

*Case Name:*

**Jia v. Toronto Standard Condominium Corp. No. 1479**

**Between**  
**Hui Jun Jia, Plaintiff, and**  
**Toronto Standard Condominium Corporation No. 1479 also known**  
**as Forest Vista Inc., Del Property Management Inc. and Donald**  
**Keeley, Defendants**

[2010] O.J. No. 3201

2010 ONSC 3433

Court File No. CV-08-365889

Ontario Superior Court of Justice

**L.B. Roberts J.**

Heard: December 14-17, 2009.

Judgment: June 22, 2010.

(133 paras.)

**Counsel:**

J. Lester Davies, for the Plaintiff.

Michael Burgar, for the Defendants.

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**L.B. ROBERTS J.:-**

**Overview of the Action and the Parties:**

**1** The plaintiff's action against the defendants is for damages arising out of her forcible arrest and eviction on January 31, 2007 by Donald Keeley, an employee of Toronto Standard Condominium Corporation No. 1479, also known as Forest Vista Inc., from the condominium complex located at 61 Town Centre in Toronto, which is owned by Forest Vista.

**2** Ms. Jia is 45 years old. She immigrated to Canada with her young son in 1998. Trained as a professional engineer, Ms. Jia became a full time real estate agent in November 2001 and has worked with Re/Max Crossroads Realty Inc. since October 2005.

**3** Mr. Keeley started employment as the first relief superintendent with Forest Vista on December 1, 2006. He was on its board from 2002 to 2008 and owned a condominium unit in the building until 2005. Prior to his employment with Forest Vista, he spent over thirty years as a police constable with the Toronto Police Services from which he retired in 2006.

**4** Del Property Management Inc. is retained by Forest Vista to manage the 61 Town Centre condominium complex.

5 The following facts are undisputed. In the early evening of January 31, 2007, Ms. Jia went to the 61 Town Centre Court condominium complex to meet her clients, Yi Bing Gao and Shu Ye, who owned unit 2001. They were in the process of selling their condominium unit and wished to retrieve the unit's keys from their tenant who was moving out of the unit, return the tenant's deposit, inspect the unit, and obtain a status certificate from Forest Vista. Ms. Jia was the listing agent on the sale of unit 2001.

6 Mr. Gao and Ms. Ye tried to obtain a key to their unit from Cecilia Badu, the security guard employed by Del Property who was on duty that evening. They became angry with her when she could not give them a key or access to their unit. Ultimately, they reached their tenant at his new residence and arranged to meet him there to obtain keys to the unit. They asked Ms. Jia to wait for them in the inner lobby of the condominium unit, which she did, with Ms. Badu's permission.

7 Responding to a call from Andrea Cooper, the Condominium Manager of Forest Vista, arising out of Ms. Badu's conversation with the unit owners, Mr. Keeley approached Ms. Jia who was sitting in the inner lobby. It is not disputed that Mr. Keeley asked Ms. Jia to leave, that she did not immediately comply with his request, and that he subsequently physically ejected her from the inner lobby.

8 The security camera located in the exterior lobby of the building recorded the exit by Mr. Keeley and Ms. Jia from the inner lobby and their interactions in the exterior lobby of the condominium. The video footage from the security camera was shown at trial on the consent of the parties through their counsel. Counsel for the parties confirmed that no one was taking issue with the accuracy of the video footage from the security camera.

#### **Issues:**

9 This case turns on the court's assessment of the credibility of the parties, Ms. Jia and Mr. Keeley, and, in particular, their competing versions of the events that led up to Ms. Jia's expulsion from the condominium's inner lobby, which were not captured on the exterior lobby's security camera.

10 The opposing accounts may be summarized as follows: Ms. Jia testified that she was sitting quietly returning messages on her mobile telephone when Mr. Keeley aggressively approached her, inexplicably and unreasonably demanded her to leave, and forcibly ejected her from the inner lobby; whereas Mr. Keeley asserted that Ms. Jia was behaving in a bizarre and erratic way, which led to his approaching her, asking her politely to leave, and then requiring him, for the safety and security of the condominium and its unit owners, to remove her physically from the inner lobby when she refused to leave.

11 This is a classic "she said - he said" case. Depending on the court's findings of fact, the parties are not in disagreement about the outcome: if Ms. Jia's reporting of events is accepted, her action should be allowed; if Mr. Keeley is believed, Ms. Jia's action should be dismissed.

12 In other words, if Ms. Jia is found to have been trespassing and acting in the alarming way described by Mr. Keeley, Mr. Keeley's ejection of her was justified; otherwise, the parties agree that Mr. Keeley's ejection of her was an assault and that Forest Vista is vicariously liable to Ms. Jia for any damages proven to have been caused by the actions of its employee, Mr. Keeley, that were carried out in the course of his employment.

13 The following issues require determination in this action:

- i. Was Ms. Jia trespassing?
- ii. Was Mr. Keeley justified in using force and did Mr. Keeley use reasonable force to eject Ms. Jia as a trespasser?
- iii. Did Ms. Jia willingly assume the risk of injury?
- iv. Is Del Property Management Inc. liable for any losses suffered by Ms. Jia?
- v. What damages, if any, did Ms. Jia suffer?

#### **Analysis:**

##### **i. Was Ms. Jia trespassing?**

14 The parties agree that it is permissible for a property owner to defend its personal and real property against trespassers by the use of reasonable force. There is also no disagreement with the principle that even a person, who has lawfully entered premises, commits a trespass if that person remains there after his right of entry has ceased.<sup>1</sup>

15 The defendants referenced the following statement from *Salmond on Torts*: When a person's license has been properly terminated, that person may be ejected as a trespasser if, after requested to leave and after the lapse of a reasonable amount of time, that person fails to leave the premises.<sup>2</sup>

16 Applying the above principles to the present case, it is undisputed that, at least initially, Ms. Jia was permitted to be on the condominium premises and was not trespassing. She attended in the company of the owners of a condominium unit in the building who, according to Ms. Badu, were expected to attend that evening to obtain a status certificate for their unit, and then was allowed by Forest Vista's authorized agent, Ms. Badu, to remain in the inner lobby.

