

CANADA / JUDGMENT

## Boyes v. Wong

2016 BCSC 1085

### COURT

Supreme Court of British Columbia

### DECIDED

14 June 2016

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2016 BCSC 1085 Boyes v. Wong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Boyes v. Wong,

2016 BCSC 1085

Date: 20160614

Docket: S115846

Registry: Vancouver

Between:

Cora Rachelle Boyes, an Infant, and Ellen Boyes, Litigation Guardian

Plaintiff

And:

Johnny Ho Cheung Wong,

Kit Bing Lai, Kenneth Wayne Starr, Sandra May Cusack (nee Starr),

Peter Franz Bachmann, Carmel Philomena Bachmann, Doris Wong,

ABC Company, Candice Searcy, David Boyes, Jennifer Searcy, and

Golden Leaf Electrical Services Ltd.

Defendants

And:

Johnny Ho Cheung Wong, Kit Bing Lai, Sandra May Ryckman (formerly Cusack and Starr), Doris Wong, Candice Searcy and David Boyes

Third Parties

Before: The Honourable Madam Justice Young

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

March 14-18 and 21-23, 2016

Place and Date of Judgment:

Vancouver, B.C.

June 14, 2016

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## INTRODUCTION

[1] This decision deals with liability only for the electrical burns suffered by an infant who came into contact with the electrified end of an extension cord under a built-in cabinet in a rental premises (the "Incident"). The defendants are the current owners, one past owner of the premises and the property manager. Liability under the Residential Tenancy Act, S.B.C. 2002, c. 78 [RTA] and the Occupiers Liability Act, R.S.B.C. 1996, c. 337 [OLA] are considered. It is not known who installed the electrified extension cord. In order to determine who owed a duty of care to the infant plaintiff, it was necessary to determine when the electrified extension cord was installed and who owned the house at that time. The main issue is whether the owner and property manager exercised reasonable care in inspecting the property. The issue in the third party action is whether the previous owner and a tenant had a duty to warn the new owners and the property manager.

## AGREED STATEMENT OF FACTS

[2] This action results from the infant plaintiff's allegations that on August 24, 2007, she was electrocuted while a resident at 961 Broadview Drive, North Vancouver, British Columbia (the "Property").

- [3] The home on the Property is comprised of two self-contained suites. The infant plaintiff lived in the upstairs suite (the "Premises") from May 1, 2007 until late August 2007 with her mother Jennifer Searcy and her father David Boyes ("Mr. Boyes").
- [4] At the time of the Incident, the defendants Johnny Ho Cheung Wong ("Mr. Wong") and Kit Bing Lai (Ms. Lai) owned the Property. The history of the ownership of the Property is as follows:
- a) Peter Franz Bachman ("Mr. Bachman") and Carmel Philomena Bachman ("Ms. Bachman") from August 15, 1963 to May 5, 1969;
  - b) Kenneth Wayne Starr ("Mr. Starr") and Sandra May Ryckman (formerly Cusak and Starr) ("Ms. Ryckman") from May 6, 1969 to November 27, 1979;
  - c) Ms. Ryckman from November 28, 1979 to July 8, 1992; and
  - d) Mr. Wong and Ms. Lai from July 9, 1992 to present.
- [5] The cabinet was constructed at some point during the early to mid-1980s.
- [6] At the time of the Incident and since the Premises were first rented, the defendant Doris Wong ("Ms. Wong") acted as the property manager and/or landlord (role to be determined at trial) for the Premises and the downstairs suite.
- [7] There were prior tenants in the Premises. The tenants included the following:

Name

Approximate Tenancy Commencement Date

David Boyes and Jennifer Searcy

May 1, 2007

Kirk Gower, Erin Hume, and Sarah Demeter

August 29, 2006

Hugo Molina, Jason Frost, Adam Horn

July 16, 2005

Sean McIlwaine, Bonnie Gorcak, Robert Gorcak, Randi Gorcak

February 7, 1997

Patricia Willimont, Jonathon Martin, James Martin, Jennifer Carrol, Dale Carrol

July 18, 1995

- [8] There was no written application or agreement with the first tenant, James Martin.

[9] The two suites in the home on the Property have generated on average \$2,000 in gross monthly rental income for the owners from 1992 to present.

[10] The cost of terminating the junction box underneath the cabinet was \$101.76.

#### HISTORY OF THE LITIGATION

[11] A notice of civil claim was filed by the plaintiff on September 1, 2011 naming a number of defendants.

[12] The plaintiff filed notices of discontinuance against Mr. Starr (now deceased), Sandra May Cusack (now Ms. Ryckman), Mr. Bachmann, Ms. Bachmann and Golden Leaf Electrical Services Ltd. ("Golden Leaf") on August 8, 2013.

[13] The plaintiff filed a notice of discontinuance against Ms. Ryckman because Ms. Ryckman swore an affidavit which stated that no entertainment unit had been installed on the Premises during the time that she owned the Premises.

[14] On March 26, 2014, the plaintiff successfully applied to have the issue of quantum and liability severed.

[15] On March 24, 2015 the defendants Ms. Wong, Mr. Wong, and Ms. Lai applied to add Ms. Ryckman, Mr. Boyes, Candice Searcy and Golden Leaf as third parties to the action. The defendants were successful with regards to their applications adding Ms. Ryckman, Mr. Boyes, and Jennifer Searcy but unsuccessful in their application adding Golden Leaf.

[16] As part of her application response materials, Ms. Ryckman swore a new affidavit which stated that she was not aware that the "entertainment unit" referenced in her previous affidavit was in fact the cabinet in question. Ms. Ryckman's new affidavit confirmed that the cabinet was built during her ownership of the Premises. Ms. Ryckman was then re-added as a defendant by the plaintiff.

[17] The defendant Sandra May Cusack (nee Starr) is the same person as the third party Sandra May Ryckman (formerly Cusak and Starr) and I order that the style of cause be amended to change the defendant's name to Sandra May Ryckman (formerly Cusak and Starr).

[18] In the first week of March of 2016, the plaintiff and the defendants Ms. Wong, Mr. Wong and Ms. Lai filed notices of discontinuances against Jennifer Searcy releasing her from this action.

[19] On March 14, 2016, a court order was made dismissing the action against Mr. Boyes and Jennifer Searcy as defendants. Mr. Boyes remains as a third party to this action and Jennifer Searcy is now released from this action entirely.

## THE PREMISES

- [20] Ms. Ryckman, who owned the Property jointly from May 6, 1969 to November 27, 1979 and exclusively from November 28, 1979 to July 8, 1992, sold the Property to Mr. Wong and Ms. Lai on July 9, 1992.
- [21] Mr. Wong and Ms. Lai have owned the Property continuously to present date. They have never set foot inside the Property.
- [22] Ms. Wong is the Mr. Wong's sister. She has been the property manager or landlord from approximately 1992 to present, including at the time of the Incident. She had exclusive control over the Property for approximately 15 years prior to the Incident.
- [23] Jennifer Searcy, Mr. Boyes, Jaidlynn Searcy (the infant plaintiff's sister), and the infant plaintiff began their tenancy on approximately May 1, 2007. Jaidlynn was six years old at the commencement of the tenancy and the infant plaintiff was six months old. They had been living in the Premises for just under four months at the time of the Incident.

## THE CABINET

- [24] In the living room of the Premises there was a built-in cabinet that had been built to act as an entertainment unit to house a television, VCR, cable box, record player and stereo equipment (the "Cabinet").
- [25] After the Incident the Cabinet was taken apart by a mechanical engineer, Mr. David Little ("Mr. Little") and it was then learned that the Cabinet had an electrical junction box and receptacles installed within. The electrical junction box ("Receptacle #1") was wired directly into the electrical system of the house. There were two interior receptacles ("Receptacles #2 and #3") which were soldered into the wood of the Cabinet.
- [26] There was a brown electrical extension cord installed in the Cabinet as well which had been constructed to have two male ends (the "Extension Cord"). One male end was plugged and taped into Receptacle #1 underneath the Cabinet. The other end was energized and protruded out from underneath the Cabinet between the wall and Cabinet. The Extension Cord may have been plugged into Receptacle # 2 at the beginning of the Incident.
- [27] The following diagram was created by electrical engineer Martin Coles and the names and numbers assigned to the three electrical devices have been adopted by all parties and used in these proceedings. I have therefore reproduced Mr. Coles diagram in these reasons for ease of reference:

Diagram of the Cabinet

## THE INCIDENT

- [28] The infant plaintiff was ten months old at the time of the Incident. She is nine years old today.

- [29] On August 24, 2007, the infant plaintiff was being babysat by her aunt, Candice Searcy.
- [30] The infant plaintiff's father, Mr. Boyes, was having a nap in the bedroom at the time of the Incident as he worked shift work. The infant plaintiff's mother, Jennifer Searcy, was on a shopping trip with her other daughter and not present at the Premises at time of the Incident.
- [31] At the time of the Incident, the infant plaintiff was playing a game of peek-a-boo with her aunt beside the family couch and near the right hand corner of the Cabinet. The infant plaintiff and her aunt would take turns ducking behind the corners of the couch and then reappear. At some point, the infant plaintiff ducked behind the couch and did not reappear. Her aunt looked around the corner of the couch and found the infant plaintiff face down on the ground. The infant plaintiff had placed the energized male end of the Extension Cord in her mouth.
- [32] When Candice Searcy picked the infant plaintiff up from the ground she saw the Extension Cord lying underneath the infant plaintiff.
- [33] The infant plaintiff sustained severe electrical burns to her face, mouth, lips, gums, palate, teeth and throat. There was an exit burn wound from the electrical current on her hand.
- [34] Candice Searcy began administering first aid to the infant plaintiff immediately. An ambulance was called. The infant plaintiff was placed in a medically induced coma for a period of time. She was kept in the ICU at Children's Hospital for three weeks. It is agreed that the infant plaintiff's injuries are profound and that the Incident has changed her life forever.

## ISSUES

1. When was the Cabinet created or modified?
2. Who owed a duty of care to the infant plaintiff and what was the standard of care?
3. Was the standard of care met?
4. Did a failure to meet the standard of care result in harm to the infant plaintiff and was the harm foreseeable?
5. How is Liability to be apportioned
6. If the defendants are liable were the third parties also at fault?

When was the Cabinet Created or Modified?

## Evidence

- a) Sandra Ryckman

- [35] Ms. Ryckman owned the Premises from 1969 to 1992. Initially the Property was registered in her name and in the name of her former spouse Mr. Starr (who is now deceased). Sometime in 1978 the title was transferred into her name because Mr. Starr was self-employed and wished to protect the Property from any liability arising from his business. Ms. Ryckman stayed home and raised children while Mr. Starr provided financial support for the family.
- [36] Sometime between 1980 and 1984, Ms. Ryckman and Mr. Starr modified a pony wall which had contained a planter box in the entranceway of the Property. Ms. Ryckman believes that the pony wall was capped and that the Cabinet was built and pushed up against the pony wall.
- [37] The Cabinet was designed to be a central feature in the living room to house a television and video recorder. Mr. Starr made all of the arrangements for the Cabinet. Ms. Ryckman had nothing to do with the process.
- [38] From the day the Cabinet was completed until Ms. Ryckman sold the Property in July 1992 to Mr. Wong and Ms. Lai, Ms. Ryckman used the Cabinet to watch television. She did not turn her mind to how the television worked or from where it received electrical power. All she knew is that when she went to turn it on it worked.
- [39] Ms. Ryckman does not recall who constructed the Cabinet. It was someone Mr. Starr dealt with directly and it was likely that he traded work at his auto repair shop in return for constructing the Cabinet. She did not observe the Cabinet being built. She did not know that the Cabinet was on a base or that it replaced the pony wall. She was not consulted about the construction. The tradesmen arrived at the home and started building the Cabinet without any prior notice to her.
- [40] Ms. Ryckman did not know that the Cabinet was affixed to the Premises but thought it was so heavy that it could not be moved.
- [41] Ms. Ryckman has very few memories of the Cabinet. She remembers that the large open space in the middle of the Cabinet housed the television and that there was a VCR machine underneath the television in the space below it. She was unsure whether the cable box sat within the space below the television or sat on top of the television. She does not remember a record player in the Cabinet at all. The open spaces at either end of the Cabinet were covered with a black cloth material from the time the Cabinet was installed until Ms. Ryckman moved out of the Property in July 1992. We now know that the spaces with the black cloth housed speakers. Ms. Ryckman never saw those openings at either end of the Cabinet uncovered.

- [42] When she moved out of the Property, Ms. Ryckman used the services of a professional moving company. The moving company disconnected her television, VCR and cable box and moved them to her new premises. She did not see how the movers did this. She does not recall inspecting the Cabinet when she left the Property. She does not recall opening drawers to make sure items were not left behind. She does not remember ever seeing the record player.
- [43] Ms. Ryckman was questioned about the electrical supply to the Cabinet. She believed that there was an electrical receptacle in behind the Cabinet and that the TV plugged into that receptacle because again, she believed that the pony wall was still there.
- [44] Ms. Ryckman was shown a photograph in Exhibit 6, tab 4, photograph 11 which shows the Extension Cord underneath the right open space in the Cabinet. She does not recall ever seeing the Extension Cord. She believes that she would have noticed it if it had been there because she vacuumed the living room frequently including cleaning in corners and she believes that this cord would have been in the way of her vacuum cleaner.
- [45] Ms. Ryckman does not recall ever seeing an electrical receptacle under the Cabinet. She never did see the Cabinet up off its base and did not know that it had been on a base.
- [46] When shown more recent photographs of the Cabinet, Ms. Ryckman was asked what had changed. Ms. Ryckman said that the black cloth which had covered the end compartments had been removed and she had never seen them uncovered. She also said that there was no marble patterned adhesive paper covering the back of the television compartment when she last saw the Cabinet.
- [47] Prior to completing the purchase of the Property, Mr. Wong and Ms. Lai commissioned a home inspection. Ms. Ryckman was not there when the inspection was done and assumed that her realtor must have allowed the inspector into the Property. Ms. Ryckman does not remember the inspector coming to the Property.
- [48] Ms. Ryckman says, and I have no reason to doubt her, that she and her husband were safety conscious and that she would not knowingly allow an electrical hazard to exist in the Premises.
- [49] In cross-examination, Ms. Ryckman was shown an affidavit she swore on May 12, 2013 saying that there was no entertainment unit installed in the Premises. As a result of the statement contained in that affidavit, the action was dismissed against Ms. Ryckman. She was subsequently served with an application in support of filing a third party notice against her. Attached to the supporting affidavit material were photographs of the Cabinet. Prior to seeing the exhibited photographs she had no recollection of an entertainment unit. After seeing the exhibited photographs, she recalled that the Cabinet was built during the time she owned the Property.

