTATE AGENCY PTY LIMITED (a pseudonym) | Third Party |

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| JUDGE: | HIS HONOUR JUDGE BROOKES  |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 27, 28 and 31 July 2017 and 1, 2, 3 and 4 August 2017 |
| DATE OF JUDGMENT: | 4 August 2017 |
| CASE MAY BE CITED AS: | Maley (a pseudonym) v O’Shane (a pseudonym) |
| MEDIUM NEUTRAL CITATION:[First revision 6 October 2017] | [2017] VCC 1996 |  |

**REASONS FOR** **JUDGMENT**

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Subject: OCCUPIER’S LIABILITY

Catchwords: Onus of proof

Legislation Cited: *Wrongs Act* 1958 (Vic)

Judgment: Claim dismissed.

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| APPEARANCES: | Counsel | Solicitors |
| For the Plaintiff | Mr B. Wickham | Phillip Lorenzini & Associates |
|  |  |  |
| For the Defendant | The defendant appeared in person | - |
|  |  |  |
| For the Third Party | Ms J. Bowes | Glover & Hawke Lawyers |

HIS HONOUR:

# On or about 21 June 2011, the plaintiff, Savannah Maley[[1]](#footnote-1), entered into an agreement with the defendant, Mr Oliver O’Shane[[2]](#footnote-2), to lease premises at White Court, Moligal, which at that time, were owned by the defendant.

# On 24 February 2013, the plaintiff alleges that she was gardening at the rear of the premises when a wooden retaining wall collapsed, causing her to trip and fall on the ground.

# As a result of the fall, the plaintiff suffered a fracture injury to her right arm and wrist requiring open reduction and internal fixation.

# At the time of the injury, the defendant was an occupier of the premises and as such, owed the plaintiff a duty pursuant to s14B of the *Wrongs Act* 1958 to ensure the plaintiff, whilst at the premises, was not injured by reason of the state of the premises or of things done, or omitted to be done, in relation to the premises.

# Secondly, it was a term of the tenancy agreement that the defendant must ensure that the premises were maintained in good repair.

# The plaintiff alleges that the defendant was in breach of his duty as an occupier; alternatively, under the lease, in that he, inter alia:

(a) failed to install a support for the retaining wall;

(b) failed to replace the sleepers in the wall;

(c) permitted the continuation of a situation of danger.

# Further, the plaintiff alleges the breach or breaches were a cause of the injuries referred to in paragraph 3.

# The plaintiff gave evidence that at the time of the injury, or shortly before, she had been lawn mowing close to the edge of the retaining wall when the earth gave way, allegedly caused by a rotting sleeper. She fell to her left, tumbled to a lower level, and as a result incurred a fracture of her right wrist.[[3]](#footnote-3) Shortly thereafter, the plaintiff attended the Latrobe Regional Hospital at 16:13 and gave a history as follows:

“Fell down retaining wall after it gave way approximately 3 feet ... patient fell onto her out-stretched right hand at approximately 15.30 hours. The pain was 10/10.”[[4]](#footnote-4)

# Photographs[[5]](#footnote-5) were taken within a few days thereafter by the plaintiff’s husband and confirm the state of the sleeper, as does the original ingoing inspection report[[6]](#footnote-6) that the state of the sleeper was “rotting”.

# There was conflicting evidence between the defendant and the third party, and again between the plaintiff, her husband, and the defendant, as to conversations and correspondence said to bring the state of the sleepers to the defendant’s notice prior to the injury. But, for present purposes, I am satisfied that the defendant had notice of the state of the sleepers prior to injury, either by what would have been obvious to him when he attended the rear of the premises prior to her injury, and/or by notice given to his agent, Ms McLeod, prior to injury.

# Accordingly, I am satisfied that if the mechanism of injury occurred in the manner attested to by the plaintiff, she would succeed in proving liability for her injuries.

# Interlocutory orders required witness statements to be filed in this matter and accordingly, all witnesses adopted same as part of their evidence-in-chief.