17 It is also undisputed that Mr. Keeley purported to revoke Ms. Jia's licence to remain on the premises when he asked her to leave.

18 Plaintiff's counsel took issue with Mr. Keeley's authority as relief superintendent to revoke the permission granted by Ms. Badu to Ms. Jia to remain on the premises. While it is true that Ms. Badu was principally responsible that evening for the security of the building, this does not mean that Mr. Keeley had no authority to take steps to deal with an urgent situation if one arose. I agree with the defendants' submission that, if the situation had changed and he had reasonable grounds, as an authorized agent of Forest Vista, Mr. Keeley was entitled on behalf of Forest Vista to revoke the permission granted to Ms. Jia by Ms. Badu.

19 Mr. Keeley testified that it was because of Ms. Jia's allegedly bizarre behaviour that he had asked her to leave; he conceded that he would not have done so had he not been urgently concerned for the immediate safety and security of the condominium's property and its residents.

20 To determine the key question of whether Ms. Jia was behaving in the manner alleged by Mr. Keeley, I turn next to the testimony of Ms. Jia and Mr. Keeley and to other evidence that serves to contradict or confirm their testimony.

**Ms. Jia's evidence:**

21 Ms. Jia testified that one of the owners, Ms. Ye, asked Ms. Badu for a key or access to the unit when she could not reach her tenant. Although she accompanied her client, Ms. Jia said that she did not ask Ms. Badu for a key or access to the unit. When Ms. Badu advised Ms. Ye that she did not have a key, the latter became angry and started to argue with Ms. Badu. Mr. Gao joined them and voiced his frustration with Ms. Badu. Both owners threatened to take their complaints to the property manager.

22 According to Ms. Jia, the owners were really upset because they were concerned about the state of the unit for the purpose of closing its sale. The closing date for the transaction was March 31, 2007. An agreement of purchase and sale had been signed on January 24, 2007. The status certificate had to be supplied within ten days of January 24, 2007.

23 As noted above, the unit owners' difficulty was resolved when they subsequently reached their tenant and arranged to meet to retrieve their keys. In the meantime, after her clients had left, Ms. Jia was permitted by Ms. Badu to sit in the inner lobby. Ms. Jia spent her time returning and making a few telephone calls.

24 Ms. Badu never told Ms. Jia to leave although she walked over to her once when she was sitting in the inner lobby and said that property management was on the telephone and wanted to talk to the owners. Ms. Badu asked if she wanted to speak with the property manager, which Ms. Jia declined to do because she was not the owner. Ms. Badu did not tell Ms. Jia that she had called or intended to call the police.

25 Ms. Jia had been sitting the lobby chair for about twenty minutes when Mr. Keeley came up to her. Before he approached her, Ms. Jia had seen him come up from the lower level and then speak to Ms. Badu. In response to Mr. Keeley's questions, Ms. Jia explained that she was a real estate agent and that she was waiting for her clients to return. According to Ms. Jia, she did not request a key from Mr. Keeley.

26 Ms. Jia asked Mr. Keeley who he was and why management did not help her clients. Mr. Keeley identified himself as the superintendent and told her that he had the power to throw her out and that she would have to leave. Ms. Jia was concerned because the security guard had permitted her to wait for her clients and it was very cold outside. She asked Mr. Keeley why she had to leave and offered to call her clients so that he could speak with them.

27 Mr. Keeley declined to speak with Ms. Jia's clients and closed her telephone. He did not speak to her about her conversation with Ms. Badu. He again asked her to leave. She thought he was joking. She said that she thought that she had the right to stay there to wait for her clients. He repeated to her that he had the power to throw her out. She understood that he was the superintendent, but disagreed that he had the power to make her leave. She was sitting in the common area of the condominium and believed that the owners had the right to allow her to stay. If the police had told her to leave, she would have left.

28 According to Ms. Jia, she did not initiate any physical contact with Mr. Keeley. On the contrary, she said that she would call the police if he dared to touch her. Mr. Keeley then apparently said "Fuck you Asian" or "Fucking Agent", grabbed her purse and threw it out the lobby door. He grabbed her chest and dragged her. Although she tried to

get rid of him, she did not bite him. He was very fast. She told him to stop. He pulled her out of the inner lobby and threw her out the door. She kept yelling for help.

**29** Ms. Jia landed on her back in the outer lobby. Mr. Keeley then jumped on her chest, punched her face and began to choke her neck. She struggled to try to get rid of his hands. When he choked her, she could not speak out or breathe and believes that she passed out for a couple of seconds. Her legs softened down. He then stood up.

**30** After Mr. Keeley released her, Ms. Jia stood up right away. She called to Ms. Badu for help and said she thought that she was having a heart attack. From the security desk, Ms. Badu could see the outer lobby. Ms. Badu did not come to help or speak with her. Using her cell phone, Ms. Jia called 911 and her boyfriend.

**31** Mr. Keeley returned from the inner lobby and gave her the status certificate for her clients' unit and left. He did not ask her how she was or if she needed assistance.

**32** Ms. Jia remained in the outer lobby, accompanied by a woman with a stroller and small child who stayed with her and comforted her. Help arrived very fast. The firefighters arrived first, followed by the ambulance attendants and then the police.

**33** Ms. Jia confirmed that the security video accurately showed what had happened in the outer lobby.

**Mr. Keeley's evidence:**

**34** On January 31, 2007, Mr. Keeley was in the building for a board meeting. He received a call from Andrea Cooper, the property manager for Forest Vista, who advised that Ms. Badu was having a problem with "unknown persons" at the front desk and he was asked to assist her. In particular, Mr. Keeley said that he was told by Ms. Cooper and then Ms. Badu that she was having trouble with the "female around the corner" (identified by Mr. Keeley as Ms. Jia) who had caused a disturbance because she had wanted to get into a unit.

**35** As he approached Ms. Jia, he saw that she had clenched fists and was throwing herself back and forth in the lobby chair in which she was sitting, kicking her legs out. She told him that she was a real estate agent and that the owners were out chasing the tenants. Mr. Keeley told her that she would have to see the property manager in the morning. Her demeanour was extremely hostile and combative.