- [50] Ms. Ryckman says that she has had memory problems. She is now 69 years of age. She has been to a doctor about her memory problems and has some concern about her job security because of her memory problems. She moved out of the Property in 1992 and wasn't aware of any problems until she was served in 2013 so there was a 21-year gap where she was not required to turn her mind to the existence of this Cabinet.
- [51] In assessing Ms. Ryckman's credibility I find that she does have a poor memory of the Cabinet which is understandable given the large passage of time between a fairly uneventful sale of her Property and being served with a notice of civil claim. There was no reason to specifically recall the details of this Cabinet because during her ownership nothing went wrong with the Cabinet to draw her attention to it. I find that she made her best efforts to give honest and full testimony.
- b) Nadine Paul
- [52] Nadine Paul is the eldest daughter of Ms. Ryckman and Mr. Starr. She moved into the Property when she was an infant and lived there until 1988 when she moved out to get married. She and her husband moved back into the Property for about a year after they were married. She confirmed the roles that her parents played during her upbringing. Her mother stayed home to take care of the home and children and her father earned the money. Her father was not handy but would hire someone to come and work on the Property if needed. If there were any purchases of electronics it would have been her father who would be responsible for the purchase.
- [53] Nadine Paul identified a photograph of the Cabinet at Exhibit 6, tab 5 which was taken during her occupancy of the Property. She recalls the Cabinet was added to the living room while they lived there. She would have been a young teenager at the time and she has no memory of it being built.
- [54] What she remembers of the Cabinet is that it housed a television, a VCR and a record player. She remembers playing a red covered record album on the record player and she remembers that the speakers were built into either end of the Cabinet. Those compartments were always enclosed. She does not recall any difficulty with the Cabinet. When she went to turn the television on it worked. She does not remember seeing any electrical cords extending outside of the Cabinet.
- [55] Ms. Paul reviewed a number of photographs of the Cabinet. She had never seen the Extension Cord under the right speaker compartment. She recalls that she spent many hours lying on the floor playing board games and does not recall ever seeing the Extension Cord or Receptacle #2 under the Cabinet.
- [56] Ms. Paul had never seen Receptacle #3.

- [57] Ms. Paul had never seen the shiny grey and black marble patterned adhesive paper on the back of the television compartment in the Cabinet. On cross-examination Ms. Paul admitted that she'd never seen the television compartment empty.
- c) Ken Starr
- [58] Ken Starr is the youngest child of Ms. Ryckman and Mr. Starr. I will refer to him as Ken Starr throughout to differentiate him from his father. He grew up on the Property and lived there for the first 19 years of his life. He recalls the Cabinet being constructed. A tradesman came in and took measurements around the wall and left. He came back and built the base of the Cabinet. Ken Starr was watching that part of the construction for a while before he went to his friend's house. When he came back, the Cabinet was installed on top of the base. The Cabinet housed the TV, VCR, a cable box, a record player and an amplifier which contained a tape player and speakers.
- [59] He identified the Cabinet in Exhibit 6, tab 5. He believed the television depicted in that photograph is the second television the family owned. He believes that they had three televisions over the time he lived in the house after the Cabinet was built. He remembers getting a new television and taking the old television out and putting it in his room. Before doing so he had no idea where the power source was in the Cabinet. Once he removed the old television he saw that there was a power bar and a cable connection in the Cabinet laying behind where the television sat. He unplugged the old television from the power bar and plugged in the new one. He believes that the new television had a built-in cable box.
- [60] Below the television was a space for a VCR. To the right of the television, the top drawer contained the record player. In the space below the record player drawer was a cassette player and amplifier. To the far right and far left were large openings for speakers. During the time Ken Starr resided in the Premises speakers were in those spaces. Records and cassette tapes were stored below the amplifier. Some videotapes were stored below the television in the space where the VCR was. He is uncertain what was stored in the drawers above the speakers.
- [61] When he pulled the old television out to replace it he remembers trying to pull out the power bar so he could replace it at the same time. He could not get his fingers through the hole at the back of the television compartment so he gave up and did not replace the power bar. The power bar sat behind the television along the back wall of the Cabinet. A cord disappeared down the hole in the back of the television compartment. He always assumed that the power cord was plugged into the wall behind the Cabinet.
- [62] Ken Starr is certain that the marble patterned adhesive paper in the back of the TV compartment was never there when he lived in the Premises and he did see that compartment empty.

- [63] To the best of Ken Starr's recollection, the record player was plugged into the same power bar as the television was. There was space behind the record player drawer to pass a power cord through.
- [64] Ken Starr never saw the front or back of Receptacles #2 and #3. There was a speaker in that lower right-hand space and so he would not have been able to see the back of the receptacles. He does not remember any cord coming underneath the Cabinet. He spent years lying on the floor in front of the television and believes that he would have seen the Extension Cord if it had been there.
- [65] He looked at Exhibit 6, tab 2, photograph 26 which is a photograph of the record player. He did not recognize the brown cord but he speculated that the grey cord likely went into the back of the amplifier in the space below the record player drawer.
- [66] Ken Starr looked at the audiovisual plugs at Exhibit 6, tab 2, photograph #25. He is sure they were not there when he lived there. There was nothing for them to connect to because the record player connected to the back of the amplifier as did the speakers. There was no game machine that would require a video cable during the time he resided in the Premises and that is the only reason he thinks that there would be audiovisual plugs in that compartment. After moving from the Property Ken Starr spent 16 years working in the film industry and says that he has had a lot of experience hooking up audiovisual equipment.
- [67] In cross-examination there were many details which Ken Starr could no longer remember. For example he couldn't remember the colour or shape of the power bar although he believes that there were five plug receptacles in the power bar. He did not remember the make of the television. He disagreed that the space where the amplifier was so small that he might not have noticed Receptacle #3. He is quite certain Receptacle #3 was not present.
- [68] He had a very clear recollection that the stairwell wall at the entrance to the house always had drywall and that it was not wood paneled. I believe he is mistaken with that recollection. It appears that the upper sheet of drywall was removed when the pony wall was removed and the Cabinet was installed. The Cabinet formed the upper half of the stairwell wall and the Cabinet was constructed using wood panelling. The lower half of the stairwell wall was still made of dry wall. Both Ken Starr and Ms. Ryckman were incorrect about this fact. I do not believe this discredits the remainder of their evidence. I found Ken Starr's evidence about removing the television and finding the power bar behind the television reliable and believable. I accept the fact that Ms. Ryckman, Ms. Paul and Ken Starr do not remember ever seeing the Extension Cord. That evidence is not sufficient by itself to prove that the Extension Cord did not exist. It is possible that it was there and that they have no memory of it.

d) David Little

- [69] Mr. Little is a mechanical engineer who has worked for Baker Engineering since 1986. Mr. Little gave evidence of the current configuration of the Cabinet. He attended at the Premises on August 30, 2007 with Al Searcy who is the grandfather of the infant plaintiff. He had been told that an infant had been injured by an electrical cord and he was asked to identify the hazard.
- [70] Although Mr. Little did prepare a report, it was not relied on at trial. By consent of all parties he was called as a lay witness to give evidence of his observations. Mr. Little was the only person to see the Cabinet shortly after the Incident and he was the witness who deconstructed the Cabinet to determine how it was wired. His evidence was tendered as lay opinion evidence based on his own observation. He is a witness who had an opportunity for personal observation in a position to give the court real assistance.
- [71] Mr. Little took photographs during his initial inspection of the Property on August 30, 2007 and some photographs the following day. His photographs are contained in Exhibit 6, tab 2. He attended a video deposition shortly before trial and a DVD of his testimony was entered as Exhibit 5b.
- [72] Mr. Little identified the Extension Cord and tested it to see if it was in fact live. He confirmed that the male end of the Extension Cord extending out from under the right bottom corner of the Cabinet was electrified.
- [73] In order to determine where the Extension Cord was coming from, Mr. Little tried to pick up the Cabinet and could not do it by himself.
- [74] He went to the ground level of the Property immediately below the Premises and cut drywall out of the ceiling. He saw a green cable heading up into the Premises but no brown cord.
- [75] With the help of Al Searcy, they were able to rotate the right end of the Cabinet off its base thereby exposing the hidden junction box and the unexposed end of the Extension Cord. This junction box has been labelled Receptacle #1 for the purpose of this trial.
- [76] Mr. Little photographed the Cabinet immediately after the right end of it was lifted off its base and rotated forward exposing three sides of the base as well as the stairwell at the front entrance of the Property below. The kick plate at the front of the Cabinet appeared to have been stapled and nailed to the base prior to Mr. Searcy and Mr. Little yanking the Cabinet off the base. The kick plate stayed attached to the bottom front of the Cabinet.
- [77] The back of the Cabinet formed part of the wall of the entrance hall so that when the Cabinet was rotated off its base the entrance hall and front door were visible. This clearly shows that the pony wall had been removed and the Cabinet formed part of the wall.
- [78] In Mr. Little's photographs 7 and 9, the Extension Cord is clearly visible under the right-hand corner of the Cabinet. In photograph 10, Mr. Little had plugged the end of the Extension Cord into Receptacle #2 which is how he believed it was initially configured. He gave evidence that it was the only place where this plug could go.

- [79] Photographs 14 and 15 show a coaxial cable receptacle under the same right-hand corner of the Cabinet.
- [80] Photograph 17 shows two things. First it shows the Extension Cord is pinched between the Cabinet base and the Cabinet itself. There was a notch cut into the base for a cable or cord to sit but the Extension Cord was sitting on the top of the base and was not resting in the notch. Secondly, it shows that the white faceplate for Receptacle #2 is also pinched between the Cabinet and the base.
- [81] Mr. Little removed all of the toys and games that had been stored in the right speaker compartment of the Cabinet and this exposed the back of Receptacles #2 and #3. In photograph 8, the back of Receptacle #2 is depicted. Photograph 21 shows a similar receptacle backing for Receptacle #3 at the top of the right speaker compartment.
- [82] Photograph 23 shows a white faceplate for electrical Receptacle #3 which is in the compartment to the left of the right speaker compartment directly below the record player drawer. It shows a white faceplate for an electrical receptacle (Receptacle #3) on the right side of the compartment and on the left side there is a hole cut in the wall with three jacks. Photograph 25 shows a close-up of the three jacks which Mr. Little refers to as RCA jacks. An RCA jack or connector is a type of electrical connector commonly used to carry audio and video signals. The connectors are also sometimes referred to as audiovisual jacks. Ken Starr identified these as audiovisual jacks.
- [83] Photograph 26 shows the drawer containing the record player and containing a plug and a cable with two audio plugs. In photograph 27, Mr. Little plugged the record player into Receptacle #3 and plugged the two audio plugs into the two audio RCA jacks leaving one jack receptacle empty. There was no power coming to Receptacle #3 so the record player did not work.
- [84] Photograph 28 shows the centre space in the Cabinet where the television had been installed in the past. This space was being used (in August 2007) to store video cassettes. After emptying this compartment, Mr. Little could see a white coaxial cable in the compartment underneath the television compartment that fed up through a hole cut in the bottom of the television compartment in the back left-hand corner.
- [85] Photograph 41 is the view of the base of the Cabinet immediately after the Cabinet had been removed from its base. The entire Extension Cord is visible. One male end is plugged into Receptacle #1 and taped in place with electrician tape so that it could not pull out on its own. Mr. Little noted the notches cut in the base of the Cabinet for wiring to travel through. The other male end of the Extension Cord extended to the far right side of the Cabinet and was exposed.
- [86] Feeding electricity to the junction box at Receptacle #1 was a thick green cable which Mr. Little had traced from downstairs as part of the household wiring. It is 110v wiring. 110v would emanate from the junction box and from the Extension Cord.

- [87] Receptacle #1 has two female receptacles. When the black electrician tape was in place, the second female receptacle could not be accessed.
- [88] The Extension Cord was not a sealed factory made unit but was adapted by pulling the removable plastic cover off the male end of the Extension Cord and splicing wires by removing the insulation around the wire and connecting them to either of the prongs of the plug and then sliding the cover back over. This is how Mr. Little believes that this Extension Cord with two male ends was created by a handyman.
- [89] He found the end of the Extension Cord to be cracked and dull so it has certainly aged.
- [90] This was the first Extension Cord with two male ends that Mr. Little had ever seen in his 30 years working as an engineer.
- [91] Mr. Little was asked how he thought the wiring was supposed to work in the Cabinet. He said it is his belief that by using the double male ended Extension Cord, power would travel from Receptacle #1 to Receptacle #2. In order to get power to Receptacle #3, wires would have to be plugged into the back of Receptacle #2 connecting up to the back of Receptacle #3. That would provide two accessible female receptacles in Receptacle #3 and one extra accessible receptacle in Receptacle #2.
- [92] Mr. Little said that there was no sign that the kick plate had been taken off the bottom of the Cabinet and replaced sometime after installation. He qualified his answer by saying that someone could have taken it apart and put it back together the same way and that he would not know. He didn't see evidence of pry bars or anything to indicate that someone had tried to take it apart but it is possible. There is no indication a nail was removed and replaced or the staples were removed and replaced.
- e) Doris Wong
- [93] Ms. Wong did not give evidence at the trial and so counsel for the plaintiff read in excerpts of her examination for discovery with the consent of the defendants and third parties.
- [94] Ms. Wong was the property manager for the Premises at the time of the Incident. She looked after the Property for her brother Mr. Wong and his wife Ms. Lai.
- [95] When her brother first purchased the Property, it was vacant. She remembers the Cabinet on the Property. She opened up the drawers and looked inside. She has also seen it between tenancies when it has been emptied of personal possessions.
- [96] Ms. Wong was shown a photograph of the big black patch in the right speaker compartment which is the back of Receptacle #2 (Exhibit 6, tab 2, photograph 18). She does not recall seeing that black patch at any time.
- [97] She does not recall noticing the black mark on the right-hand side of the Cabinet during the move-in inspection. Ms. Wong did not see any liner or wallpaper or anything lining the bottom of the right speaker compartment at that time.

- [98] After the Incident, Ms. Wong went to the Property to take a look at the Cabinet. Prior to that, she had not been aware of any wires that existed inside the Cabinet or under the Cabinet. She denies ever seeing the Extension Cord prior to the Incident. She did inspect the Extension Cord after the Incident by looking underneath the Cabinet. She does not recall looking under the Cabinet prior to the Incident.
- [99] In all the years she has managed the Property, nobody has reported seeing the Extension Cord.
- [100] She saw the outlet (Receptacle #2) where she was told the Extension Cord was likely plugged into. She never saw Receptacle #2 before.
- [101] Ms. Wong was aware that there was a record player in the Cabinet. She does not know whether it was functional at the time of the Incident or at any time during the time period since her brother has owned the Property. She is not aware of tenants using the record player. She is not aware of tenants installing electrical devices like a computer or television or a stereo in the Cabinet at any time. She is not aware of any work done by her tenants to rewire the Cabinet for any purposes.
- [102] The Cabinet had never been moved and Ms. Wong believed that it was built-in.
- [103] Ms. Wong identified the marble patterned plastic on the back of the television compartment. She does not remember when that was installed but she does remember seeing it.
- [104] She does not recall seeing any sort of electrical plug, power bar or extension cord in the open area in front of the marble patterned plastic.
- f) Johnny Wong and Kit Bing Lai
- [105] Mr. Wong and Ms. Lai have never set foot in the Premises so they have nothing to add to the discussion about the Cabinet.
- g) Heinz Beigeinzein
- [106] Heinz Beigeinzein painted the Premises before the Boyes/Searcy family moved in. He has no recollection of seeing the Extension Cord or the Receptacles.
- h) Kirk Gower
- [107] Kirk Gower lived in the Premises between August 2006 and March 2007 when he was 18 years of age. He remembers the Cabinet and he remembers the record player and the Extension Cord on the right side of the bottom of the Cabinet. He thought the record player looked unusual. The Extension Cord was plugged into Receptacle #2 when he last saw it. He remembers seeing it when he was walking through the Premises before moving in. He bent down fairly close to the floor so he could look at it. He never touched the Extension Cord.

- [108] Mr. Gower confirmed that the photograph at Exhibit 3, tab 2, photograph 11 accurately depicts the Extension Cord in the position when he saw it (it is plugged into Receptacle # 2).
- [109] When he lived in the Premises, the speaker compartments were empty and they were not covered by shelf paper or fabric. Mr. Gower confirmed that Exhibit 6, tab 3, photograph 17 looks like the Cabinet did when he lived there. He and his roommates did not like the look of the Cabinet so they pushed their couch up against it for the remainder of their tenancy.
- [110] No other tenants gave evidence at this trial.