# The defendant called evidence from the plaintiff’s then next-door neighbours, Thomas James Brown[[7]](#footnote-7), and Angelina Emma Grice[[8]](#footnote-8). Mr Brown gave evidence-in-chief between Transcript (“T”) 261-264. Therein, he stated as follows:

“… at or around the middle of [the] morning at the end of February, start of March, we heard both of my dogs barking and carrying on out in the backyard, at something in the backyard. So me and the girlfriend, we heard someone scream as well. We walked out the backyard to see what the commotion was with me (sic) dogs. Me (sic) dogs were wet. We poked our head over the fence - this is actually my own words, I’m not reading this as well. … [We] poked our heads over the fence, there was a lady on the ground with a garden hose running next to her, still running. Me (sic) dogs were soaking wet. My girlfriend actually poked her head over the fence and asked if she was all right which I sort of didn’t really care at the time because of the amount of trouble I have been having. And then yeah, she just turned round and said that she had broke[n] her arm. The neighbour, and walked inside, and that was all that we heard from her. Then a couple of days later she poked her head over the fence when I was out the backyard having a few beers with the missus and turned around and goes she’s going to be suing us, and that’s pretty much - I just turned round and said, ‘Yep, whatever’, and I just walked off. … I did yell back saying it wasn’t my fault, [it] had nothing to do with me whatsoever.”[[9]](#footnote-9)

# Further on, he stated as follows:

“A few days later I got home from work, I was sitting out the back with Angelina, and Savannah Maley came outside and yelled that because she had an operation to fix her broken arm she’s going to need time off work and that she is suing us for costs of earnings. …

 I then yelled back that she shouldn’t have been on the fence wetting my dogs and that it is none of my fault.”[[10]](#footnote-10)

# He was further asked:

“When you said: ‘She shouldn’t have been up on the fence wetting my dogs and that’s none of my fault’, did she make any reply?”

# he replied:

“No, none whatsoever, just carried on and walked inside.”[[11]](#footnote-11)

# In cross-examination, he stated the way in which he had come to make a statement was that he had a conversation with the defendant concerning repair of their communal fence and that they began talking, and it was then that he recalled the incident.[[12]](#footnote-12) Specifically when asked how the accident came to be raised in conversation, he stated:

A. “Well, we were actually sitting there talking and I was talking about the - all the trouble with local laws, I don’t know if I went to court before that or after that. And I was telling him about the court and said that I had been told that I’m going to get sued and then he turned around and goes, ‘I have been told the same’. So then we both sat down and I said, ‘Well, what have you been told?’, and then he told me what his story was and I said, ‘That’s not true’.

…

Q. You described to him what you have written in your statement?---

A. Yes, and then he asked me if I was willing to put it in (sic) paper.”[[13]](#footnote-13)

# Further, he was asked:

Q. “You didn’t see the fall, you said?

A. No.

Q. You didn’t see anything until she was on the ground?

A. True.

Q. So how do you know she had been up on the fence?

A. Well, me (sic) dogs were wet and ... I just put two and two together.”[[14]](#footnote-14)

# Shortly after the incident, he said he saw the plaintiff lying on her back. He was asked:

Q. “How was Mrs Maley lying there?

A. Just laying on her back.

...

Q. And screaming in pain?

A. Yes.

Q. Did you do anything to help her?

A. No.

Q. Why was that?

A. Because of the amount of trouble that I have had, I wasn’t liable to bloody - yeah.

Q. So you just left her there screaming?

A. Yeah - well, she pretty much got up straightaway anyway, so - - -

Q. But your partner, Angelina Grice, she asked if she was okay?

A. Yes.”[[15]](#footnote-15)

# He was asked to show where the plaintiff had been lying at the time that she was screaming in pain, and he marked with an X on a photograph.[[16]](#footnote-16) He was then asked:

Q. “So that hose would have been in her hand, would it?

A. It was on the ground lying next to her.”[[17]](#footnote-17)

# Further, in cross-examination when the witness was told the plaintiff had given an entirely different version as to how the accident had happened, it was put to him:

Q. “And indeed, there is a great deal of bad blood between you?

A. There is, no doubt about that.

Q. Which would go some way to explaining why you’re so keen to come to court here and give evidence that is completely contrary to what Mrs Maley would say?

A. Well, I wouldn’t be coming here not to tell bullshit - excuse – yeah, I have got nothing to hide, mate. I’m not gaining nothing if you know what I mean.

Q. Are you gaining anything, Mr Brown?

A. I got a new fence out of it, that’s about it.”[[18]](#footnote-18)

# He was later questioned:

Q. “Why would you say to someone who has not accused you of anything when you see them later on that, ‘You shouldn’t have been up on the fence’, when you didn’t see that, and that it is none of your fault, why would you use the words, ‘This is none of my fault’?