**36** Ms. Jia was apparently very upset about what had happened with her clients and commented that keys should have been made available to them. Mr. Keeley said that she then stood up and started shouting that she had to get into the unit to shut off equipment in the unit because there could be a fire, followed by the statement that she needed to get her "marijuana".

**37** Mr. Keeley then called over to Ms. Badu and asked her to call the police again, to which Ms. Badu responded that she had already called them and that she would give them another call. When Ms. Jia heard Ms. Badu say that she was calling the police, she "went crazy", became "completely hysterical", yelling, "No, no, no, no!", and threw herself back into the chair with such force that he could hear the back of the chair cracking. She rocked back and forth in the chair.

**38** Ms. Jia said that she would go to the door of the unit and let herself in. He told her that he could not let her do that. He told her to please settle down or he would have to ask her to leave. She said that she was not going to listen to him. He told her that he was the superintendent and that under the *Trespass to Property Act* he could ask her to leave. He asked her to please wait outside. He walked around, approached her and waited. He asked her again to wait in the outer lobby.

**39** In response, Ms. Jia started to growl at him "like a dog" and punched him in the chest. He was taken aback and tried to assess the situation. By this point, the arm of the chair had broken loose at the back of the chair and had come off the chair. Ms. Jia's purse was on an end table. He grabbed her purse. She picked up the end of the table, threw it, flipping the table over. The table top cracked, breaking down the seam. It was a heavy marble-topped table.

**40** Mr. Keeley then opened the lobby door and threw out her purse, hoping that Ms. Jia would follow. Instead, she again yelled, "No, no, no, no!" and returned to the chair. He asked her three separate times to leave. He went to reach out to take her by the arm. She lunged at him and ripped his shirt. She bit his left biceps and he pushed her away at arm's length. He spun her around backwards and pushed her to the lobby door and out of the lobby before "she could break anything else". He kept moving her backwards through the door. At the same time, she was kicking the foam columns in the lobby, and hitting the lobby door and him.

**41** They stopped talking and he had difficulty getting her through the door. As they were going out the door, he tripped or stumbled over the threshold. As they started to fall, he felt his only option was to pin her down to control her.

She was biting and snarling at him. He tried to hold her down. She stopped and he released her. Mr. Keeley denied placing his knees on Ms. Jia's chest, punching her face or putting his hands around her neck. He does not know how she injured herself.

42 Mr. Keeley also confirmed that the security video portrayed accurately what happened after they went through the door.

**iii. Analysis of the competing versions of events:**

43 In assessing the respective credibility of Ms. Jia and Mr. Keeley, I find helpful the statement of O'Halloran J.A. in *R. v. Pressley*<sup>3</sup> that the "most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case".

44 I have come to the conclusion that Ms. Jia's evidence must be preferred over Mr. Keeley's testimony. Ms. Jia's evidence was inherently consistent, free of contradictions, and made sense; and it was corroborated by the testimony given by Ms. Badu and by the security video. Mr. Keeley's evidence was riddled with inconsistencies and contradictions, illogical, and contrary in important aspects to the evidence given by Ms. Badu and to the events shown in the security video.

45 Ms. Jia denied angrily rocking back and forth, breaking things, yelling hysterically, or otherwise carrying on in the crazed manner alleged by Mr. Keeley. She just complained to Mr. Keeley that property management should have helped her clients. She was not angry with Ms. Badu or anyone else for not providing the key or access to the unit.

46 This makes sense. There was no reason for Ms. Jia to be angry while she was sitting in the inner lobby knowing, as she said, that her clients' issue had been resolved. By that time, any angry confrontation between her clients and Ms. Badu about the keys was resolved as the owners had succeeded in locating their tenant and securing access to their unit, and the owners would be returning and did ultimately return in a short period of time. The most compelling and logical version of events is that Ms. Jia was indeed just sitting there quietly returning telephone messages.

**Cecilia Badu's evidence:**

47 Ms. Jia's evidence is corroborated by the evidence of the security guard, Ms. Badu. I have no reason to discount Ms. Badu's evidence. Indeed, if she were aligned with any other party, it would likely have been with Mr. Keeley and the other defendants.

48 Ms. Badu confirmed during her testimony that it was the unit owners and not Ms. Jia who angrily confronted her about the keys. Ms. Badu remembers that the owners were "serious" and "hot" but not Ms. Jia. Ms. Badu corroborated Ms. Jia's testimony that Ms. Ye asked Ms. Badu for a key and that Mr. Gao and Ms. Ye were insisting to have a key for their unit. Ms. Badu refused entry to them because their names were not on the residents list.

49 Ms. Badu also testified that the unit owners asked for the telephone number of the property manager. Because they were insisting, Ms. Badu called her supervisor who confirmed that she could not give keys to them. Mr. Gao spoke to Ms. Badu's supervisor on the telephone. Ms. Badu testified that the owners and Ms. Jia left her desk and went to sit in the inner lobby. Mr. Gao said they would call the police about her.<sup>4</sup>

50 Ms. Badu confirmed that she allowed Ms. Jia to remain in the interior lobby area while her clients left to retrieve keys from their tenant. Most important, Ms. Badu confirmed at trial and in her notes that for the fifteen or twenty minutes after the owners' departure and prior to Mr. Keeley's arrival, Ms. Jia was sitting quietly in the lobby area and answered her calmly when Ms. Badu asked if she would like to speak to the property manager.

51 Ms. Badu then went to the inner lobby where she saw only Ms. Jia. Ms. Badu told Ms. Jia that the property manager wanted to speak to her but Ms. Jia declined to do so and advised Ms. Badu that the owners had gone out to look for the tenant. Ms. Badu observed that Ms. Jia was not talking loudly or harassing tenants, but was sitting there alone quietly waiting for her clients. Ms. Badu confirmed that at no time did she ask Ms. Jia to leave. She also confirmed at trial that she made no notes in her log of that evening between 18:30 and 18:44 p.m. because nothing happened during the time that the owners left and Mr. Keeley arrived but that if something had occurred, she would have noted it.