### **Decision on When the Cabinet Was Created and Modified**

- [111] I accept the evidence of Ms. Ryckman, Ms. Paul and Ken Starr that the Cabinet was constructed during the time that Ms. Ryckman owned the Property and it housed a television, cable box, a VCR, a record player and an amplifier with a tape deck and two speakers.
- [112] I accept the evidence of Ken Starr that a power bar was located behind the television and that the appliances were plugged into the power bar. I accept his evidence that there were no audiovisual jacks on the side of the compartment beneath the record player drawer because there was no need for them. Record player cables were fed into the amplifier which sat in the space below the record player drawer.
- [113] I accept Ken Starr's evidence that the power bar cable was fed through a hole at the back of the television compartment.
- [114] Ken Starr was unaware of the existence of Receptacle #1 and thought that the power bar plugged into the wall behind the Cabinet. I find that it is more likely than not that the power bar plugged into Receptacle #1 and that Receptacle #1 was installed at the time the Cabinet was constructed.
- [115] Having found that, I therefore find that the electrical supply to this Cabinet was altered after Ms. Ryckman sold the Property. I rely on the following additional evidence in making this finding:
- a) The wiring for Receptacle#1 is building wiring and it is more likely than not that the person constructing the Cabinet dropped the existing junction box from the pony wall down into the base of the Cabinet and nailed it down.
  - b) A series of holes were made in the Cabinet to allow for the routing of power cables in the manner which I have accepted.
  - c) The power bar sat behind the television and a hole was cut in the shelf upon which the television sat.
  - d) Another hole was cut in the Cabinet frame to allow the Extension Cord for the power bar and the coaxial cable to be fed up to the television (Exhibit 6, tab 10, photos 12 and 23).

- e) There is room to feed electrical cables behind the record player drawer or over top of the left side of the record player drawer. A groove has been cut into the record player drawer to accommodate a wire coming from the record player to the power bar (Exhibit 6, tab 7, top photograph at page 6).
- f) Obvious alterations were made to the Cabinet after the Ryckmans moved out. The marble adhesive paper was applied to the back of the television Cabinet. The power bar from the back of the television Cabinet was removed. The speakers from either end of the Cabinet were removed. These alterations are not controversial.
- g) The Cabinet either had to be lifted up or the kick plate had to be removed in order to unplug the power bar. This is a possible explanation that contradicts the argument that anyone modifying the Cabinet had to know the junction box (Receptacle #1) was there. In fact they may not have known that Receptacle #1 was there until they attempted to remove the power bar and traced the cord to the hole in the base of the Cabinet. At that point they may have determined that either the Cabinet needed to be lifted or the kick plate removed. Perhaps by the time the double ended male Extension Cord was installed, the handyman had already determined that the receptacle was under the base.
- h) When the Cabinet was swung off its base revealing Receptacle #1, the Extension Cord was taped using electrician tape to hold it in place in Receptacle #1. The electrician tape covered the other female receptacle so that no power bar could have been plugged into Receptacle #1 at the same time if this tape was in place and the Extension Cord was in place. Given that I have found that a power bar provided power to the Ryckmans' appliances and that the power bar was plugged into Receptacle #1, this Extension Cord and electrician tape had to be an alteration to the original electrical plan.
- i) During the Ryckmans' ownership there was no need for power outlets at the right end of the Cabinet. I have concluded that the alterations were made by a tenant after Ms. Ryckman sold the Property.
- j) The Extension Cord remained pinched between the Cabinet base and the Cabinet and was not inserted in the notch cut in the frame for wires. This suggests that the Extension Cord was not installed by the original cabinet maker but was installed later. Perhaps that the Cabinet was lifted up at one end but not fully removed in order to pull the Extension Cord to the right end of the Cabinet.
- k) The white faceplate to Receptacle #2 is wedged between the kick plate and the base of the Cabinet suggesting that it was not installed by the original cabinet maker but was installed later.
- l) Three witnesses who lived in the home for many years after the Cabinet was constructed have no memory of seeing the Extension Cord.

- [116] The defendants submit that it is unbelievable that a tenant would go to such great lengths to remove a large structure such as the Cabinet which formed a wall to the stairwell. In response, I see it as a possibility that this sloppy wiring and tape job could have been done by removing the kick plate, plugging in the Extension Cord and taping it into place and then with assistance of one other person jacking up the right end of the Cabinet a few inches to pull the Extension Cord through to the far right end. This would explain the sloppy job in pinching the Extension Cord and the faceplate to Receptacle #2. Apparently the kick plate is now attached to the Cabinet, however, it is not clear when it was attached. It may have been attached by the tenant after altering the electrical wiring.
- [117] Alternatively, a tenant could do what Mr. Little and Mr. Searcy did. He could swing the Cabinet off of the base to expose the power source.
- [118] This could explain the shoddy job of installing Receptacles #2 and #3. If these receptacles were installed without removing the Cabinet then this can explain the uneven sloppy cuts in the wood and the caulking job.
- [119] Clearly these alterations were done by an unskilled handyman who took no pride in the appearance of the work or in fact, the safety of the work but wanted additional power to the far right end of the Cabinet. This is inconsistent with the overall construction of this Cabinet which appears to have been done by skilled craftsmen. We will never know with scientific certainty but on a balance of probabilities, I find that these alterations were more likely than not done by tenants who occupied the Property during the time Mr. Wong and Ms. Lai owned the Property.
- [120] Ms. Wong was unaware of renovations to the Cabinet. Her counsel argues it is improbable that any tenant made a structural change of this nature including properly finishing the carpentry around and under the Cabinet to match the existing carpentry. In response to this I suggest that this rewiring of the Cabinet could have been done in an afternoon and the existing nails and the kick plate tapped back in place. This is not a major structural change to the Premises.
- [121] I placed little weight on the age of the wiring in making this decision. I accept the submissions of counsel for Ms. Ryckman that handymen are known to have a stash of hardware and wiring odds and ends in their garages or shops. It is quite possible that the handyman who rewired this Cabinet had old supplies in his stash.
- [122] Counsel for Mr. Wong and Ms. Lai submits that it makes no logical sense that a tenant would go to the trouble of installing an electrical device to the bottom of the Cabinet. I reject that argument because of the limited number of power sources in the room and the fact that the configuration of the Cabinet was no longer suitable for the number or size of common entertainment devices currently used. It is likely that the tenant's television was either located on top of the Cabinet or where the Boyes had their TV in front of the window. If the tenant had a stereo, VCR, DVD player, a cable box and a gaming console as many houses now do, there were not enough electrical outlets in that room to accommodate all

these devices. A handyman tenant may have taken this as a challenge to find an additional power source.

Who Owed A Duty of Care to the Plaintiff?

### Statutory Law

[123] The infant plaintiff argues that the defendants each owed her a duty of care that required them to ensure that she would be reasonably safe in using the premises. This included maintaining the Premises in a manner that complied with appropriate health, safety and housing standards including the applicable codes.

[124] At common law, no duty of care was owed by a landlord to his or her tenant. To rectify this situation, a statutory duty was created by the OLA and the RTA: *MacLeod v Yong*, 1999 BCCA 249.

[125] The RTA defines "landlord" in the following terms:

"landlord", in relation to a rental unit, includes any of the following:

- (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
- (i) permits occupation of the rental unit under a tenancy agreement, or
- (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;

[126] Section 32 of the RTA requires a landlord to maintain residential property in a state of repair and specifically provides:

32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that

- (a) complies with the health, safety and housing standards required by law, and
- (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

[127] In the OLA, Section 1, an "occupier" is defined in the following terms:

"occupier" means a person who

- (a) is in physical possession of premises, or
- (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

and, for this Act, there may be more than one occupier of the same premises;

[128] Section 3 of the OLA sets out the duty of care of an occupier:

3 (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

[129] Section 6(1) of the OLA makes it clear that duties established under that Act are applicable to tenancy relationships:

6(1) If premises are occupied or used under a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from failure on the landlord's part in carrying out the landlord's responsibility, as is required by this Act to be shown by an occupier of premises toward persons entering on or using the premises.

[130] Section 6(3) of the OLA further expands on the liability of a landlord and provides:

- (3) For the purposes of this section
- (a) a landlord is not in default of the landlord's duty under subsection (1) unless the default would be actionable at the suit of the occupier,
  - (b) nothing relieves a landlord of a duty the landlord may have apart from this section, and
  - (c) obligations imposed by an enactment in respect of a tenancy are deemed to be imposed by the tenancy.

[131] Section 32 of the RTA imposes a duty on the landlord to make repairs to ensure that the demised premises meet safety standards required by law. Section 6(3)(c) of the OLA incorporates this statutory duty into the tenancy agreement. Thus, the landlord, with respect to residential property, has the responsibility to make repairs relating to safety. This is a duty he owes the occupier of the premises. A default in this duty gives rise to an action in tort by the tenant against the landlord, pursuant to s. 6(1) of the OLA: *Zavaglia v. Maq Holdings Ltd.* (1983), 50 B.C.L.R. 204 at para. 30 [Zavaglia].

[132] It is therefore clear that the owners of the Premises, Mr. Wong and Ms. Lai, owed a duty to tenants who occupied the Premises pursuant to s. 32 of the RTA and section 6(3)(c) of the OTA.

[133] Relying on the definition of "landlord" in s. 32 of the RTA, which includes the owners, agent or person who acted on behalf of the landlord, it is clear that Ms. Wong fits the definition of "landlord" under the RTA and owed a duty to the infant plaintiff as well.

- [134] Ms. Wong was acting as agent of Mr. Wong and Ms. Lai. She had exclusive responsibility for the Property for over 15 years prior to the Incident. The evidence will show she entered into tenancy agreements for the Premises with tenants including Mr. Boyes and Jennifer Searcy. She exercised powers under the RTA including interviewing, approving tenants, collecting rent, preparing and maintaining the Property. As such she is a landlord and bound by s. 32 of the RTA.
- [135] The OLA defines an occupier as a person who "has responsibility for, and control over the condition of the premises, the activities conducted on the premises and the persons allowed to enter the premises." The tenancy agreement signed by Ms. Wong, Mr. Boyes and Jennifer Searcy says that the landlord will be responsible for repairing the Premises during the tenancy according to statutory standards. Ms. Wong would be an occupier under s. 6 of the OLA.
- [136] Ms. Ryckman did not owe a duty to the infant plaintiff under the OLA. There are no provisions in the OLA to trace occupier's duties back to previous owner: *Giant Tiger Stores Ltd. v. 697781 Ontario Ltd.* (1995), 59 A.C.W.S. (3d) 861 at para. 31 [Giant Tiger].
- [137] The duties that arise in connection with the OLA are exclusively derived from occupation. The responsibility is based on control, not ownership. Ms. Ryckman has not been an occupier of the Property since 1992 nor did she enter into any tenancy agreement with the parents of the infant plaintiff.
- [138] Mr. Wong and Ms. Lai rely on the case of *Davis v Grand* (2003), 67 O.R. (3d) 520 [Davis] to support the position that, when a person creates a foreseeable danger to others on his or her property, the fact that the property is transferred to another person is not in and of itself reason why the transferor should immediately be relieved of liability for damages. *Davis* is distinguishable on its fairly unique facts. In that case the defendant failed to stop at a stop sign because it was obscured from view because of overgrown brush and trees on the public roadway. The accident took place 108 days after the vendor Regional Municipality had sold to the city, the land where the intersection was located. The non-repair or maintenance of the intersection had occurred during the vendor's occupation of the land. The distinguishing feature of the *Davis* case is foreseeability of damage and the timing of the accident so soon after the transfer of the land.
- [139] The courts have said in *Davis* and in *Giant Tiger* that the proximity of a vendor to the injured plaintiff is not automatically broken by reason of the mere fact of transfer of ownership. In *Giant Tiger*, the vendor was negligent in respect of its maintenance of an oil burner and that was found to be a contributing cause to the resulting explosion and fire. The vendor was found to be responsible even after the sale of the property.

[140] These cases are resolved on determinations of whether the defect was latent or patent, whether the defect caused or contributed to the damages and whether the vendor knew or ought to have known of the hazard and had a duty to warn the purchaser. As such, the issue of whether or not Ms. Ryckman owed a duty to warn Mr. Wong and Ms. Lai will be dealt with under the third party claim.

[141] The infant plaintiff has not commenced an action against Mr. Boyes, her father, and so it is not necessary for me to determine what duty he owed her in the main part of this decision. He was certainly an occupier at the time of the Incident. I will assess his duty under the third party claim section.

#### What Standard of Care Was Owed by the Defendants and Has it Been Met?

[142] The standard of care owed by the landlord pursuant to s. 6(1) of the OLA is set out in s. 3(1) of that Act which provides that the occupier will take care that the premises will be reasonably safe. The test is an objective test, namely, that of a reasonable person. In *Zavaglia*, the court outlines several factors that courts have considered in applying this test; they are:

- a) Whether the plaintiff, in the light of his own knowledge, exercised reasonable care for his own safety;
- b) Whether the occupier's conduct accorded with an accepted standard of practice;
- c) Whether the occupier's system of inspection or supervision was commensurate with the risk; the length of time the danger was allowed to exist being highly relevant;
- d) The steps necessary to remove the danger and the consequent burden on the occupier; and
- e) Whether or not the danger was foreseeable in accordance with the principle enunciated in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).

[143] In *Tolea v. Ialungo*, 2008 BCSC 395 [Tolea], and in referring to *Zavaglia*, Silverman J. said, at para. 61:

1. A landlord's obligation is to not only provide but to maintain buildings in a state of repair that complies with the housing standards required by law.
2. Section 6 of the OLA imposes an occupier's duty of care on a landlord where there is "a tenancy under which a landlord is responsible for the maintenance or repair of the premises".
3. A landlord's duty to repair is as set out in both the tenancy agreement and the RTA.
4. A landlord's duty to inspect is part of the duty to provide and maintain residential premises in a reasonably suitable state under the RTA, as well as part of a landlord's duty to take reasonable care in carrying out the responsibility for repair of the premises under s. 6 of the OLA.

5. A landlord with a duty to repair under the RTA has a duty to make reasonable inspections of the premises for defects, regardless of whether he or she has notice or actual knowledge of defects.
6. The OLA imposes a duty of reasonable inspection on both the landlord and tenant. The standard of reasonableness for each party must be determined according to their respective positions and responsibilities. The standard of reasonable inspection imposed on a landlord will likely be elevated above that imposed on a tenant where the following factors occur:
  - (a) the landlord has observed the evolution of a residence through multiple tenancies and repairs and alterations;
  - (b) the landlord has the legal responsibility for maintaining and repairing the premises;
  - (c) where the area of concern relates to a structural defect that existed prior to the current tenancy.

[144] The applicable standard is one of reasonableness and not perfection *Horti-Pac Inc, v. Nikko Materials USA Inc.*, [2009] O.J. 3404 (Ont.S.C.) at para. 464.

[145] In *O'Leary v. Rupert*, 2010 BCSC 240 at para. 31 and 33, the court relied on *Zavaglia* and added the neither the RTA nor the OLA impose a higher duty of care of the landlord than imposed by the law of negligence.

[146] In assessing what is reasonable in any given case, the courts have repeatedly endorsed the notion that the care required is commensurate with the degree of risk of harm; the greater the risk of harm, the greater will be the care required to protect against the risk: *Lawrence v. Prince Rupert (City)* and *B.C. Hydro & Power Authority*, 2005 BCCA 567 at paras. 21-22.