A. Because it is not my fault.

Q. But why do you think it was even suggested it was your fault?

A. Because I got told I was going to get sued.

Q. Who by?

A: By her.”[[19]](#footnote-19)

# Further, he was asked:

Q. “And why do you think she was saying any of this was your fault?

A. I don’t know, probably because of me (sic) dogs.”[[20]](#footnote-20)

# In re-examination, it was put to him by the defendant acting in person:

Q. “… So I just ask you to put this in writing, I haven’t paid you anything in any way?

A. No, no.

Q. No incentive whatsoever?

A. No, nothing whatsoever.

Q. Have I ever bought you a beer or anything?

A: No.”[[21]](#footnote-21)

# Ms Grice then gave evidence-in-chief from T279-281. She stated:

“… around the end of February to the start of March 2013 at about mid morning at 3 Blake Court, Traralgon, [I] heard the dogs barking and carrying on in the backyard along with something screaming. So my boyfriend, Thomas Brown, and I went outside to see what was happening. The dogs were both wet and barking at the fence and someone was screaming on the other side. We had a look over the fence and saw the neighbour, Savannah Maley, laying on the ground with the hose next to her with running water. I then asked if she was okay and if she needed any help. She screamed her arm was broken and she got up and went inside her house. Two or three days later in the evening, Thomas and I were sitting in the backyard, Savannah Maley has come outside and yelled out that she’s had an operation on her arm and that because she’s going to have to have time off work, she’s going to sue us for loss of earnings. Thomas has yelled back that she shouldn’t have been up on the fence squirting the dogs with the hose and that none of this is our fault. After that we never heard another thing about it.”[[22]](#footnote-22)

# When asked whether the plaintiff made any reply when Thomas said she should not have been up on the fence squirting the dogs, she replied: “No, she just got up and just went inside.”[[23]](#footnote-23)

# In cross-examination, Ms Grice stated that she had met the defendant some years later when there were discussions about building the adjoining fence. This would have occurred in about 2016.[[24]](#footnote-24) When asked how well did she remember an accident that had occurred some three years previously, she said:

“As pretty much as what I have just written in the statement.”[[25]](#footnote-25)

# She was further asked:

Q. “… you don’t say how well you remember it, I’m asking how well you remember it today?

A. I remember the dogs barking, I remember somebody screaming, going out and seeing her on the ground ... Savannah Maley.”[[26]](#footnote-26)

# Later, when she confirmed she had seen the plaintiff lying on the ground with the hose next to her with running water, and that she was lying on her back, she stated the hose was next to her.[[27]](#footnote-27)

# When asked where on the ground the plaintiff was lying with respect to photograph number 265, she stated it would have been on the other side of the fence (away from the photographer).[[28]](#footnote-28)

# Later, she was asked:

Q. “Why did you conclude she had climbed up on the fence?

A. Because a couple of days after we noticed that the fence paling was broken and it was bent onto the side and the dogs were pretty wet.

Q. And that’s the only reason why you think she climbed up on the fence?

A. Yes.

Q. Ms Grice, I want to suggest to you that you’re either mistaken about your account of events or that you’re not telling the truth about what happened, do you understand that?

A. Yes.

Q. Mrs Maley says she never spoke to you or never saw you when she had her accident, that her accident was somewhere else and that she’s never spoken to you at all, what do you say to that?

A. It’s true when she says that we have never spoken at all other than that one moment.

Q. And there was a great deal of bad blood between the two of you, wasn’t there?

A. Not between me and her, no.

Q. But between your partner?

A. Yes.

Q. And you certainly weren’t friends with the Maleys, were you?

A. No, we never met.”[[29]](#footnote-29)

# In re-examination, she was again taken to her statement to the effect that the plaintiff had come outside and yelled out that she had had an operation on her arm and that she was going to have time off work and she was going to sue them for her loss of earnings. She was asked:

Q. “… she said that to you?

A. Yes, she yelled it out, yeah.

Q. Are you a hundred per cent sure of that?

A. Yes.”[[30]](#footnote-30)

# Further, she was asked:

Q. “Have I ever offered you any incentive to come to this court?

A. No.

Q. Or to do anything?

A. No.

Q. We came to a decision to fix the fence and we put up a new fence?

A. Yes.

Q. I don’t know if I’m allowed to say this, but do you know who paid for the fence?

A. You paid for the fence.

Q. I paid for the fence?

A. Yes.

Q. What did Thomas Mr Brown do?

A. He built the fence.

Q. He built … [the] fence, I supplied the materials and he done the labour?

A. Yes.

Q. There was no problems?

A. No.”[[31]](#footnote-31)

# Because these statements had been filed in court prior to the commencement of the hearing, these matters were put to the plaintiff in cross-examination. The defendant asked the plaintiff as follows:

Q. “Mrs Maley, I put it to you that you were hosing the neighbour’s dogs and they come out and you had fallen off the fence and screamed in pain. They asked you were you all right?

A. How did I fall off the fence?

Q. Well, you were hosing the neighbour’s dogs when they come out when they heard you scream they come and seen you over the fence - they didn’t actually see you fall, sorry, but you still had the hose running and the dogs were all wet?

A. Totally wrong, false.”[[32]](#footnote-32)

# Further, she was asked:

Q. “Shortly before you hurt yourself, did you have your hose out at any time?

A. No.

Q. When was the last time you had a hose out before this accident?

A. Most probably to fill up the dog’s water bucket which was most probably week beforehand, and as you can see on this photo.”[[33]](#footnote-33)

# When shown the hose apparently in Photograph 265, she was asked:

A. “Will that hose reach over the fence?

Q. It would reach over the fence, yes, but that’s a gated area to a paved area between the neighbours and our house. We had that always closed, blocked off so our dogs couldn’t go near their dogs.”[[34]](#footnote-34)

# When she was further asked about the hose shown in the photograph, it was put:

A. “So it would be possible to put a nozzle on that, take the hose, lean over the fence and spray the dogs if you had a mind to do it?

Q. It would be possible, yes.

A. And at the time you hurt yourself, are you able to say the last time you used that hose - is that the only hose you had in the backyard?

Q. Yes.

A. Are you able to say when the last time you had used that hose prior to your fall?

Q. The week beforehand.

A. But not that day?

Q. No, not that day.

A. So there is no way you have used the hose either to spray the dogs or for any other reason prior to the fall?

Q. No, there isn’t, no.

A. Did the neighbours come out and speak to you after the fall?

Q. No.

A. Not that day?

Q. Sorry?

A. Not that day, the neighbours didn’t speak to you?

Q. We have never spoken to the neighbours.”[[35]](#footnote-35)

# Later, the plaintiff confirmed she had read their statements, and the following matters were put to the plaintiff from the statement:

(a) “And Ms Grice has given a statement that they heard you screaming on the other side, ‘We had a look over the fence and saw the neighbour, Savannah Maley, laying on the ground with the hose next to her with running water’, what do you say about that?---Totally false.”

(b) “I then asked if she was okay and if she needed any help, what do you say about that? Totally false.”

(c) “‘She screamed her arm was broken and she got up and went inside her house’, did you say to anyone that your arm was broken before you - - -?There was nobody there.”

(d) “‘Two or three days later in the evening Thomas and I were sitting in the backyard. Savannah Maley’s come outside and yelled out that she’s had an operation on her arm and she’s going to have to have time off work’ did you speak to her and Thomas some days later and say you had broken your arm and you were going to have some time off work? No.

 Did you speak to her at all? No.”

(e) “It’s alleged Thomas has yelled back to you that you shouldn’t have been up on the fence squirting the dogs with the hose, what do you say about that ...? I wasn’t. He didn’t make that allegation? No.”

(f) “Apparently Mr Brown says the same, and he’s saying that the hose was running, the dogs were wet, and you deny all that? M’mm.”[[36]](#footnote-36)

# In submissions, plaintiff’s counsel submits that the plaintiff’s complaint to the hospital on the day of the injury amounts to a prior consistent statement admissible to rebut a recent invention of the mechanism of injury, and this is to be compared with two statements made some three years after the incident by the neighbours. He further submits that there was bad blood between the witnesses, at least Mr Brown, who admitted some animus towards the plaintiff.

# Counsel concedes, however, that there can only be one incident relating to the broken arm which was the subject of the neighbours’ evidence. Further, he conceded the two versions are not reconcilable with respect to: (a), the presence of the running hose; (b), the position where the plaintiff was lying after she had fallen; and (c), the alleged conversation between the plaintiff and the neighbours.