52 At 18:44 p.m., Mr. Keeley arrived and he asked Ms. Badu what was going on and she explained the situation to him. Ms. Badu told Mr. Keeley that the owners had signed the status certificate and wanted keys and that she could not give the keys to them. Ms. Badu confirmed that all that Mr. Keeley and she discussed was the owners' signing the status certificate and their asking for keys and access. Contrary to Mr. Keeley's evidence, Ms. Badu did not testify that she had told Mr. Keeley that Ms. Jia was causing a disturbance or that she had called the police.

**53** Ms. Badu's description of Ms. Jia is completely at odds with Mr. Keeley's allegations of Ms. Jia's wild behaviour. Ms. Badu saw Mr. Keeley approach Ms. Jia and noted that they were initially speaking calmly to each other. She heard Mr. Keeley ask Ms. Jia who she was and her reply that she was the unit owners' agent. Mr. Keeley answered that he was the superintendent.

**54** Ms. Badu then heard Ms. Jia speaking loudly at the top of her voice. She left her desk and went over to where Ms. Jia was sitting. She saw Mr. Keeley bent close to Ms. Jia saying that she had to leave because she was not a resident and not visiting. Ms. Badu confirmed that Ms. Jia was not shouting at the time that Ms. Badu was standing there. Ms. Jia was just talking in a normal voice at that time.

**55** Ms. Badu then went back to her desk. She did not testify that Mr. Keeley called out to her for assistance. She heard a noise from Ms. Jia that continued to the exit door. When the noise was getting closer to the lobby door, she heard it more loudly. She did not see Ms. Jia or Mr. Keeley, or anything that occurred in the inner lobby.

**56** If Ms. Badu could hear loud voices having been raised, as she testified, she would certainly have heard furniture having been overturned and noticed the kind of hysterical screaming and thrashing about described by Mr. Keeley. Further, Ms. Badu would have heard Mr. Keeley's cries for assistance.

**57** When Ms. Badu turned to see Mr. Keeley and Ms. Jia once they were in the outer lobby, at that point, they were not touching. Mr. Keeley was on his knees and Ms. Jia was sitting on the other side of the outer lobby. Ms. Jia stood up from the ground and Ms. Badu could hear her say that someone had assaulted her and that she thought she was having a heart attack.

**58** Finally, contrary to Mr. Keeley's allegations about the broken chair, Ms. Badu did not notice anything wrong with the lobby chair. Ms. Badu testified that she did not see that the chair was broken when she went to speak to Ms. Jia in the lobby or at any time thereafter. Ms. Badu confirmed that, if she had seen that the chair was broken, she would have noted it in an incident report, but that she never made an incident report about it. Ms. Badu confirmed that, contrary to Mr. Keeley's allegations, "There was nothing like that."

#### **Security Camera Video:**

**59** Mr. Keeley's evidence concerning the events in the outer lobby are also contradicted by the clear images of the security camera video, which support Ms. Jia's evidence, as follows:

- i. Although Mr. Keeley claimed first that he fell with Ms. Jia over the threshold of the lobby door and, next, that he placed Ms. Jia carefully on the outer lobby floor because he was concerned about her safety, the video shows that Mr. Keeley did not trip over the threshold but, with his two feet firmly straddling the lobby door threshold, dragged Ms. Jia across it and then flung her onto the lobby floor where she landed on her back.
- ii. Contrary to Mr. Keeley's assertions that he was merely trying to pin her down to control Ms. Jia's wild thrashings and that he did not place his knees on her chest or on her body but on the floor, the video shows that, after flinging Ms. Jia to the floor, Mr. Keeley immediately pinned down Ms. Jia, with his right knee clearly on the left side of her upper body and his left knee on her right leg. Mr. Keeley's knees were not touching the floor and were on Ms. Jia's body.
- iii. Contrary to Mr. Keeley's assertions that he did not choke Ms. Jia, the video shows that his hands are around her neck area.
- iv. Contrary to Mr. Keeley's assertions that Ms. Jia was trying to bite and hit him, the video shows that she did not and could not do either to him because of the way that he was pinning her to the lobby floor.
- v. Contrary to Mr. Keeley's assertion that Ms. Jia had torn his shirt during their confrontation in the inner lobby, the video shows that Mr. Keeley's shirt was not ripped but perhaps unbuttoned. After releasing Ms. Jia, Mr. Keeley stood there for a few moments calmly buttoning up his shirt and speaking to Ms. Jia. He then returned some seconds later and handed the envelope containing the status certificate to Ms. Jia.

**60** In addition to the above contradictions, Mr. Keeley's own testimony was inherently inconsistent and given in a manner that completely belied his credibility. Although I appreciate that no one should expect perfection in testimony and that even honest and truthful witnesses are often nervous or even defensive when giving their evidence, I have no hesitation in concluding that Mr. Keeley was simply not telling the truth about the relevant events in this case.

**61** During his examination in chief, Mr. Keeley changed his evidence in significant respects. Some representative examples are as follows:

- i. As already noted, Mr. Keeley first said that Ms. Jia and he tripped or fell over the lobby door threshold. He later testified that, when crossing the threshold, he was thinking carefully about where he should place Ms. Jia and that he thought the safest thing was to put her down on the ground and hold her there until she calmed down. He did not think that there was a risk of injury because he was being careful.
- ii. At first Mr. Keeley said that Ms. Jia had caused the arm to come away from the chair by rocking back and forth in it. Subsequently, he testified that the arm had come off during his "tussle" with Ms. Jia. Finally, he said that he had tripped over the leg of the chair which had allegedly fallen off and which he kicked under the chair.
- iii. Mr. Keeley initially said that, when he first approached Ms. Jia, she was upset and angry and that, after a brief interaction, she became "hysterical" and then he called out to Ms. Badu for help. Later, he said that, as he approached her, she was having a temper tantrum in the chair, she was making noticeable noise, notable enough to hear it from the security desk, and that, as he approached her, she became "more hysterical". He testified that he could not explain why no one else saw this.
- iv. In cross-examination, Mr. Keeley admitted at first that his right knee might have been on Ms. Jia's left knee, as shown on the security video, but then changed his evidence, saying, notwithstanding the video footage displaying the contrary, that, "I know that my knee was on the floor because I never knelt on her".