[147] The infant plaintiff in this case submits that risk of harm arising from a live male plug was significant, resulting in an elevated level of required care, commensurate with the risk.

[148] The infant plaintiff further submits that there is an elevated standard of care for owners, landlords, and property managers due to the dangers inherent in electrical installations. In the case of *Young v. Gravenhurst*, (1910) 22 O.L.R. 291 at pp. 302-304 the court notes as follows:

Any one, individual or corporation, dealing in electricity "is bound to the public to exercise the utmost degree of care in the construction, inspection, repair and operation of its apparatus and appliances" -- 10 Am. & Eng. Encyc. of Law, 2nd ed., pp. 872, 873 -- must "exercise the high degree of skill, care, and foresight required of persons engaging in operations of a dangerous nature:" *Royal Electric Co. v. H  v  *, 32 S.C.R. 462.

[149] The courts have also recognized that the goals of the OLA are "to promote, and indeed, require where circumstances warrant, positive action on the part of occupiers to make their premises reasonably safe": *Bustin v. Saatchi*, [1996] 64 A.C.W.S. (3d) 505 at para. 13.

## Expert Evidence on the Standard of Care

[150] To assist me in determining what a reasonable standard of care would be for the owners and property manager in this situation I have reviewed reports from the following experts:

1. Martin J. Coles, Electrical Engineer of Jensen Hughes Consulting Canada Ltd. expert report dated December 17 2015 Re: Electric Shock Injury;
2. Martin J. Coles rebuttal report dated February 2 2015;
3. Brent Murphy, Electrical Contractor of BPM Electric Ltd. expert report dated December 18 2015, re: Standards for Electrical Home Inspections;
4. Richard Van Leeuwen, Electrical Engineer expert report dated December 20 2015 Re" Standard of Care owed by an Electrician;
5. Scott Ulrich, Property Manager of Gateway Property Management Corporation, Expert Report dated August 15 2015 re: property management; and
6. J. Garth Cambrey, Property Manager, rebuttal report dated January 27, 2016 re: Standards for Residential Property Manager Inspections.

[151] Martin Coles, Scott Ulrich and Garth Cambrey were also called for cross-examination. I will review their evidence and then, before reviewing the evidence of the defendants Ms. Wong, Mr. Wong and Ms. Lai is in these circumstances.

a) Martin Coles, Electrical Engineer

[152] The plaintiff served and relied on the expert opinion of Martin Coles, electrical engineer, who produced a report dated December 17, 2015 (Exhibit 7, Tab 1) and a rebuttal report dated February 2, 2016 (Exhibit 7, Tab 2). He is an electrical engineer qualified to give evidence regarding code compliance of residential electrical systems, the investigation and determination of electrical failures, electrical equipment and electrical hazards.

[153] In his report, Mr. Coles gave the opinion that Receptacles #1, #2 and #3 and the Extension Cord all violated various provisions of the Canadian Electrical Code.

[154] Mr. Coles identified the codes that would have applied to the Premises from the date the house on the Property was built until the date of the Incident. It was Mr. Coles' opinion that Receptacle #1 violated the Canadian Electrical Code Rules named "Cable Supports", "Running of Cable Between Boxes and Fittings", "Outlet Box Supports" and "Accessibility of Junction Boxes."

[155] His opinion was that Receptacles #2 and #3 violated the "Outlet Box Supports" and "Accessibility of Junction Boxes" Rules. In his opinion the Extension Cord violated the code concerning "Uses of Flexible Cord." These electrical codes were duplicated in his report.

- [156] Mr. Coles' interpretation of the codes was not challenged and I have no reason to doubt that he is correct.
- [157] Mr. Coles said that Receptacle #1 is a standard duplex outlet that one could plug any cord into. It consists of a metal box with a thick green cable of building wire being fed into it. An outlet box such as Receptacle #1 is required to be fixed to a structural member of the building. It was not. It was attached to the floor.
- [158] Receptacle #1 was hazardous because there was no way to access it for maintenance. It could not be readily located by inspectors or electrician or others and so it could remain in place long after it was installed and never get maintained or checked. Receptacle #1 and its wiring were consistent with the original building wiring of the era when the house was built. Comparing the three Receptacles, Mr. Coles was of the opinion that Receptacle #1 was closer to a professional job than were Receptacles #2 or #3.
- [159] Receptacle #2 and #3 did not pose a hazard if they were not energised. They were however not installed to code because they are caulked into a light weight fibre board.
- [160] The Extension Cord was hazardous as soon as it was plugged into Receptacle #1. A double male cord is not commercially available nor are they used in the industry. The Extension Cord would have been created from individual components purchased at a hardware store. It was made from a lamp cord in a light gage for low current devices like desk lamps. The Extension Cord would be found to be energized by way of a simple test using a voltage tester.
- [161] An electrician would be able to tell that Receptacles #2 and #3 were not code compliant by a simple visual inspection.
- [162] If the Extension Cord was plugged into Receptacle #2, and a person were to connect Receptacles #2 and #3 with a simple wire, it would energize Receptacle #3.
- [163] Receptacles #2 and #3 would represent an unusual condition to an electrician or electrical engineer that would warrant further investigation. If an electrician or engineer were specifically asked to examine the Cabinet, Mr. Coles would expect them to decommission the Cabinet.
- [164] Mr. Coles did not think that an electrician being tasked with a full home inspection or in response to a tripping breaker would locate a hazard within or under the Cabinet unless specifically directed to look in the Cabinet.
- [165] In his second report, Mr. Coles said that, had a homeowner wished to have an electrician review any electrical components in or under the Cabinet, such a review would have needed to be requested specifically. In his rebuttal report, Mr. Coles opined that a simple inspection of the Cabinet by an electrician would have revealed that the electrical components within the Cabinet were not code compliant and would have resulted in the hazard being discovered.

[166] Mr. Coles is an engineer who specializes in fire loss prevention. The defendants submit that he is imposing too high a standard for the residential electrician and that he is overqualified to give a relevant opinion in this case. He has never worked as an electrician but has worked with many electricians.

b) Brent Murphy, Electrician

[167] Brent Murphy is a licensed electrician who prepared a report for Ms. Wong. He was not required for cross-examination. He was asked what steps he would expect an electrician to take if asked to inspect the electrical wiring at home because a breaker tripped when some appliances were used. He explained the steps he would take and said he would not check wall receptacles in other areas of the home if inspecting only for cause of breaker trips when some appliances are used. He would check the receptacles that are losing power

[168] If he were asked to conduct an electrical inspection in a home for insurance or home inspection purposes, he would go through every room in the house using a plug tester also called a receptacle or outlet tester and he would test every easily acceptable plug. The plug tester is used to check that an outlet has power and that it is properly wired. He would also look at light switches in the home. He would check the electrical panel in the home to see if breakers were sized correctly. He would check the type of wiring used (i.e., look for knob and tube wiring). He would also look at grounding and bonding, smoke detectors and junction boxes.

[169] While conducting a home inspection at the Property he would not inspect the Cabinet unless he saw signs that it had power supply to it.

c) Richard van Leeuwen, Electrical Engineer

[170] Mr. van Leeuwen is an electrical engineer retained by counsel for Mr. Wong and Ms. Lai to give an opinion of the appropriate standard of care owed by an electrician and to determine whether the work of "an electrician" met that standard. I am assuming he is referring to Golden Leaf who performed an inspection of a tripping breaker in the Premises prior to the Incident. Mr. van Leeuwen's qualifications were not disputed and he was not called for cross-examination.

[171] Mr. van Leeuwen was asked what steps he would expect an electrician to take if asked to "inspect electrical at the home because the breaker trips when some appliances are used." He said he would expect the electrician to speak to the tenants to determine which appliances were used when the breaker tripped and then to evaluate that appliance and that breaker.

[172] If asked to perform an electrical inspection in a home for insurance inspection purposes he would expect an electrician to examine the accessible electrical components to the property to determine if they were safe and met the requirements of the electrical codes.

- [173] In his opinion it would not be normal to expect an electrician to expose hidden electrical components behind walls or under built-in cabinetry. He was of the view that the double male end cord was highly unusual and not visible unless the Cabinetry was removed from its location. It would be highly unlikely that an electrical inspection would have located or revealed this hazardous condition.
- d) Scott Ullrich, Property Management Expert
- [174] Scott Ullrich is the President of Gateway Properties, one of the largest residential property management firms in Canada. He was qualified as an expert in the field of Residential Property Management. Mr. Ullrich's report, prepared at the request of the infant plaintiff, provided the Court with a number of different resources for landlords which describe the obligation that a property manager owes a tenant. These resources include access to relevant statutes like the OLA and the RTA, as well as the Code of Ethics from Landlord BC. Landlords or property managers are not required to belong to Landlord BC but if they chose to, the organization provides education and a description of best practices for landlords.
- [175] Mr. Ullrich was thoroughly cross-examined on his credentials and on disciplinary actions he faced in his capacity as president of Gateway Properties. I was satisfied with Mr. Ullrich's answers and did qualify him as an expert. Certain redactions were made to his report.
- [176] There was no requirement that Ms. Wong be licensed to provide property management services to her brother.
- [177] Mr. Ullrich said that a reasonable expectation of a property manager would be firstly, after being contracted to manage property, to perform a detailed inspection of the property and note any deficiencies and advise the owners. The RTA requires that a landlord conduct mandatory move-in inspections of rental properties at the beginning of each tenancy.
- [178] A property manager should perform a detailed inspection of the property with every tenant prior to their move in and out.
- [179] On at least an annual basis, a property manager should inspect the property and note any issues. Issues would include potential preventative and deferred maintenance as well as life and health safety issues.
- [180] On receiving a complaint from a tenant a property manager should investigate the issue.
- [181] Section 23 of the RTA sets out the mandatory requirement for a landlord and tenant together to inspect the condition of a rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreeable day. In subparagraph (4) the landlord must complete a condition inspection report in accordance with the regulations.
- [182] Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.

- [183] The landlord must make the inspection and complete and sign the report without the tenant if the tenant does not participate.
- [184] Under s. 32 of the RTA, the landlord must provide and maintain the residential property in a state of decoration and repair that complies with health, safety and housing standards required by law and makes it suitable for occupation by a tenant. The tenant has an obligation to maintain reasonable health, cleanliness and sanitary standards throughout the rental unit. The tenant must repair damage to the rental unit that is caused by actions or neglect of the tenant. The tenant is not required to make repair for reasonable wear and tear.
- [185] The landlord's obligation under s. 32(1)(a) applies whether or not the tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.
- [186] In his opinion, Mr. Ullrich said the minimum standard for a landlord or property manager would be to perform a detailed inspection of the property at the start and end of each tenancy, inspect the property at least once a year and when advised by a tenant of a potential safety issue and ensure the issues were investigated by a qualified technician.
- [187] Mr. Ullrich said, at page 8 of his redacted report, that it is common practice to check all cabinets between tenancies to ensure they have been properly cleaned. During this inspection the wires in the Cabinet should have been discovered and further investigation as to the purpose of those wires should have been made. In his opinion, had a detailed inspection been done at the start of any tenancy when the home was vacant, the property manager would have seen the Extension Cord. Even though it was the male end of the Extension Cord that was visible, it would be prudent to investigate what it was being used for. During the investigation, Mr. Ullrich believed the property manager would have discovered that the Extension Cord was live.
- [188] Mr. Ullrich is of the view that there are no legal requirements to take extra precaution for children who are tenants in property except when referring to swimming pools.
- [189] Mr. Ullrich was asked what responsibilities, obligation or duties does the owner of property have in the present situation.
- [190] He said the property manager would either be an employee of a landlord or the landlord's agent. It would be commonplace for the landlord to investigate the qualifications of the property manager.
- [191] It would be prudent for a landlord to ensure at the time of purchase of the property to ensure that all necessary permits had been issued by the municipality or city for renovation work. If, during any inspection, it became apparent that an obvious serious code violation was present, the landlord or the property manager should have the violation corrected.

- [192] Mr. Ullrich did attach a sample Apartment Interior Inspection Report but clarified that this is just a sample and that there is no mandated form. A report is mandatory; however, the landlord or property manager is at liberty to use their own inspection form if they choose.
- [193] Mr. Ullrich would not expect a property manager to pull out furniture or appliances. It is common practice to check all cabinets. He agreed that he had no experience leasing furnished single homes but he believes that the standards would be the same for a multi-unit apartment building or a single family home.
- [194] In cross-examination Mr. Ullrich said he was concerned when he saw the photograph of the record player in the drawer. He was also concerned when he saw the backs of Receptacles #2 and #3 with no faceplates on them. It looked to him like it was not done to code so he likely would have called an electrician in to inspect it.
- [195] The property manager is not obliged to check an electrical hazard behind a finished wall but if there is something visible that should lead to a chain of inquiry that should be investigated.
- [196] Mr. Ullrich was shown a copy of the Property Inspection Report done by Allied Home Inspection Inc. on June 16, 1992 (Exhibit 2, tab 8, joint book of documents). As a property manager he would likely be given a copy of the Property Inspection Report. He would not rely on it entirely and he still would feel obliged to inspect the property but he would find it helpful.

e) Garth Cambrey, Property Management Expert

- [197] Mr. Cambrey was retained by Ms. Wong, Mr. Wong and Ms. Lai to provide an opinion on the standard for residential property manager inspections. Mr. Cambrey has been licensed under the Real Estate Act, R.S.B.C. 1996, c. 397 since 1985 and has been involved in property management in the Province of British Columbia since 1986. He has owned and operated a property management company and I accepted his qualifications as an expert in the area of property management for residential properties.
- [198] In his report, Mr. Cambrey said, that in his opinion, industry standards do not require that a property condition inspection conducted by a landlord or property manager to include inspection of outlets and cords that are hidden and unknown to the landlord or property manager.
- [199] Property condition inspections are relatively simple visual inspections of rental property completed by the landlord or property manager with or without the tenant while walking through the rental property noting the general condition of the various components of the property and identifying any damage or items in need of repair. The property condition inspection would not include testing of electrical outlets.

- [200] In preparing his report he was told to assume that the speaker compartments at either end of the Cabinet were covered. He does say that, if that was not the case and the receptacle was not covered but visible during a property condition inspection, he would expect a prudent landlord or property manager to take a closer look at the receptacle to attempt to determine its purpose. Upon examination, if the receptacle did not have electrical wiring connected to it and was not live then no further investigation would be necessary. If the cord was plugged into the receptacle at the time of inspection the purpose of the receptacle would be difficult to ascertain. He said it was his opinion that testing of the receptacle would exceed industry standards.
- [201] During cross-examination Mr. Cambrey agreed that it looked odd to have Receptacle #2 three inches off the ground facing down. He agreed the back of Receptacle #2 was not professionally installed. Once he saw the back of Receptacle #2, he agreed that it would demand further investigation. If he saw the Extension Cord either lying on the ground or plugged into Receptacle # 2 and the other end of the Extension Cord disappearing into the back of the Cabinet at that juncture, he would agree it did not look right. He would ask questions of the owner before getting an electrician in to inspect the Cabinet.
- [202] If he did not feel comfortable in assessing whether the wiring constituted a threat or a hazard electrically, Mr. Cambrey agreed that would be the time when the prudent property manager would get an electrician in to inspect the Cabinet further.
- [203] When asked what the standard for a non-resident owner of rental property would be, Mr. Cambrey agreed on cross-examination that if it was not geographically possible for the owner to inspect the property, the expectation is that the owner would get someone qualified to manage the property for them. He would be concerned if that non-resident landlord hired someone with no experience who is not licensed. He would also be concerned if the property manager never completed property inspection forms. If he was an owner, he would be concerned if the property manager had no training or education in property management at all. He would be concerned if she did not even keep written notes of walk-through inspections.