# The evidence of the defendant and Mr Brown and Ms Grice is that in 2016, the adjoining fence was to be repaired, in the sense that the defendant would supply the materials and Mr Brown would supply the labour. Further, it would appear both the neighbours made a joint statement in early 2017 but were then required by the court, on an interlocutory hearing, to provide separate statements. Both the neighbours convincingly denied any collusion. It is conceded by the plaintiff, if I accept their evidence, the plaintiff has not proved that she fell off a retaining wall.[[37]](#footnote-37)

# I make the following findings of fact:

# In or about February 2013, or at any other material time, the plaintiff only suffered one fracture to her wrist at the defendant’s premises and that was on 24 February 2013.

# The plaintiff gave evidence she was the only person in proximity of the accident both at the time and in the immediate aftermath.

# The plaintiff denies she had been using a hose at all that particular day and was not spoken to by her neighbours or anyone else immediately after her fall.

# She further denies all the particulars of a conversation said to have taken place with her neighbours within two or three days of the injury occurring.

# On the other hand, both neighbours gave evidence before me and were challenged as to all the material differences with respect to the plaintiff’s evidence.

# I found both neighbours to be credible witnesses, particularly Ms Grice.

# Mr Brown, it could perhaps be said, made an admission against interest with respect to, first, not asking if the plaintiff was all right when she was screaming in pain, and, secondly, that he had obtained a new fence from the defendant.

# I find that with respect to the first matter, that although the sentiment was less than laudable, he was still prepared to concede as much because it was the truth.

# With respect to the second matter, the evidence discloses that the defendant paid for the materials and he provided the labour, which on the face of it appears equitable.

# In finding the defendant’s witnesses credible, I would also find that the plaintiff herself was not shaken in her evidence as to the mechanism of injury.

# However, the overall state of the evidence from the three relevant witnesses leaves me with not being satisfied on balance that the plaintiff injured herself because of the collapsing retaining wall as claimed.

# It follows that both the claim and the third party notice should be dismissed. I will hear the parties as to any consequential orders I should make.

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1. a pseudonym [↑](#footnote-ref-1)
2. a pseudonym [↑](#footnote-ref-2)
3. #  Exhibit L, pages 261, 262 and 265

 [↑](#footnote-ref-3)
4. Exhibit N [↑](#footnote-ref-4)
5. Exhibit L [↑](#footnote-ref-5)
6. Exhibit TP4 [↑](#footnote-ref-6)
7. a pseudonym [↑](#footnote-ref-7)
8. a pseudonym [↑](#footnote-ref-8)
9. T262, L23 – T263, L24 [↑](#footnote-ref-9)
10. T263, L29 – T264, L6 [↑](#footnote-ref-10)
11. T264, L17-20 [↑](#footnote-ref-11)
12. T267 [↑](#footnote-ref-12)
13. T270, L2-20 [↑](#footnote-ref-13)
14. T271, L10-15 [↑](#footnote-ref-14)
15. T274, L15-24 [↑](#footnote-ref-15)
16. Exhibit L [↑](#footnote-ref-16)
17. T274, L28-29 [↑](#footnote-ref-17)
18. T276, L11-25 [↑](#footnote-ref-18)
19. T277, L1-9 [↑](#footnote-ref-19)
20. T277, L15-16 [↑](#footnote-ref-20)
21. T279, L8-12 [↑](#footnote-ref-21)
22. T279, L28 – T280, L18 [↑](#footnote-ref-22)
23. T280, L19-21 [↑](#footnote-ref-23)
24. T283, L18 [↑](#footnote-ref-24)
25. T284, L12-13 [↑](#footnote-ref-25)
26. T284, L10-19 [↑](#footnote-ref-26)
27. T286, L27 [↑](#footnote-ref-27)
28. T287, L22-23 [↑](#footnote-ref-28)
29. T292, L8-27 [↑](#footnote-ref-29)
30. T294, L25-27 [↑](#footnote-ref-30)
31. T295, L3-14 [↑](#footnote-ref-31)
32. T153, L11-19 [↑](#footnote-ref-32)
33. T154, L2-7 [↑](#footnote-ref-33)
34. T154, L14-18 [↑](#footnote-ref-34)
35. T155, L10-26 [↑](#footnote-ref-35)
36. T156, L1-25 [↑](#footnote-ref-36)
37. T531, L24-26 [↑](#footnote-ref-37)