**62** During his cross-examination, Mr. Keeley became belligerent and combative. He made speeches instead of responding to simple questions, asked questions of and made statements to plaintiff's counsel who could not have been more civil in the manner in which he posed his questions. Further, Mr. Keeley became more and more agitated during the cross-examination, reddening, rocking, rubbing his face with his hands, and softly groaning.

**63** For example, when Mr. Davies was setting up a question, Mr. Keeley impatiently told him, "Just ask your question, Sir." Later, rather than answer a proper question, Mr. Keeley made the comment, "You sure are hung up on me being a police officer". During another remarkable exchange, when asked why he would not admit the obvious, Mr. Keeley replied, "Lawyers usually take it and run off to weird places where I don't want to go".

**64** As already noted, Mr. Keeley refused unreasonably to concede what the security video plainly displayed. Mr. Keeley also contradicted his own counsel with respect to the legitimacy of the video itself, saying that, while a police officer, he had "made case law" in this area and suggested that the manner in which the video was being presented was "against the case law".

**65** Another example of Mr. Keeley's refusal to admit the obvious was in relation to Ms. Badu's evidence that contradicted his own. When shown Ms. Badu's notes that indicated that she had noted that nothing had occurred during the time period when Ms. Jia's hysterics allegedly took place, Mr. Keeley had no explanation for the discrepancy. When asked to explain why he did not ask Ms. Badu to take control of Ms. Jia, Mr. Keeley alleged that he could not turn Ms. Jia over to Ms. Badu because the latter had "run away" and refused to answer his cries for help.

**66** Finally, Mr. Keeley's photographs of the lobby chair that Ms. Jia apparently broke do not support Mr. Keeley's evidence. Photographs of the chair were not taken immediately following the incident. Mr. Keeley acknowledged that the chair had been moved to the downstairs boardroom where the photographs were taken a few weeks after the incident and that he did not know how the chair was moved. He also conceded that he did not know but was told that the chair in the boardroom was the same chair as in the lobby.

**67** Even if it were the same chair, the photographs show that the arm was not cracked or broken as alleged by Mr. Keeley but merely that the arm had become loosened from its dowels. It would have been a simple thing to place the arm back on the chair.

**68** As a result, I accept Ms. Jia's evidence, as supported by Ms. Badu, that there was nothing wrong with the chair when Ms. Jia left it.

**69** To repeat the judicial test of truth noted earlier, there is an utter lack of harmony in Mr. Keeley's evidence with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of this case. Most of it defies belief.

**70** Ms. Jia is a well-educated, elegant woman who is highly regarded by her employer of several years and who appears to be in a stable relationship with her son and boyfriend of many years. It is frankly incredible that she would

throw the kind of "tantrum" suggested by Mr. Keeley simply because her clients were denied access to the unit, especially, as her clients were able to retrieve a key and were to return at any moment.

71 Had Ms. Jia been carrying on in the extraordinary manner alleged by Mr. Keeley, one would have expected the various individuals who passed in and out of the lobby as shown on the security video to have complained or at least shown some distress, and certainly that Ms. Badu would have heard it.

72 I do not accept for one moment that Ms. Jia said any of the bizarre things attributed to her by Mr. Keeley about wanting to retrieve marijuana, that she was worried the unit was aflame, or that she "growled like a dog" on his approach. Finally, I do not find it remotely believable that Ms. Jia would have overturned a very heavy table. No photographs of the table were produced at trial. As Mr. Keeley acknowledged, he doubted that he would have had the strength to do it.

73 Further, the erratic conduct attributed to Ms. Jia by Mr. Keeley would be clearly symptomatic of some sort of physical and mental illness or breakdown. In none of the medical clinical notes and records that were filed is there the slightest mention that Ms. Jia had any sort of pre-existing or ongoing illness that would account for such behaviour. The defendants did not lead any such evidence nor did they attempt to elicit any such evidence during Ms. Jia's cross-examination.

74 Finally, it makes no sense that, if Ms. Jia were truly carrying on in the insane manner described by Mr. Keeley and he was sincerely concerned that she was dangerous and had to be immediately removed, he would leave her in the outer lobby of the building and not ensure that she had vacated the building. In the same way, he would not have stood around buttoning up his shirt or returned with the owners' status certificate; he would have immediately called the police. He did not do so.

75 The evidence establishes quite clearly in my view that Mr. Keeley simply misread and overreacted to the situation that he was being asked to investigate, having initially misunderstood that Ms. Jia was causing trouble. As Mr. Keeley himself ultimately acknowledged, "This is one of those cases where you wish you had acted differently - obviously."

76 Mr. Keeley made the mistake of aggressively approaching Ms. Jia who, not knowing the much larger man who was looming over her, naturally became apprehensive and refused to acquiesce immediately to Mr. Keeley's request that she leave the building. I find that Ms. Jia's questioning of Mr. Keeley's request also natural in the circumstances: she had done nothing wrong, she had been asked by her clients to wait in the lobby, and the security guard had permitted her to do so and had not asked her to leave. As Mr. Keeley acknowledged, all of this occurred within a very short period of time.

77 It is understandable that Ms. Jia raised her voice in response to Mr. Keeley having threatened to throw her out and having grabbed her by the arm. She was perfectly entitled to struggle to try to free herself from Mr. Keeley. If Ms. Jia hit him or even bit him, which she denies, it was completely defensible in the circumstances of this case where Ms. Jia was being assaulted by a large man who was half a foot taller and more than twice as heavy as she was on that date.

78 In the present case, I find that Ms. Jia was not trespassing. She had been given permission by Forest Vista's authorized agent to remain in the lobby. As Mr. Keeley admitted, security guards would ordinarily ask trespassers to leave. Ms. Badu did not ask him to remove Ms. Jia or issue a trespass notice or ask Ms. Jia to leave because she was sitting quietly. Without reasonable explanation or justification, Mr. Keeley peremptorily revoked that licence.