#### Decision on the Standard of Care Owed by a Landlord or Property Manager

- [204] Based on the expert evidence I find the standard of care owed by a landlord or property manager is to:
1. Conduct an initial thorough inspection of premises to ensure that the premises is safe and clean and to note any deficiencies;
  2. Perform a detailed inspection of the property with every tenant prior to their moving in and moving out;
  3. On an annual basis, the landlord should inspect the property and note any issues including preventative and deferred maintenance as well as life and health safety issues;

4. On receiving a complaint from a tenant, the landlord has an obligation to investigate the complaint;
  5. In the current situation where there is a built-in Cabinet with several covered spaces and drawers, I would expect, at a minimum, a property manager would open the cupboard spaces and drawers at the beginning and end of each tenancy to make sure that the drawers and cupboards are properly cleaned out of the tenant's possessions and that they did not contain dirt, insects or other household pests.
  6. In the current situation, where the Cabinet, when empty, revealed the back of two electrical receptacles which have been unprofessionally installed, I find the minimum standard would require further investigation by the property manager. Further investigation at a minimum would be to get down on one's knee and look under Receptacle #2. This inspection would have revealed the faceplate for Receptacle #2 which was three inches above the ground facing the floor and the Extension Cord either plugged into Receptacle #2 or lying on the carpet. Upon discovering this, I find the minimum standard would be for the landlord or property manager to retain the services of an electrician to investigate the Cabinet further for safety purposes.
- [205] I do not believe these standards change because of the size of the project. The focus is on maintaining safe premises for tenants and the duty is a statutory one which does not differentiate between building sizes.
- [206] I accept that an electrician, asked to investigate breaker trips, might not do an inspection of the Cabinet. An electrician who is doing a full home inspection and doing a receptacle check on each accessible plug may well be expected to further investigate Receptacle #2 of the Cabinet if it were exposed at the time of the electrical inspection. Of course no electrical inspection of the house was requested.
- [207] When the Cabinet contained speakers or was full of tenant's possessions and when the Extension Cord was plugged into Receptacle #2 and not visible, I find it quite likely that nothing unusual was visible to lead to a further inquiry during a routine inspection.
- [208] I have examined Exhibit 4 which is an enlarged version of the photograph contained at Exhibit 6, tab 3, page 17. Even from a distance the back of Receptacle #2 is clearly visible to the naked eye. This should have been noted by Ms. Wong during her inspections.
- [209] I do not see the Extension Cord under the Cabinet. I do see a dark line under Receptacle #2 that comes out in front of the Cabinet, but I cannot identify that as the Extension Cord from these photographs.
- [210] Nonetheless, given the shoddy job of installing Receptacles #2 and #3, I find they are clearly visible to the naked eye and should have led to a further inquiry by the property manager, Ms. Wong.

Was the Standard of Care Met?

a) Doris Wong

- [211] As stated earlier, Ms. Wong's evidence was read in from her examination for discovery and she did not take the witness stand.
- [212] When Mr. Wong and Ms. Lai purchased the Property and planned on renting it, Ms. Wong volunteered to manage the Property. She had no previous experience as a property manager. She was not licensed as a property manager. She had no training whatsoever.
- [213] She was asked at the examination for discovery what her responsibilities were. Her answer was that she was responsible for looking after "everything that's required". Anything that needed to be done she will find someone to do it. She was responsible for arranging tenants to live in the Property. She was responsible for hiring and firing of trades persons including handymen. She would arrange for the payment of taxes for the Property. She was responsible for interviewing tenants when they were applying to move into the Premises.
- [214] She has been the person primarily in charge of the Property since shortly after the purchase in 1992. Between that time (shortly after the purchase) and the time of the Incident (2007), no one else was ever responsible or in charge of looking after the Property.
- [215] There was no agreement between her and the owners about what her responsibilities would be in looking after the Property. The extent of the discussion after learning that Mr. Wong wanted to rent out the Property was that she volunteered to help him and he said okay.
- [216] Ms. Wong was paid \$50 - \$100 a month for her services as a flat fee. This money was really just to compensate her for gas and out-of-pocket expenses. There was no real discussion about compensation. She collected the rent and she collected her compensation from the rent. At the time of the Incident she was being paid \$100 a month. Ms. Wong deposited the rent into her brother's account at the Bank of Montreal.
- [217] Ms. Wong was questioned about a building inspection done at the Property around the time of purchase of the Property. She does not know what instructions were given to the inspector or what was inspected at the time of purchase. She had no idea what the results of the inspection were. She never read the report.
- [218] When Ms. Wong filled in the tenancy agreement she inserted her name under the heading "landlord". She recognized her signature on the tenancy agreement signed by Mr. Boyes and Jennifer Searcy. The tenancy agreement provided that the landlord was responsible for necessary repairs to the Premises.
- [219] From the time of the purchase of the Property to the time of the Incident, there were some renovations done to the Property, mostly downstairs. Also the carpet was changed in the Premises in 1997.

- [220] In 2004 or 2005, the insurance coverage on the Property changed. This was because her broker had found a more competitive price.
- [221] Optimum West Insurance Company sent a letter dated May 13, 2005 to Ms. Wong by fax. The letter recommended certain repairs and inspections to reduce the possibility of loss or damage. One recommendation was for an inspection "of electrical as breaker trips when some appliances are used". Ms. Wong found the name of an electrician in the Yellow Pages and called Golden Leaf to come and do an inspection.
- [222] She agrees in general that it is important to get electrical problems checked out because they can be hazardous or dangerous but she did not request this inspection because of her own concerns. This arose because of the letter from the insurer.
- [223] When asked if she ever considered that the electrical wiring might not be safe because of the age of the Property she said she never considered it. She told Golden Leaf that the insurance company asked her to do an inspection and those were the only instructions she gave Golden Leaf. She may have shown Golden Leaf the letter from the insurance company. She said she probably told Golden Leaf that the breaker trips but she can't remember the exact instructions she gave Golden Leaf.
- [224] Prior to the Incident, Ms. Wong never asked Golden Leaf or any electrician to do an electrical safety inspection of the Property.
- [225] Ms. Wong's understanding was that Golden Leaf fixed the problem that was complained about in the insurance letter and he also fixed a dimmer switch. She did not inspect the work that Golden Leaf did.
- [226] Mr. Boyes and Jennifer Searcy looked at the Property before renting it. Ms. Wong was present when they viewed the Property. She does not remember how long they took.
- [227] Ms. Wong has never heard of the RTA.
- [228] She would ordinarily take a look at the Property before the tenants moved in. The tenants were giving her damage deposits so when she was inspecting the Property before they moved in it was to determine whether there were any pre-existing damages. She would also do an inspection to make sure the Premises was safe for the next tenant to move in. If she noticed anything unsafe or which she thought was not to standard then it is something that she would try to rectify. She particularly did not look for hazards but if she saw one then she would have it taken care of. She took no special precautions for tenants with children.
- [229] When asked how many times she inspected the Premises, Ms. Wong said every time a tenant moved out she would look around but she did not really look at the Cabinet. She thinks she inspected the Premises ten times over the years.

- [230] In the past there was a problem with a breaker tripping related to plugs in the kitchen. When the tenants plugged too many things in, the breaker tripped and the tenant would have to go to the panel and switch it on again. This was prior to 2009. She told the tenant not to plug too many appliances in at one time. She did not seek an electrical inspection at that time. The Golden Leaf inspection occurred because she was changing insurance policies.
- [231] At the start of a new tenancy Ms. Wong does not have a tenant fill in a form to note deficiencies. She just has them (the tenant, I presume) tell her what needed to be done. She does not remember what deficiencies Mr. Boyes or Jennifer Searcy pointed out.
- [232] She said usually people noticed the Cabinet and make a comment about it. It is conspicuous. It was Ms. Wong's practice to say it is built-in and it has to stay. She never had the Cabinet inspected.
- [233] As stated earlier, Ms. Wong was aware that there was a record player in the Cabinet. She does not know whether it was functional at the time of the Incident or at any time during the time period since her brother owned the Property. She is not aware of tenants using the record player. She is not aware of tenants installing electrical devices like a computer, television or stereo in the Cabinet at any time.
- [234] Ms. Wong is not aware of any work done by her tenants to rewire the Cabinet for any purposes.
- [235] Ms. Wong's knowledge of the Incident is that an infant put an electrical cord in her mouth which was live and she got burned. She went to the Premises and saw the outlet where the Extension Cord was plugged in. She had never seen the Extension Cord before. She was not aware of any wires that existed inside the Cabinet. In all these years, nobody reported seeing the Extension Cord in that area. As stated earlier, she had never noticed Receptacle #2 or #3 before.
- [236] After the Incident she did have someone come in and terminate Receptacle #1 in the Cabinet. The agreed statement of facts is that she paid \$101.00 to have the junction box at Receptacle #1 removed.
- [237] When Ms. Wong first heard about the Incident she informed Mr. Wong and Ms. Lai. She and Mr. Wong and Ms. Lai had no policy in place to deal with incidents like this. She doesn't usually talk with the Mr. Wong and Ms. Lai who are her brother and her sister-in-law. She has talked to Mr. Wong at some point since he purchased the Property. She cannot remember whether she talked to Mr. Wong or emailed him about the Incident.
- b) Johnny Ho Cheung Wong
- [238] Mr. Wong did not give evidence at the trial so the evidence I am referring to was read in from his examination from discovery transcript as part of the plaintiff's case.

- [239] Mr. Wong owns the Property with his wife Ms. Lai in joint tenancy. Mr. Wong and Ms. Lai live in Hong Kong. Neither of them has ever set foot on the Property. Mr. Wong has walked by the Property because his sister Emmy Leung ("Ms. Leung") lives in a house across the street from the Property. He used to jointly own that property with her. When he purchased the Property he was always intending to rent it out.
- [240] Mr. Wong asked his sister Ms. Wong if she would help him take care of the rental of the Property. Since the time he purchased the Property until the present, she has been the one who has been responsible for the care and supervision of the Property.
- [241] She has been responsible for collecting rent and for paying expenses including property tax. She is responsible for the maintenance of the Property. She is responsible for organizing repairs to the Property. She is responsible for advertising and interviewing of any tenants that are to live in the Property. Mr. Wong did not ask Ms. Wong to inspect the Property before or after tenancies. He does not know whether Ms. Wong was conducting any inspection before or after tenancies.
- [242] When asked if Ms. Wong was responsible for ensuring that the Property was safe for the tenants to use, Mr. Wong said she is not my employee, she is just helping me so I don't know she is responsible for doing that. He did not understand what was required for moving in inspections.
- [243] When asked who Mr. Wong thought should be responsible for ensuring the Property is safe for tenant's use, he responded that he thinks it is the owners who should do that. He thinks that it is his responsibility.
- [244] When asked what steps he took to ensure that the Property was safe for tenants to use he said I did tell my sister to make sure the house is clean and if there is no problem you can rent it out. When asked what he meant by "there is no problem" he said "I would say no hazards or anything like that. No danger". There were no other steps he took to ensure the Property was safe.
- [245] He was asked who he thought was responsible for ensuring that the Property was in compliance with the local electrical codes and he said he appointed Ms. Wong for the rental but in terms of electrical and all he does not know. He did not consider whether the Property was in compliance with local building codes, electrical codes and bylaws.
- [246] Mr. Wong first said that he relied on the inspection report and did not worry about the other stuff. He was shown a copy of the Home Inspection Report and Agreement dated June 16, 1992 prepared by A.W. Hopen at the examination for discovery and he said he had never seen it before. He then said that he relied on the representation from Ms. Leung, that the Property was "good" and that is why he bought it. He did not take any steps himself to further investigate. There were no other inspections done to ensure the Property was in compliance with building codes electrical codes or bylaws.

- [247] Ms. Wong was the only one responsible for the care and supervision of the Property from approximately the date of purchase until present. There is no written contract with Ms. Wong. Mr. Wong did not set out in writing what he expected her to do. He does not give her instructions with respect to the care, maintenance, inspection or upkeep of the Property. He does not know whether she has any qualifications to be a property manager. He does not know if she has taken any courses or education or training to be a property manager or a landlord in British Columbia. He did not ever take any steps to inform himself as to what the requirements are for someone to be a property manager or landlord in British Columbia. He doesn't know if Ms. Wong had any experience managing property.
- [248] Mr. Wong wished to pay Ms. Wong for her services but she would not accept payment. All the money collected for rent is just deposited in a bank account and he never looks at it. On one occasion Ms. Wong said "You have a lot of money in this account. What would you like me to do with it?" On his instruction she transferred the money to him in Hong Kong.
- [249] Ms. Wong is authorized to deduct from the rent any personal expenses she has in the course of her duties. He does not know what expenses she deducts. He told her that any expenses related to the Property could be paid for out of the bank account. She never asked him for permission for repairs or maintenance. She has complete control over the bank account. She is responsible for filling out the income tax returns in Canada related to the Property. Mr. Wong communicates with Ms. Wong by telephone infrequently, less than once a year.
- [250] Mr. Wong does not have any information about the tenants who have lived in the Property from the date of purchase until 2007. Ms. Wong does not need his approval to accept or reject or evict a tenant.
- [251] Mr. Wong has no experience being a property manager or landlord in British Columbia.
- [252] Mr. Wong was not made aware by Ms. Leung, by the sellers or by any real estate agents about any electrical hazards or danger that existed in the Property at the time he purchased it. He was never aware of any electrical issues or problems in the Property from the date of purchase to the present. He is not aware of whether or not there has been an electrical inspection done on the Property. He is not aware of whether a further building inspection was done on the Property at any time during his ownership. He is not aware if any electrical work was done on the Property at any point during his ownership of the Property.
- [253] He was first made aware of the Incident after Ms. Wong told him on the phone. She told him that there was an infant who put an electric cord in her mouth. He was told there was a cord which was left by the previous owner.
- [254] Mr. Wong does not take any special precautions renting houses to people with children. He doesn't know who Ms. Wong rents the house out to.
- [255] It is Mr. Wong's intention to continue to use Ms. Wong to manage this Property.

c) Kit Bing Lai

[256] Ms. Lai is a joint tenant on title to the Property. Her evidence was comprised of excerpts from her examination for discovery read-in at the trial.

[257] She was aware that her husband Mr. Wong was purchasing the Property and that it was being rented out. She knew that Ms. Wong was managing the Property. She has never been in the Property and knows nothing about inspections or the requirements of landlords in British Columbia. She is content to have her husband and Ms. Wong take care of the Property on her behalf and had no evidence to add.

### Analysis and Decision on Whether the Standard of Care Was Met

[258] There are similarities between this case and the facts in *Klajch (Guardian ad litem of) v. Jongeneel*, 2002 BCCA 14 [Klajch] which deal with the issue of whether a landlord should have discovered a hazardous condition on reasonable inspection.

[259] In *Klajch*, the plaintiff resided in a rental property with his mother. The accident involved a heavy planter filled with soil resting on a plank lying across two beams projecting from the front wall of the rental property. The planter was not nailed or otherwise fastened to the plank and, in turn, the plank was not fastened to the beams. On the day of the accident, the 5-year old plaintiff grabbed the side of the planter to pull himself up so that his mother could see him. The plaintiff lifted himself up, holding onto the planter as if doing a chin-up. His feet did not remain on the ground. The planter rolled over towards him and came down on top of him causing a severe head injury.

[260] At a liability only trial, the trial judge held that the landlord and the property manager (75%) and the plaintiff's mother (25%) were liable in negligence for the accident. The Court of Appeal dismissed the appeal of the landlord and property manager and allowed the cross-appeal of the plaintiff, reapportioning liability 100% as against the landlord and property manager. The Court of Appeal found that the planter was the property of the landlord even if it originated with a prior tenant because it was affixed to the premises.

[261] The planter was unstable and a danger to children which would have been easily and inexpensively remedied but the landlord and the property manager were unaware of the danger.

[262] At paragraph 16 the Court of Appeal identified the issue of reasonable inspection and quoted the trial judge's reasons with approval:

... I find that the nature of the defendants' inspections were superficial. In effect, little if any consideration was given to hazards that might exist outside the house or protrude from the house. Second, the inspections were not carried out as frequently as they should have been. Thus, there was in fact no inspection between the time the plaintiffs took over the tenancy and the Accident. There may have been "drive-by" inspections, but I find these were insufficient. I am persuaded that a reasonable inspection could have, and more importantly should have, been

made immediately prior to the plaintiffs' commencing their tenancy. Had such an inspection been carried out with reasonable diligence, it would have shown the lurking hazard posed by the Planter.

[Emphasis added]

[263] The Court of Appeal says that the landlord's duty to inspect is part of the landlord's duty to provide and maintain premises in a reasonable state of repair as required by the RTA and is part of the landlord's duty to take reasonable care in repairing the premises under the OLA. At paragraphs 17 and 29 the Court of Appeal adds the following conclusion about the landlord's duty of reasonable inspection being independent of a tenant's duty to report:

[17]... In the circumstances of this case, I am not persuaded that the landlord's duty is confined to defects that have been brought to her attention by the tenant.

[29] While the Occupiers Liability Act imposes a duty of reasonable inspection on both the landlord and tenant of a premises, the standard of reasonableness to which each party will be held must be determined according to the respective position and responsibilities of each party. It is the landlord who observes the evolution of a home through multiple tenancies, and witnesses structural alterations and additions to the premises. The landlord also has the legal responsibility for maintaining and repairing the premises, and exercises his duty of inspection as an incident of that broader duty to repair. These factors will generally elevate the standard of reasonable inspection imposed on a landlord above that imposed on a tenant, particularly where the inspection relates to a structural defect that existed prior to the current tenancy.

[Emphasis added]

[264] In the case before me, the hazard was created by an earlier tenant and was a lurking hazard. The Cabinet was a fixture and became the property of Mr. Wong and Ms. Lai. Ms. Wong's inspections were superficial. In effect, little, if any, consideration was given to hazards that might exist in the Premises. Ms. Wong depended on someone bringing a problem to her attention and did not take reasonable steps to assess the safety of the Premises on her own initiative. The inspections were not carried out as frequently as they should have been.

[265] I am persuaded that a reasonable inspection could have, and more importantly, should have been made immediately prior to the infant plaintiff's parents commencing their tenancy. Had such an inspection been carried out with reasonable diligence, it would have shown the lurking hazard posed by the Cabinet.

[266] Ms. Wong had exclusive responsibility for rental of the Property for 15 years prior to the Incident. She was in the unique position of having observed the evolution of the Premises through multiple tenancies and repairs and alterations.

- [267] She conducted ten cursory inspections of the Property between the time it was purchased in 1992 until the time she was examined for discovery.
- [268] Ms. Wong did nothing to educate herself about her legal responsibilities as a property manager despite the availability of resources for landlords and property managers. She did not know what the RTA was at the time of her examination for discovery. She has never taken training or schooling for property management. She did not bother to review the Property Inspection Report after her brother purchased the property and she agreed to be a property manager.
- [269] She never requested a full electrical inspection of the house despite the fact she was aware that the Property had been built in late 1950s and there was no indication that the electrical system had ever been upgraded. The Golden Leaf electrical inspection related to a tripping breaker was conducted at the suggestion of the insurance company but it was specific to certain breakers and appliances which did not include the Cabinet.
- [270] I find that a reasonable property manager would have requested an overall electrical inspection at that time knowing that the electrical system was likely over 45 years old.
- [271] Ms. Wong has no policy for regular maintenance or inspections. She waited for complaints. When she conducted inspections she was not particularly looking for hazards or dangers. She did not look in every drawer of the Cabinet ever in all these years.
- [272] The back of Receptacle #2 and #3 were plain to see when the Cabinet was empty which it would have been in between each tenancy. It is not known when the modification to the Cabinet was made but it is known that the modification existed when Mr. Gower moved in to the Premises and he did not make the modification. That means that, at a minimum, Ms. Wong had the opportunity to see the back of Receptacle #2 and #3 when the tenant before Mr. Gower moved out, when Mr. Gower moved in and out and when Mr. Boyes and Jennifer Searcy moved in to the Premises. Yet she never saw the back of Receptacle #2 or #3 and she certainly never bent down to look under the Cabinet. I think it is fair to say that if no one made a complaint, Ms. Wong did not feel obliged to conduct further inspection or repair. I accept Ms. Wong's evidence that no one did complain about the wiring of the Cabinet until the Incident.
- [273] I agree with the submissions by counsel for the defendants that by themselves, Receptacle #2 and #3 posed no hazard but they were not by themselves. Receptacle #2 either had the Extension Cord inserted into one of the female receptacles or the Extension Cord was lying on the floor underneath it. Either way, that situation should have led to a chain of inquiry which would have revealed the hazard once an electrician had been hired to inspect the Cabinet.
- [274] Ms. Wong had an obligation to inspect the Property for hazards even if they were not drawn to her attention. Tolea at para. 61(5). Ms. Wong did not meet that obligation.

- [275] Mr. Wong and Ms. Lai are owners who delegated all of their authority with respect to the Property to their agent Ms. Wong. They are vicariously liable for her negligence and in addition liable directly under s. 32 of the RTA for their failure to provide and maintain a residential property in a state of decoration and repair that complies with health and safety standards required by law in regard to the age, character and location of the rental unit to make it suitable for occupation by a tenant.
- [276] They did nothing to determine whether Ms. Wong was qualified to manage the Property. They took no steps to understand what the laws were in British Columbia for inspecting resident rental property. They rarely spoke with Ms. Wong and took no responsibility whatsoever in ensuring the safety of Property.
- [277] Mr. Wong did not read the Property Inspection Report obtained by Ms. Leung. He never visited the Property. I think that it is fair to say that he abdicated all responsibility and clearly did not meet the standard of care expected of landlords. Ms. Lai was content to rely entirely on Mr. Wong and Ms. Wong to take care of the Property despite the fact that she is a half owner of the Property.
- [278] I find that Ms. Wong, Mr. Wong and Ms. Lai did not meet the standard of care expected of a landlord/property manager under either Act.

## CAUSATION

### The Law

- [279] With regard to causation, a plaintiff must show, on the balance of probabilities, that a defendant's failure to meet the standard of care caused him/her injuries. The primary test for causation is the "but for" test which asks: "but for" the defendant's negligence would the plaintiff have suffered the injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey].
- [280] A plaintiff does not need to establish that the defendant's wrongful conduct is the sole cause of the injury. So long as the plaintiff proves a substantial connection between the injuries and the defendant's negligence beyond the de minimis range, the defendant will be fully liable for the harm suffered, even if other causal factors for the defendant is not responsible for were at play in producing the harm: *Athey*.
- [281] The law on causation was considered by McLaughlin C.J. in *Clements v. Clements*, 2012 SCC 32:
- [46] The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:
- (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.

- (2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

### Martin Coles Evidence

- [282] Mr. Coles, the electrical engineer who prepared a report on behalf of the plaintiff, gave the opinion that the Extension Cord is hazardous because it could result in fire or serious injury to a person. Mr. Coles further opined at p. 13 of Exhibit 7 that the injuries sustained by the infant plaintiff were consistent with her putting her mouth on the Extension Cord:

It is our understanding that the Cora Boyes was injured at the age of ten months while she was playing a hiding game with her aunt, Candice Searcy. Her injuries included severe burns to her mouth, gums, tongue, palate, teeth, and her left index finger. These injuries are consistent with the Cora Boyes having taken hold of and energized the exposed plug in her left hand, possibly touching one blade with her index finger and placing the plug in her mouth. In such a scenario, electrical current would flow across the tissues of her mouth, wet with saliva, from one blade to the other. Electrical current appears to have also flowed from one blade, through her body from her mouth to her hand where she was touching the other blade.

- [283] Mr. Coles also explained how the standard North American household voltage of 110v in the mouth could reasonably create a current between the plug blades of 11 amps and a reasonable value of current from the mouth to the fingertip of 0.055 amps or 55 milliamps. Eleven amps would be expected to produce significant heat, causing burns and other injuries. Relatively small currents such as 55 milliamps, if they travel through the body, can disrupt the respiratory and cardiac systems.
- [284] Mr. Coles explained that current is arrived at by calculating voltage over resistance. A wet environment creates far less resistance than a dry environment. The outside of the body is not a good conductor but the inside of a mouth is. That is why the Extension Cord might not shock a finger but could cause horrible damage to a mouth.
- [285] He said in his report that it is possible that this Incident did not involve sufficient current to trip the circuit breaker but still caused the injuries that occurred.

[286] In his conclusion, Mr. Coles said that extension cords with two male ends are not commercially available and are a violation of the Canadian Electrical Code and have consistently been so since 1958 or earlier. There is no legitimate reason to create an extension cord with two male ends and such cords constitute a major safety hazard. They pose a risk of fire, as well as electric shock risk from personal contact with the exposed energized plug blades.

[287] Although Mr. Cole was cross-examined, none of the defendants challenged his conclusions that the Extension Cord caused the injuries suffered by the infant plaintiff and no one challenged his calculation of the electrical current she was exposed to.

### Analysis of Causation and Decision

[288] When Candice Searcy lifted the non-responsive body of the infant plaintiff up from the floor beside the right end of the Cabinet on August 24, 2007, she saw the male end of the Extension Cord underneath where the infant plaintiff's face had been. The skin around the infant plaintiff's mouth had turned white and yellow showing immediate disintegration of the skin of her mouth and lip.

[289] I find that the Extension Cord caused the damage to the infant plaintiff.

[290] It is unknown who installed this double male ended Extension Cord into the Cabinet. The person who created this hazard is clearly responsible for causing these horrible injuries. So too is the person who allowed this hazardous situation to remain in the Premises for years.

[291] But for the negligence of Ms. Wong, Mr. Wong and Ms. Lai, the injuries to the infant plaintiff would not have occurred.

[292] The infant plaintiff does not need to establish that the defendants' wrongful conduct was the sole cause of the injury. The infant plaintiff need only prove a substantial connection between the injuries and the defendants' negligence beyond the de minimis range. The defendants Ms. Wong, Mr. Wong and Ms. Lai are found to be fully liable for the harm suffered, despite the fact that they did not install this hazardous Extension Cord: Athey.

[293] At para. 16 in Klajch the trial judge concluded:

16 I am persuaded that a reasonable inspection could have, and more importantly should have, been made immediately prior to the plaintiff's commencing their tenancy. Had such an inspection been carried out with reasonable diligence, it would have shown the lurking hazard posed by the Planter.

[294] I am persuaded that had a reasonable inspection by Ms. Wong been carried out with reasonable diligence, it would have led to the chain of inquiry I have referred to above which reasonably would have led to her retaining the services of an electrician to inspect this Cabinet. I am certain that an electrician with those instructions would have discovered the hazard and decommissioned it.

- [295] The hazard was there to be seen likely for years. It wasn't discovered because Ms. Wong conducted very superficial cursory inspections and relied on tenants to draw concerns to her attention. In *Klajch* the Court of Appeal held at para. 17 that the landlord's duty is not confined to defects that have been brought to his attention by the tenant.
- [296] The risk of injury from electric shock caused by an exposed energized cord is clearly foreseeable.
- [297] Mr. Wong and Ms. Lai are vicariously liable for the actions of their property manager who is acting as their agent in the execution of her duties. They are also liable for their failure to take reasonable care in ensuring that the Premises was safe. They failed in their obligation to appoint a trained experienced property manager and to take reasonable interest in the maintenance and repair of the Premises. Clearly they did not do so and the evidence is that they spoke to their property manager less than once a year. To date, the infant plaintiff calculates that Mr. Wong and Ms. Lai have earned over \$575,000 in gross rental income. They could well afford to hire a professional property manager.
- [298] I accept the infant plaintiff's submission that the purpose of an owner ensuring they hire competent property manager to manage the property is to ensure that their property will be reasonably safe for the tenants. If an owner does not hire a competent property manager it is foreseeable that tenants could be injured.
- [299] Although I intend to deal with the third party claim against Ms. Ryckman under that heading, I will address the issue of causation here. I found that Receptacle #1 was more likely than not installed in the Cabinet during Ms. Ryckman's ownership and occupation. The electricians have said that it did not meet electrical codes. The fact that it was concealed created a hazard because no one could inspect it and ensure that it was still in working order.
- [300] I found that that Receptacle #1 was used to energize a power cord which sat behind the television and provided energy to the rest of the Cabinet. Had that configuration remained, I find that this Incident would not have occurred. I therefore find that the construction of Receptacle #1 during the occupancy of Ms. Ryckman is too remote to the infant plaintiff's injuries to establish causation. When Receptacle #1 was constructed, it was not foreseeable that someone would create a very unusual two male ended Extension Cord and leave one of the energized male ends exposed.

## APPORTIONMENT OF LIABILITY

- [301] Groves, J. provides a helpful review of the law as it related to apportioning liability in *Aberdeen v. Township of Langley, Zanatta, Cassels*, 2007 BCSC 993 [Aberdeen]. He starts at para. 54 and 55 with the basic statement of the law:

(viii) Apportionment of Liability

- [54] The parties are essentially in agreement with respect to the law on the apportionment of liability as discussed below. In particular, they agree that the apportionment of liability pursuant to the Negligence Act, R.S.B.C. 1996, c. 333 should be made based on a consideration of the degree to which each party is at fault, and not the degree to which each party's fault caused the plaintiff's loss (as detailed by Lambert J.A. in *Cempel v. Harrison Hot Springs* (1997), 43 B.C.L.R. (3d) 219, 100 B.C.A.C. 212).
- [55] Before an apportionment of liability can be considered, it must be established that each relevant act or omission was a legal cause of the plaintiff's loss (see e.g. *Heller v. Martens* (2002), 213 D.L.R. (4th) 124, 2002 ABCA 122 at ¶ 31; *Vigoren v. Nystuen* (2006), 266 D.L.R. (4th) 634, 2006 SKCA 47 at ¶ 89). In this case, as explained above, the negligence of both Langley and Zanatta caused the plaintiff's loss.
- [302] There is no issue of contributory negligence of the infant plaintiff. I have determined that both the owners Mr. Wong and Ms. Lai and the property manager Ms. Wong were negligent and that their negligence caused or contributed to the injuries of the infant plaintiff.
- [303] Section 4 of the Negligence Act, R.S.B.C. 1996 c. 333 applies.
- 4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.
- (2) Except as provided in section 5 if 2 or more persons are found at fault
- (a) they are jointly and severally liable to the person suffering the damage or loss, and
- (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.
- [304] The factors the court considers in assessing comparative blameworthiness of the parties include:
1. The nature of the duty owed by the tortfeasor to the injured person: *Aynsley v. Toronto General Hospital*, [1968] 1 O.R. 425 at 444-45 (C.A.), aff'd [1972] S.C.R. 435; *Arnold v. Teno*, [1978] 2 S.C.R. 287.
  2. The number of acts of fault or negligence committed by a person at fault: *Bruce v. McIntyre*, [1954] 2 D.L.R. 799 (C.A.), aff'd [1955] S.C.R. 251.
  3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault: *Aynsley*, supra.