79 As a result, I find that Mr. Keeley had no reasonable basis for asking Ms. Jia to leave, for arresting her or for ejecting her.

**ii. Was Mr. Keeley justified in using force and did Mr. Keeley use reasonable force to eject Ms. Jia as a trespasser?**

80 The force that Mr. Keeley used was unnecessary in the circumstances of this case. Even if he had good reason to arrest and eject Ms. Jia, the force that he used was excessive.

81 While there is no question that occupiers may direct persons to leave their property, as the defendants acknowledged, it must be done on a reasonable basis. An occupier must consider whether the use of force is a necessary or reasonable course of action in the first place and whether it might lead to a confrontation more serious than the alleged trespass. The latitude shown to a police officer will not necessarily be shown to an occupier who is under no duty to act and who instigates a confrontation with a trespasser, as I have found Mr. Keeley did in the present case.<sup>5</sup>



82 On January 31, 2007, Mr. Keeley weighed 230 pounds; and he is 5 feet and 10 inches tall. On that date, Ms. Jia weighed 110 pounds. She is around 5 feet four inches tall. Ms. Jia was thrown on the floor by Mr. Keeley and she landed on her back. She was inert just before he pinned her to the floor with his knee on her chest and his hands to her throat.

83 There can be no justification for this kind of excessive force in the circumstances of this case as I have found them.

### iii. Did Ms. Jia willingly assume the risk of injury?

84 The defendants argued that Ms. Jia willingly assumed the risk of injury caused by her arrest and ejection at the hands of Mr. Keeley because she wrongly refused to leave when asked. According to the defendants' submissions, if a person fails to leave once asked to leave, that person faces the risk of being touched and of being injured as a result of that refusal to leave.

85 The success of the defendants' assertions depends on whether there are reasonable grounds to ask someone to leave, a reasonable time has elapsed since the request was made, there has been no compliance, and other options, short of arrest and ejection have been attempted.<sup>6</sup>

86 As I have already found, Ms. Jia's refusal to comply immediately with Mr. Keeley's request that she leave was reasonable in the circumstances of this case where she had been permitted to stay, had done nothing wrong, and there was no reason for her to leave. Mr. Keeley overreacted and did not give her a reasonable opportunity to understand the situation and to comply before he physically arrested and ejected her.

87 In these circumstances, it is not reasonable that Ms. Jia should have assumed that her mild resistance would have led to the kind of physical and dramatic altercation that ensued with Mr. Keeley. As Ms. Jia stated, if she had known that she was going to be assaulted, she would have left immediately and waited in her car for her clients' return.

88 When Ms. Jia reasonably questioned his authority, given Ms. Badu's permission for her to sit in the lobby, Mr. Keeley overreacted and the situation escalated out of control. Ms. Jia was not given a reasonable time to comply. As Mr. Keeley ruefully acknowledged during his cross-examination, he wished he would have done things differently.

### iv. Is Del Property Management Inc. liable for any losses suffered by Ms. Jia?

89 As occupier of the premises, Forest Vista has a positive duty to take such care as is reasonable to keep the premises reasonably safe for all persons in attendance.<sup>7</sup> Forest Vista, as Mr. Keeley's employer, and not Del Property Management, is vicariously liable for Mr. Keeley's actions.

90 No employee or agent of Del Property participated in Mr. Keeley's assault and battery of Ms. Jia. There is no evidence that Ms. Badu saw Mr. Keeley assault Ms. Jia and fail to intervene. As Ms. Jia and Mr. Keeley both testified, the altercation occurred very quickly. According to Ms. Badu's uncontested evidence, she did not see Ms. Jia and Mr. Keeley until they emerged into the outer lobby. By the time that she returned to the window of the security office and saw them, Ms. Jia and Mr. Keeley had disengaged.

91 As a result, I do not find that Del Property Management is liable for any losses suffered by Ms. Jia.

### v. What damages, if any, did Ms. Jia suffer?

92 Ms. Jia claims damages from the defendants for physical injuries, pecuniary losses, and aggravated and punitive damages.

93 While the defendants conceded that it was certainly possible that Ms. Jia had incurred injuries, they say that she only had herself to blame and that, in any event, any damages that she may have suffered are minimal, suggesting no more than \$5,000.00 for general damages and \$5,000.00 for loss of income.

#### General, Non Pecuniary Damages:

94 With respect to her physical injuries, Ms. Jia alleges that she suffered bruises to her neck and chest area, and three broken ribs as a result of Mr. Keeley having thrown her to the ground, knelt on her ribs, and grabbed her around the neck.

95 In the Ambulance Call Report, it was noted that Ms. Jia was inconsolable, had neck and facial discomfort, as well as anxiety. A small abrasion was noted to her lateral anterior neck. She also had chest wall discomfort consistent with injury.

**96** The report from the emergency ward of the Scarborough Hospital where Ms. Jia was taken by ambulance on January 31, 2007 notes that x-ray and CT scans taken at the hospital did not reveal any fractures.

**97** Describing how she felt immediately after the incident, Ms. Jia said that her left side was in great pain and her left leg was painful. The pain radiated from her knee up her leg. Her head was dizzy and she had a huge headache that lasted a long time. She had shoulder and neck pain. She could not use her left hand to open a door. She could not turn her neck. She was driven home from the hospital by her boyfriend at around 4:00 a.m. and could not move.

**98** The next day she felt terrible. She could not sleep and took sleeping pills. She did not see her son that day. Her boyfriend drove Ms. Jia's son to school and back. Ms. Jia said that she had bruises on her neck, chest and back that lasted for ten days.

**99** According to Ms. Jia, by February 6, 2007, she still had huge pain in her left breast and from her shoulder to her back to her knee on the left side. She was not sleeping. She saw her physician, Dr. Jason Tsai<sup>8</sup>. Dr. Tsai noted that she had bruises on her neck, upper chest and arm, that she had neck pain, headache and upper chest pain, and that she was very afraid and would cry when thinking of the incident. Dr. Tsai told her not to carry heavy things and ordered a bone scan.