4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy: *Chamberland v. Fleming* (1984), 12 D.L.R. (4th) 688 (Alta. Q.B.) (where the driver of a motor boat sped by a canoe causing it to tip, and the canoeist to drown). Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis: see John G. Fleming, *The Law of Torts*, 8th ed. (Sydney: Law Book Company, 1992) at 273-74.
5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy: *Crothers v. Northern Taxi* (1957), 10 D.L.R. (2d) 87 at 100 (Man. C.A.); see also *Clyke v. Blenkhorne* (1958), 13 D.L.R. (2d) 293 at 304 (NSSC).

(*Heller v. Martins*, 2002 ABCA 122 at para. 34)

[305] To that list Groves, J., in *Aberdeen* at para. 63, added the following:

[63] ...

6. the gravity of the risk created;
7. the extent of the opportunity to avoid or prevent the accident or damaged;
- 8..whether the conduct in question was deliberate, or unusual or unexpected; and
9. the knowledge one person had or should have had of the conduct of another person at fault.

[306] In exchange for a collection of rent money, the most basic obligation of a landlord/owner is to provide tenants with a reasonably safe place to live (*Garth Cambrey*, property manager). The hazardous receptacles were there to be seen by Ms. Wong. Ms. Wong, Mr. Wong and Ms. Lai owed the infant plaintiff a duty of care to have in place a reasonable system of maintenance and inspection of the Property and they were negligent in their failure to do so. The casual walk-through with the tenants did not discharge this duty.

[307] Mr. Wong and Ms. Lai clearly abdicated their obligation as offshore property owners to take steps to hire a properly qualified property manager. They took no steps whatsoever to assess whether Ms. Wong had any sense of a property manager's obligation. They failed to research their obligation as owners of rental property in British Columbia. It is apparent that they were grossly indifferent to their duties of care.

[308] They have never attended at the Property despite numerous visits to the house across the street where Ms. Leung resides. It appears to me that Ms. Wong, Mr. Wong and Ms. Lai were indifferent to their obligations to their tenants.

[309] In assessing the gravity of the risk created, the hazard was an extreme hazard and although it may not have been immediately ascertainable it was detectable with a basic visual inspection and further inquiry.

- [310] It is difficult to assess the extent of the opportunity to avoid or prevent the Incident or damage that is apparent that the owners and property manager had, because I do not know when the modification was made to the Cabinet. I do know that the modifications existed at the time Mr. Gower moved into the Property in 2005 so the owners and property manager had at least two years, if not more, to discover the hazard.
- [311] I agree that Mr. Wong and Ms. Lai cannot claim ignorance as a defence to negligence. They took no steps whatsoever to ensure that they had retained a knowledgeable property manager and they took no steps whatsoever to ensure that Ms. Wong was aware of her legal obligations and performing them adequately.
- [312] As between the owners and property manager, I allocate liability as between the three of them and I apportion liability equally. That means Ms. Wong, Mr. Wong and Ms. Lai each have one third liability.
- [313] The decision to find Ms. Lai to be one third liable is inconsistent with a finding that I will make that Ms. Ryckman should not be found liable for the negligence of her husband based on *Ellis v. Wiebe*, 2011 BCSC 683 [Ellis] at para. 28 and *McCluskie v. Reynolds*, [1998] 65 B.C.L.R. (3d) 191 [McCluskie] which support the proposition that the law does not deem husbands and wives to be a single entity for the purpose of imposing liability for the actions of the other. Nor does the law automatically deem husbands and wives to act as each other's agents with respect to third parties.
- [314] In this case, Ms. Lai has a duty under the OLA. She did not raise a separate defence. It is clear to me that she was aware she was a property owner and that the Property was rented out. She had no further dealings with the Property and was content to allow her husband and sister-in-law to deal with the Property. Had she raised a separate defence, the apportionment of liability might have been different.

### THIRD PARTY CLAIMS

- [315] The following chart produced by the infant plaintiff in her submissions provides a description of the parties' rolls and who has commenced third-party actions against whom.

Party

Defendant

Third Party Notice Issued By

Represented By

Doris Wong

Yes

Johnny Wong

Kit Bing Lai

Chris Rhone

Johnny Wong

Yes

Doris Wong

Jim Morin

Kit Bing Lai

Yes

Doris Wong

Jim Morin

Sandra Ryckman

Yes

Doris Wong

Johnny Wong

Kit Bing Lai

Aron Bookman

David Boyes

No

Doris Wong

Johnny Wong

Kit Bing Lai

### **Kevin Gourlay**

[316] My decision in apportioning liability equally between Ms. Wong, Mr. Wong and Ms. Lai resolves the first three third party claims, leaving only the third party claims against Mr. Boyes and Ms. Ryckman to be decided.

### **Third Party Claim Against Mr. Boyes Brought by Ms. Wong, Mr. Wong and Ms. Lai**

[317] Mr. Boyes, the infant plaintiff's father, is a certified red seal electrician who was working as a tunnel superintendent at the time of the Incident. He and his family resided in the Premises for nearly four months prior to the Incident.

- [318] The defendants have abandoned their claim that Mr. Boyes failed to supervise his daughter. On the day of the Incident, Mr. Boyes left the infant plaintiff in the capable care of Candice Searcy and the parties accept that Candice Searcy was a competent caregiver.
- [319] The claim made in the third party proceeding is that Mr. Boyes either created the electrical hazard by installation of the Extension Cord at the Premises or that he failed to warn the defendants of the existence of an unsafe electrical hazard.
- [320] The third party claim further alleges that Mr. Boyes breached his tenancy contract by failing to inspect the Premises and give notice to the defendants respecting a defect deficiency or hazard in the Premises.
- [321] They further claim that Mr. Boyes breached his duty as an occupier of the Premises to ensure that it was safe or reasonably safe for the infant plaintiff in breach of his duty under the OLA.
- [322] I have already found that the Extension Cord was installed before Mr. Boyes occupied the Property so the only claim that remains is the claim that he failed to inspect, report and warn under his tenancy contract and the OLA.
- [323] Mr. Boyes has never worked as a residential electrician. He has never done home electrical inspections although he did learn about residential codes when he was in school. He has also done home electrical work for himself and possibly for friends and family. When the Boyes/Searcy family owned a home in Abbotsford, he did the electrical work there.
- [324] Mr. Boyes' evidence is that he never saw the Extension Cord prior to the Incident. He had no memory of having seen Receptacle #2 or #3 prior to the Incident. He has very little recollection of moving into the Premises because of the traumatic event that ended the tenancy.
- [325] Mr. Boyes agreed that he did sign the tenancy agreement found at Exhibit 2, tab 6 which said that the tenant shall inspect the Premises at the commencement of the tenancy and will, within three days, notify the owner in writing of any damages or defects.
- [326] Mr. Boyes has no memory of conducting the inspection of the Property prior to moving into the Property and no memory of ever seeing the Extension Cord or the backside of Receptacle #2 or #3 before the Incident.
- [327] The Cabinet was used to store board games and videos for the Boyes Searcy family.
- [328] The evidence does not demonstrate that Mr. Boyes ever saw the home in an empty state. Neither Jennifer Searcy nor Mr. Boyes have any recollection of whether he was there for the inspection or part of the move-in process. He was working as a tunnel superintendent, 12-14 hour shifts, eight days in a row with four days off.

- [329] I will deal with an issue with respect to the reading of Ms. Wong's examination for discovery transcript. In her examination for discovery Ms. Wong made reference to both Mr. Boyes and Jennifer Searcy being present at the walk-through but provided no detail. Mr. Boyes was not represented or present at Ms. Wong's examination for discovery and had no opportunity to question her about it. Ms. Wong did not take the witness stand at trial and so there was no opportunity to cross-examine her at trial.
- [330] I have been asked to disregard this evidence from Ms. Wong's discovery about Mr. Boyes being present for the inspection. Mr. Boyes did have an opportunity to retain counsel and attend at the examination for discovery because he was served with the third party notice before the discovery took place. The fact that he had no opportunity to cross-examine Ms. Wong at trial does reduce the weight of this evidence. Also Ms. Wong was very vague about the details of the walk-through inspection. Candice Searcy cannot recall who was present.
- [331] Mr. Boyes was clear in examination-in-chief and cross-examination that he has never spoken with Ms. Wong or the owners Mr. Wong or Ms. Lai. He has no memory of going through the Property before deciding to rent it. He said it was quite possible that Jennifer Searcy rented the place without him seeing it. He cannot say that he ever saw the Cabinet empty. His family stored board games and videos in the Cabinet but he does not recall going to the Cabinet to get a video. It is possible that he did.
- [332] I conclude that Mr. Boyes may have attended the Property during the initial inspection but that he has no recollection of it nor does he recall noticing Receptacle #2 or #3 or the Extension Cord.
- [333] Mr. Boyes' recollection of the Cabinet is that it did have a record player in it. He never moved the Cabinet. He never tried to lift it off its base. He never altered the wiring in the Cabinet. Mr. Boyes never saw the back of Receptacle #2 or #3 prior to the Incident. He agrees that that portion of the Cabinet was full of board games. He only saw the black mark (back of Receptacle #2) after the Incident. When he saw the photographs of the back of Receptacle #2 he didn't recognize it as the back of an electrical outlet. He thought it could be a speaker wire connector.
- [334] After the Incident he did go back to the Property and looked at the Extension Cord. He does recall the Extension Cord was not plugged in when he saw it after the Incident. Before the Incident he never saw the Extension Cord poking outside the right end of the Cabinet. Had he seen it, he might not have been concerned because the male end of an extension cord would not ordinarily be energized.
- [335] After the Incident Mr. Boyes did touch the prongs of the Extension Cord and nothing happened.

- [336] Baby proofing premises where they were residing was always Jennifer Searcy's responsibility. He does not recall having any concerns about the Premises before the Incident. He does not remember any power supply being brought to the Cabinet. The family had a large television and stereo system but it was hooked up against the front window using the electrical outlet underneath the front window.
- [337] Jennifer Searcy's evidence is that she contacted Ms. Wong. She remembers meeting Ms. Wong at the house. She doesn't remember details of the walk-through. She can confirm that she was there with Ms. Wong but she doesn't recall who else was there. The purpose of the walk-through was to record any previous damage done so that they would not lose their damage deposit. The photographs at Exhibit 6, tab 3 were found on her father's camera and were identified as photographs taken during the walk-through showing the condition of the house. Tab 17 is a photograph of Jennifer Searcy and the empty Cabinet.
- [338] After the Boyes Searcy family moved in, the photographs of the Cabinet show that the right speaker compartment was full of board games. Jennifer Searcy was asked who put the board games in the Cabinet and she said it was likely her because she does the unpacking usually.
- [339] Ms. Wong was her only contact person. She thought the owners were Ms. Wong's parents who lived across the street.
- [340] Jennifer Searcy agrees that she was responsible for baby proofing the house. She put a guard on the fireplace so the infant plaintiff could not get near it. She put a baby gate at the top of the stairs. She does not recall if she put any electrical coverings over electrical receptacles in the house. She did ask Ms. Wong to fix an open area in the wall of the bathroom. She does not remember much about the Premises given the trauma of the infant plaintiff's injury so soon after they moved into the Premises.
- [341] She does not recall the inside of the Cabinet. She does remember seeing a record player in the Cabinet but doesn't remember when she saw it.
- [342] The Boyes/Searcy couch was pushed up against the Cabinet because Jennifer Searcy did not like the look of the Cabinet. She has no recollection of seeing the Extension Cord sticking out of the Cabinet prior to the Incident.

### The Parties' Positions

- [343] The third party claim by Mr. Wong and Ms. Lai arises against Mr. Boyes in the event the court finds that the Extension Cord was there to be seen. If the court accepts the submission that the cord was clearly visible then Mr. Wong and Ms. Lai say that Mr. Boyes, as an electrician having lived in the house for almost four months, should surely be partly liable.

- [344] Ms. Wong's submission is that Mr. Boyes, a red seal journeyman electrician, failed to inspect the Premises and insure the same was reasonably safe for the infant plaintiff. She says this is in breach of his contractual obligation and his OLA duty owed by him to the infant plaintiff. This argument is made in the alternative because the primary position of Ms. Wong is that the hazard was not noticeable on reasonable inspection.
- [345] Ms. Wong submits that the case law includes a requirement that tenants inspect premises and bring dangers or defects to landlord's attention. Mr. Boyes signed a tenancy agreement which said that the tenant shall inspect the Premises at the commencement of the tenancy and shall, within three days thereof, notify the owner in writing of any damages or defects.
- [346] As outlined in *Zavaglia*, courts have applied an objective test to determine whether a tenant has breached the duty of care. There is a subjective element to that analysis. It is necessary to consider the tenants' own knowledge. Mr. Boyes had training as an electrician. He had regular access to the Cabinet where the family stored personal belongings.
- [347] In reply Mr. Boyes' counsel submits that section 3 of the OLA imposes a duty of reasonable inspection on an occupier to ensure the reasonable safety of persons in the premises. This duty is clarified by the tenancy agreement. Section 9 of the tenancy agreement was identical in the *Klajch* case. It reads:
9. CONDITION OF PREMISES: The Tenant shall inspect the premises at the commencement of the tenancy and shall, within three days thereof, notify the owner in writing of any defects or damages. Tenant agrees and consents to entry by the Landlord into the premises, upon receiving notification of defects and damages in writing for the purposes of inspecting the said defects and damages....
- [348] The joint effect of the contract and the OLA is to impose a duty on the tenant to report any defect discoverable by reasonable inspection to the landlord at the commencement of the tenancy: *Klajch* at para. 27.
- [349] The court clarified at para. 30 of *Klajch* that the duty will not normally extend to structural defects and defects not apparent upon ordinary visual observation. In *Klajch*, the mother was not aware of the defect in the planter. The *Klajch* family lived in the house for three years. At para. 28, the British Columbia Court of Appeal said the relevant factors in determining Ms. *Klajch*'s liability or lack thereof included the following:
- 28 ...None of the parties were aware of the danger posed by the planter. Two prior tenants who used the planter testified that they were unaware it was not attached. The experienced property manager did not discover the defect in the course of his several inspections over the years. The danger was hidden and the lack of attachment could only have been discovered by a close inspection.
- [350] The British Columbia Court of Appeal concluded at paras. 29 and 30:

[29] While the Occupiers Liability Act imposes a duty of reasonable inspection on both the landlord and tenant of a premises, the standard of reasonableness to which each party will be held must be determined according to the respective position and responsibilities of each party. It is the landlord who observes the evolution of a home through multiple tenancies, and witnesses structural alterations and additions to the premises. The landlord also has the legal responsibility for maintaining and repairing the premises, and exercises his duty of inspection as an incident of that broader duty to repair. These factors will generally elevate the standard of reasonable inspection imposed on a landlord above that imposed on a tenant, particularly where the inspection relates to a structural defect that existed prior to the current tenancy.

[30] In this case, I think that the tenant's duty under paragraph 9 is limited to the reporting of defects or damages discoverable by reasonable inspection in the circumstances, not normally extending to structural defects not apparent upon ordinary visual observation. As there is no evidence that such a reasonable inspection by the tenants would have disclosed that the planter was unattached, paragraph 9 provides no basis for a finding of contributory negligence on the part of Ms. Klajch.