**100** The bone scan results of February 23, 2007 showed, "recent left anterior third through fifth rib fractures", namely, that Ms. Jia had three broken ribs.

**101** Following the February 23, 2007 bone scan and the discovery of the broken ribs, Dr. Tsai told her that her ribs should heal in about six weeks and not to carry too much and to try not to drive. Dr. Tsai's notes of her visits on February 13 and 26, March 5, April 2 and July 20, 2007, still note tenderness and pain felt by Ms. Jia on examination. According to Ms. Jia, the pain continued to about August, however, she still feels pain when the weather changes.

**102** Mr. Yaroslav Swiercz, who has been Ms. Jia's boyfriend for about ten years, gave evidence about Ms. Jia's condition following the incident. He was not cross-examined by the defendants. On January 31, 2007, he received a frantic call from Ms. Jia, in which she was crying, saying that she had been beaten up and asking him to come right away. He met Ms. Jia in the emergency room of the hospital. He observed that she was in shock and very upset and that she was crying. He drove her home.

**103** Mr. Swiercz stayed at her home for about five or six weeks after the incident and helped her. She was not able to drive. She had pain in her chest and could not raise her hand. She had problems focussing not just on driving but doing other things as well. Ordinarily, Ms. Jia is very active and talks a lot. She was often crying at night and could not sleep. She would be on the edge of the bed and preoccupied and in bad shape. She tried to work but could not focus. He drove her son to school. Gradually, she started driving her son to school.

**104** Mr. Swiercz testified that Ms. Jia was taking pain medication and sleeping pills that ordinarily she would not have taken. Mr. Swiercz observed and, as also reflected in Dr. Tsai's notes, Dr. Tsai prescribed stronger pain medication because the Tylenol that Ms. Jia was taking was not enough for the pain.

**105** Barney Johnson, the broker of record and owner of Re/Max Crossroads where Ms. Jia works, described Ms. Jia as an extremely diligent and hard working agent. Prior to January 2007, Ms. Jia was in the office every morning by 9:00, which was rare for agents. After January 2007, he did not see much of her. He did not see much of her in February and March. The couple of times that he saw her, she could barely walk.

**106** Ms. Jia claimed that her emotional state was the most terrible part. She described herself as very independent and strong-willed and that this incident really hurt her. She would replay the encounter with Mr. Keeley like a movie through her head. She would go through the motions. She was afraid to go into condominium buildings, where most of her sales were located.

**107** Ms. Jia became particularly upset when she was charged with assaulting Mr. Keeley as a result of his private complaint to the police and when Mr. Johnson showed her the March 15, 2007 letter that Andrea Cooper had written on behalf of Forest Vista to Mr. Johnson complaining about Ms. Jia's allegedly inappropriate behaviour.

**108** Dr. Tsai diagnosed Ms. Jia with post traumatic stress disorder and referred her to a psychiatrist. Ms. Jia saw Dr. Archana Bapat, a psychotherapist, who also concluded that Ms. Jia was suffering from post traumatic stress disorder with anxiety and sadness. The medical notes and records produced by Ms. Jia do not reveal any pre-existing, ongoing or family history of mental or emotional illness or difficulties.

**109** Ms. Jia saw Dr. Bapat on ten occasions over the period April to September 27, 2007, and said that she was very helpful. Dr. Bapat's notes show that by September Ms. Jia indicated to her that she felt better and did not need any more sessions.

**110** The evidence establishes that Ms. Jia suffered extensive bruising, three broken ribs<sup>9</sup>, and significant emotional distress as a result of the assault committed by Mr. Keeley.

**111** Ms. Jia was unable to sleep, had to take heavy pain and sleeping medications, could not care for her young son, drive or return to work for several weeks, and she suffered considerable physical and emotional pain for many months. She continues to have pain when the weather changes.

**112** Based on my survey of the case law provided, these circumstances warrant an award of general damages in the amount of \$30,000.00<sup>10</sup>.

**Aggravated Damages:**

**113** Ms. Jia asks to increase the award of general, non pecuniary damages because of aggravating features of Mr. Keeley's conduct.

**114** Aggravated damages are intended to compensate a plaintiff whose injuries have been exacerbated by particularly outrageous conduct. They are appropriate where a defendant's conduct has been particularly high-handed or oppressive. In particular, in cases of assault and battery, aggravated damages have been awarded if the assault and battery occurred in humiliating or undignified circumstances.<sup>11</sup>

**115** In my view, this case warrants increasing the award of general damages because of the particularly aggravating and high-handed conduct of Mr. Keeley for which Forest Vista is also vicariously responsible. As I have already found, the force used by Mr. Keeley was excessive and unnecessary in the circumstances of this case. It was particularly humiliating to Ms. Jia, a professional woman, to be dragged out of the lobby, where she was quietly waiting for her clients, flung to the ground and pinned there by Mr. Keeley. She then had the embarrassment of having to explain to her family and clients what had occurred.

**116** Mr. Keeley has never apologized to Ms. Jia for his conduct. Instead, as I have found, he constructed an elaborate fabrication of what occurred in an attempt to avoid responsibility for his miscalculation and overreaction. To make matters worse, Mr. Keeley laid a private complaint of assault against Ms. Jia; and he misrepresented what occurred to Forest Vista so that the latter wrote an accusatory letter about Ms. Jia to her real estate broker through whom she earned her livelihood and to whom she, again, had to suffer the humiliation of explaining what had occurred.

**117** Mr. Keeley's conduct during the assault and afterwards had the effect of increasing Ms. Jia's humiliation and anxiety and worsening her mental and physical conditions. As a result, Ms. Jia is entitled to aggravated damages in the amount of \$8,500.00.

**Pecuniary Damages:**

**118** Ms. Jia claims the amounts of \$995.13 as OHIP's subrogated claim and \$45.00 for Ms. Jia's ambulance bill. These amounts are not contested and I allow them.

**119** Ms. Jia also claims lost income as a result of the time that she missed from work while recovering from her physical injuries. Ms. Jia missed work until April 2007 when she returned to work part time. Since May 2007, she has been working full time.

**120** Ms. Jia's compensation as a real estate agent is commission based. If she is not earning commissions, she does not receive any other compensation. Ms. Jia is an independent contractor and did not collect benefits under unemployment insurance, the Workplace Safety and Insurance plan, or any private insurance plan.

**121** Mr. Johnson testified about Ms. Jia's performance. He said that Ms. Jia had a fantastic start to 2007 as a result of all her work and prospecting and that her results trailed off after May. According to Mr. Johnson, this was really unfortunate because 2007 was a banner year for real estate sales in Toronto, resulting in 30% greater sales in 2007 than otherwise would have occurred. 2008 was not a good year for real estate sales and 2009 was not as good a year as 2007. 2006 was not representative of Ms. Jia's results because it was her first full year with Re/Max.

**122** Ms. Jia's gross commission income for 2007 was \$146,374.95. Her gross commission income for 2006 was \$79,987.00; for 2008, it was \$105,550.75; and for 2009, it was \$167,643.25.

**123** Although at first glance it appears that Ms. Jia did not suffer any loss of income for the weeks missed in 2007, the evidence establishes to my satisfaction that she suffered an income loss of at least \$10,000.00:

- i. A closer examination of her more representative results for 2009 reveals that Ms. Jia earned about \$10,000.00 more for the months of February, March and April.

- ii. Increasing Ms. Jia's 2007 income for those months by the 30% suggested by Mr. Johnston would also result in a loss of about \$10,000.00.
- iii. Another way of coming to the same figure is by allowing Ms. Jia the commission from the lost sale of the house subsequently sold by Mr. Gao and Ms. Ye, which, at 2.5% commission if she were the listing agent, or a 3.5% commission, if she were listing and selling agent, with respect to the sale price of \$381,000.00, would amount to about \$10,000.00 in lost income to Ms. Jia.

**124** In consequence, I hold that Ms. Jia has suffered a loss of income of \$10,000.00 as a result of her absence from work during the period February, March and April 2007.

**Punitive Damages:**

**125** Finally, Ms. Jia submits that the assault committed by Mr. Keeley justifies an award of punitive damages.

**126** The Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*<sup>12</sup> set out thorough and helpful guidelines to assist courts in determining whether and when punitive damages should be awarded. In particular, I have considered the following:

- i. The general objectives of punitive damages are punishment in the sense of retribution, deterrence of the wrongdoer and others, and denunciation of the outrageous conduct of the wrongdoer.<sup>13</sup>
- ii. Restraint should be exercised in the award of punitive damages.<sup>14</sup>
- iii. Relevant factors to be considered include the reprehensibility of the defendant's conduct, the defendant's good faith, and whether the defendant has already been punished under criminal law.<sup>15</sup>

**127** Applying the above noted criteria to the present case, I am of the view that, while Mr. Keeley clearly and inappropriately overreacted in his interactions with Ms. Jia, I do not believe that his conduct at the time of the assault reached the extraordinary stratum of vicious outrageousness that would require this court's further denunciation and punishment, such as was the case in *Herman v. Gironda*<sup>16</sup> and *Dogan v. Pakulski*<sup>17</sup>.

**128** Further, it can be said that Mr. Keeley has already been punished under the criminal law in that the assault charges were dropped against him because he agreed to enter into a peace bond.

**129** As a result, I decline to award punitive damages.

**Judgment:**

**130** For the above reasons, judgment will go in favour of Ms. Jia against Forest Vista and Mr. Keeley in the amount of \$49,540.13. Forest Vista and Mr. Keeley are jointly and severally liable for Ms. Jia's damages.

**131** The action against Del Property Management is dismissed.

**132** Ms. Jia is also entitled to pre judgment and post judgment interest in accordance with the provisions of the *Courts of Justice Act*.

**Costs:**

**133** If the parties cannot agree on the disposition of the costs of this action, they may make brief written submissions to me of no more than two pages, plus a costs outline, as follows: the plaintiff shall deliver her submissions by July 6, 2010; and the defendants shall respond by July 20, 2010.

L.B. ROBERTS J.

cp/e/qlafr/qlmxj/qljxr

<sup>1</sup> *Cullen v. Rice* (1981), 120 D.L.R. (3d) (Alta.C.A.), at p. 644

<sup>2</sup> *Ibid.*

<sup>3</sup> (1948), 94 C.C.C. 29 (B.C.C.A.)

4 Ms. Badu wrote in her notes and testified that she called the police about her argument with the owners because Ms. Cooper told her to do so and they were going to call the police about her. She confirmed at trial that she never felt physically harassed by the owners or Ms. Jia and that they had not "attacked" her.

5 *R. v. Asante-Mensah*, [2003] 2 S.C.R. 3, at paras. 71, 73 and 74

6 *Ibid.*

7 Section 3(1), *Occupiers' Liability Act*, R.S.O. 1990, c. O.2

8 The defendants confirmed that Ms. Jia's doctors did not need to testify.

9 While the defendants attempted to suggest that Ms. Jia may have broken her ribs subsequent to the assault, the violence and manner of the assault and Ms. Jia's localized and continuing pain from the date of the accident to the date of the bone scan establish a clear link between the assault and the broken ribs disclosed on the February 23, 2007 bone scan.

10 *Berketa v. Regional Municipality of Niagara Police Services Board*, 2008 CanLii 2147 (ONSC); and *DiGiorgio v. Smardenka*, 2004 CanLii 33311 (ONSC)

11 *Dogan v. Pakulski*, [2007] O.J. No. 1903 (Ont.Sup.Ct.J.), at para. 91; *Zammit v. Kukhar*, [2001] O.J. No. 939 (Ont.Sup.Ct.J.), at para. 46

12 [2002] 1 S.C.R. 595, 2002 SCC 18

13 *Ibid.*, at para. 68

14 *Ibid.*, at para. 50

15 *Ibid.*, at para. 50

16 [1995] O.J. No. 1864

17 *Supra*, at footnote 11

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