[Emphasis added]

[351] Counsel for Mr. Boyes submits that this third party claim can be decided by applying the principles from Klajch alone. He also refers to items 6 and 7 in para. 61 of Tolea, as being of particular significance to this third party claims:

6. The OLA imposes a duty of reasonable inspection on both the landlord and tenant. The standard of reasonableness for each party must be determined according to their respective positions and responsibilities. The standard of reasonable inspection imposed on a landlord will likely be elevated above that imposed on a tenant where the following factors occur:
  - (a) the landlord has observed the evolution of a residence through multiple tenancies and repairs and alterations;
  - (b) the landlord has the legal responsibility for maintaining and repairing the premises;
  - (c) where the area of concern relates to a structural defect that existed prior to the current tenancy.
7. The tenant's duty will likely be limited to the reporting of defects or damages discoverable by reasonable inspection in the circumstances, [not normally extending to structural defects] not apparent upon ordinary visual observation: Klajch (Guardian ad litem of) v. Jongeneel, 2002 BCCA 14, 174 B.C.A.C. 184 (B.C. C.A.)

[352] The wording of sub para. 7 in the quote above is confusing because it is missing the words in brackets which I have underlined. I agree those words should be inserted because Silverman J. was clearly referring to para. 30 of Klajch which I set out above.

- [353] Mr. Boyes' counsel submits that the landlord has a duty in both statute and contract to provide safe premises that comply with housing standards. Regardless of notice of a particular hazard, a landlord has a duty to inspect so that hazards, an electrified male cord being but one example, are not allowed to exist until they are discovered as a result of someone being seriously injured.
- [354] Although a tenant also has a duty of reasonable inspection, the court must look to the particular facts of the case to determine the standard that each party will meet. The tenant's duty will typically be limited to those things that are discoverable on ordinary visual observation. When dealing with a longstanding defect that pre-existed the current tenancy and escaped the landlord's inspection or inspections as well as notice of prior tenants, it is difficult to foresee a situation where the current tenant could be faulted.

### Analysis and Decision

- [355] The evidence does not support a finding that Mr. Boyes ever saw the Cabinet empty in the four months that he resided in the Premises. Without the Cabinet being empty, I have already found that the backs of Receptacles #2 and #3 were not visible.
- [356] It is quite likely that the Extension Cord was plugged in during their tenancy and that the infant plaintiff grabbed the Extension Cord and pulled it out. Therefore the Extension Cord may not have been visible until after the Incident. I have found that photograph 17 does not clearly depict a cord.
- [357] Mr. Boyes' duty is limited to reporting defects or damages discoverable by reasonable inspection. If the Extension Cord was not visible and the backs of Receptacles #2 and #3 were covered with possessions, then I find that there was nothing that would have alerted Mr. Boyes to make a further inspection.
- [358] Even if Mr. Boyes was there during the initial walk-through, and I am uncertain that he was, that would have afforded him one short opportunity to discover the Receptacles. I do not find that he could be found liable on that uncertain basis.
- [359] As I have said earlier, Ms. Wong is in a different position because she had at least four to six opportunities to inspect the Premises while empty and a statutory duty to inspect for hazards. Her duty is elevated above that of a tenant because she has observed the evolution of the Premises through multiple tenancies and repairs and alterations and because she has the legal responsibility for maintaining and repairing the Premises.
- [360] It appears from Klajch that the tenant's duty under para. 9 is limited to reporting defects or damages discoverable by reasonable inspection in the circumstances not normally extending to structural defects not apparent upon ordinary visual observation.
- [361] The defendants have not proven their case against Mr. Boyes that the hazard was apparent upon ordinary visual observation during his brief tenancy.

[362] Accordingly, I dismiss the third party action against Mr. Boyes.

Third Party Action Against Sandra Ryckman Brought By Ms. Wong, Mr. Wong and Ms. Lai

### The Parties' Positions

[363] Ms. Wong, Mr. Wong and Ms. Lai make overlapping submissions to support their third party claims against Ms. Ryckman which I will deal with at the same time.

[364] They submit that the evidence supports a finding that the Cabinet, including its electrical wiring, was constructed by Ms. Ryckman during the time that she was owner of the Property. I have rejected part of that claim and have found that only Receptacle #1 was present in the Cabinet during Ms. Ryckman's ownership.

[365] Ms. Wong, Mr. Wong and Ms. Lai submit that Ms. Ryckman took no reasonable steps to ensure the Cabinet had been constructed to applicable codes at the time and prior to selling the home to Mr. Wong and Ms. Lai.

[366] They submit that even if Ms. Ryckman lacked specific knowledge of the hazard she had made assumptions about its construction without a reasonable basis. She never once looked inside the Cabinet herself for a source of the power.

[367] Mr. Wong and Ms. Lai submit that before selling the Property, Ms. Ryckman ought to have warned the purchasers that she did not know whether the Cabinet had been constructed to code and she did not know whether it had been constructed by a qualified electrician. Alternatively they submit she should have taken steps to ensure that it had been properly constructed before selling the home.

[368] They submit that a vendor has an obligation to disclose a material latent defect to a prospective buyer if the defect renders the property dangerous or unfit for habitation. A latent defect is one that is not discoverable by a purchaser through reasonable inspection: *McCluskie and Cardwell v. Perthen et al*, 2006 BCSC 333 [Cardwell], aff'd at 2007 BCCA 313.

[369] In *Cardwell (S.C.)*, Ballance J. distinguished latent and patent defects and noted that the doctrine of caveat emptor is displaced by a latent defect that is dangerous. As Ballance J. held at paras. 122 and 128:

[122] The distinction between patent and latent defects is central to a vendor's obligation of disclosure under the doctrine. Patent defects are those that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property. The authorities provide some guidance about the extent of the purchaser's obligation to inspect and make inquiries. The extent of that obligation is, in some respects, the demarcation of the distinction between latent and patent defects. In general, there is a fairly high onus on the purchaser to inspect and discover patent defects. This means that a defect which might not be observable on a casual inspection may nonetheless be patent if it would have been discoverable upon a reasonable inspection by a qualified person:

[citations omitted]. In some cases, it necessitates a purchaser retaining the appropriate experts to inspect the property [citations omitted]

- [128] Every imperfection or deficiency which a reasonably careful inspection and inquiry will not reveal cannot amount to a latent defect of the kind capable of displacing the doctrine of caveat emptor. In order to qualify as such, the defect must carry with it a consequence of substance; that is, it must be of such a nature as to render the house uninhabitable or dangerous: *McCluskie*. Beyond that, the vendor has no obligation to disparage his own property.

(Emphasis added)

- [370] Mr. Wong and Ms. Lai submit that actual knowledge of a defect is not required for a finding of liability and they quote from *McCluskie*:
- [54] The law also supports the imposition of a duty to disclose latent defects on the vendor where he is not subjectively aware of those defects, but where he is reckless as to whether or not they exist. It is up to the plaintiff to prove this degree of knowledge or recklessness.
- [371] They further submit that it is sufficient to establish that Ms. Ryckman "ought to have known" about the hazard. The defects came into existence during the course of construction occurring while Ms. Ryckman was in possession of the Property.
- [372] The question is whether Ms. Ryckman ought to have known that there was a receptacle in the Cabinet that did not comply with the electrical code.
- [373] In *Hayes v Davis*, [1991] 4 W.W.R. 678, the Court of Appeal considered the issue of a decaying tree. At para. 17, the majority quoted the following passage from the English Court of Appeal decision in *Caminer v. Northern & London Investment Trust, Ltd.*, [1947] 1 All E.R. 874 (Eng. C.A.), *aff'd* [1952] 2 All E.R. 486 (H.L.): [17] Tucker L.J. said at pp. 877:
- Ought to have known' cannot mean more than would have known if he had taken the precaution which a reasonable landowner would take'
- [374] Mr. Wong and Ms. Lai submit that Ms. Ryckman failed to ensure competent tradespeople undertook the work and she failed to supervise or check that work in any reasonable way: *Dixon v. Eldorado Development Corp.*, [2000] 1 W.W.R. 671 (B.C.S.C.).
- [375] Ms. Ryckman relies on the doctrine of caveat emptor and the release from liability contained in the Contract of Purchase and Sale.
- [376] In response to this, Mr. Wong and Ms. Lai say that the notion that a prior owner cannot escape liability simply through property transfer, quoting from *Davis v. Grand*, [2003] 67 O.R. (3d) 520:

11 that the current state of the law is that when a person creates a foreseeable danger to others on his or her property the fact that the property is transferred to another person is not, in and of itself, a reason why the transferor should immediately be relieved of liability for damages.

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[58] I do not think that the issue as to whether the defect is latent or patent is determinative. Rather, the essential question is whether the elements of a tort for negligence are present. ... The real question is - has such time lapsed since the change in ownership that it can be said either that there is no longer a relationship of proximity such that a duty of care arises on the part of the former owner or, if it does, that the negligence of the former owner is not the proximate cause of the loss, and hence, not all the elements necessary to prove negligence are present. If the defect is patent then there will usually no longer be a relationship of proximity between the injured person and the former owner. Even if the duty of care remains, it could be said that the negligence of the former owner is not the proximate cause of the loss. In such instances, the defect is of such a character that it could or should have been known to the new owner as s/he has had a reasonable opportunity to discover the condition on prompt inspection and s/he had the responsibility as owner to make the necessary repairs.

(Emphasis added)

[377] Ms. Ryckman submits that when she sold the Property to Mr. Wong and Ms. Lai in 1992 she transferred responsibility for the Premises to them pursuant to the Contract of Purchase and Sale. The Contract of Purchase and Sale is a standard form of agreement which has been used in British Columbia for decades and it says:

6. RISK: all buildings on the property and all other items included in the purchase and sale will be and remain at the risk of the Vendor until 12:01 a.m. on the Completion Date. After that time, the Property and all included items will be at the risk of the Purchaser.
9. THERE ARE NO REPRESENTATIONS, WARRANTIES, GUARANTEES, PROMISES OR AGREEMENTS OTHER THAN THOSE SET OUT HEREIN; ALL OF WHICH SURVIVE THE COMPLETION OF THE SALE.

[378] Ms. Ryckman further submits that she is protected by the legal doctrine of caveat emptor.

[379] The only exception to this doctrine is if she had or ought to have had knowledge of latent defects and she withheld this information from the defendants.

[380] Ms. Ryckman submits that in essence, the parties opposed to her are attempting to impute knowledge of the cabinetmaker, Ken Starr and anyone else that had actual knowledge of the creation of the hazard to Ms. Ryckman. As a matter of law, she submits that this cannot be done. "[L]iability for tortuous conduct is personal.": *Shah v. Stainless Cleaning Inc.*, 2008 BCCA 114 at para 14. Ms. Ryckman cannot be faulted for any action or inaction on the part of Mr. Starr.

- [381] The evidence has shown that Ms. Ryckman was a stay-at-home mother and wife. She was responsible for cooking and cleaning and caring for her children. Mr. Starr ran a business and took care of maintaining the Property and modifications to the Property. All significant decisions to renovate the Property were made by Mr. Starr. He made all arrangements in that regard as well as establishing a practice of trading work at his auto shop for work by tradesman. He arranged for the Cabinet to be made. Ms. Ryckman was not even involved in the decision to build it.
- [382] Ms. Ryckman submits that the law does not automatically deem husbands and wives to be a single entity for the purpose of imposing liability for the actions of the other. Nor does the law automatically deem husbands and wives act as each other's agents with respect to third parties: Ellis at para. 28.
- [383] Further, in McCluskie, though liability was imposed on Mr. Reynolds for his reckless concealment of information from the geotechnical engineer and in turn the purchasers with respect to slope stability issues, the court specifically did not impose liability on his wife.
- 56 Mr. Reynolds is liable as a vendor of the property, for failing to disclose a latent defect, concerning the existence of which he was reckless. Mrs. Reynolds was also a vendor. However she was not a builder. The plaintiff did not succeed in proving that she knew or ought to have known that slope stability was a problem. I therefore do not ascribe to her the recklessness that Mr. Reynolds, with his particular knowledge of the facts and the information given to the engineer, has exhibited. She is therefore not liable for a failure to disclose.
- [384] Ms. Ryckman submits that she is far removed from a proximate relationship to the infant plaintiff and does not owe her a duty.
- [385] Ms. Ryckman agrees that the passage of time may not limit the duty to warn according to Comstock International Limited v. Edmonton Flying Club, 1979 ABCA 217 [Comstock] (leave to appeal to the Supreme Court of Canada was refused, see (1979), 21 A.R. 270 (S.C.C.)). In Comstock, the basis for the Court of Appeal's decision was that the defendant Comstock had knowledge of defective wiring and its failure, despite that knowledge, to take steps to warn users as to how to avoid the risk meant they continued to have a duty to warn
- [386] Similar results occurred in Forsyth at all v. Sikorsky et al, 2000 BCSC 642 which dealt with a claim for personal injury resulting from a 1995 helicopter crash caused by field spindles and the tail rotor of the helicopter. The defendant was aware that some of the spindles it manufactured had failed. The court held the defendant was liable for failure to warn. The rationale for the finding of fault was grounded in the defendant's knowledge of the defect and its corresponding failure to take steps to warn the users of the helicopter.
- [387] Ms. Ryckman's counsel submits that she had no knowledge of how the wiring of the Cabinet was configured. She is not obliged to have acquired such knowledge and she did not acquire that knowledge after she transferred the Premises to the Mr. Wong and Ms. Lai.

## Analysis and Decision

- [388] I have accepted the evidence that Receptacle #1 was not installed to electrical code, however, I have found that it was not the proximate cause of the damage. It was not foreseeable that it would be altered and contribute to the cause of the damage. By itself, it did not pose a significant hazard. It was unsafe because it was concealed and could not be regularly inspected. In its original configuration with the power cord, Receptacle #1 did not render the Premises dangerous and unfit for habitation and was not the kind of latent defect of the kind capable of displacing the doctrine of caveat emptor as anticipated in Cardwell.
- [389] It is clear to me that Ms. Ryckman had no knowledge of its existence. Both she and her son thought that the pony wall still existed behind the Cabinet and that the electrical appliances were plugged into the electrical outlet which had always been in the pony wall.
- [390] There is no evidence of any sparking or shorting out of electrical appliances which might have drawn Ms. Ryckman's attention to a problem with the Cabinet.
- [391] Unlike the other defendants, Ms. Ryckman has no duty to continue inspecting the Property.
- [392] The very concept of negligence presupposes the actor could foresee harm if he conducted himself as a reasonably prudent person. I have found that it was not foreseeable that Receptacle #1 would cause this harm.
- [393] If any duty is owed by Ms. Ryckman, it would be to Mr. Wong and Ms. Lai. As a vendor she could not intentionally conceal a latent construction defect and avoid liability for damage caused by that defect by selling the Property.
- [394] Given that this did not occur, Ms. Ryckman can rely on the doctrine of caveat emptor as a defence to the third party notices against her. Ms. Ryckman's legal obligation regarding the Property ended when she sold the Property to Mr. Wong and Ms. Lai.
- [395] There is no evidence that she withheld information by way of the disclosure statement. There is no allegation of misrepresentation.
- [396] It is my view that the third party action should be dismissed against Ms. Ryckman.

## COSTS

- [397] The infant plaintiff has been fully successful in her claim and is entitled to costs at Scale B from the defendants Ms. Wong, Mr. Wong and Ms. Lai.
- [398] The third parties Mr. Boyes and Ms. Ryckman have also been successful and are entitled to their costs at Scale B from the defendants Mr. Wong, Ms. Wong and Ms. Lai.

"Young J."

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