# In the Provincial Court of Alberta

**Citation: Fisher v. Marquis Condominium Corporation, 2009 ABPC 223**

**Date:** 20090723
**Docket:** P0890304824
**Registry:** Edmonton



Between:

**John H.K. Fisher**

Plaintiff

- and -

**Marquis Condominium Corporation and Condominium Plan No. 9120461**

Defendant

**Decision of the Honourable Judge M.M. Donnelly**

[1] The Plaintiff is an owner and long time resident of a condominium complex. The Defendant is the complex's association of unit holders incorporated pursuant to the Condominium Act, R.S.A. 2000, c.22. The Plaintiff's vehicle was damaged when it and the complex's parkade door collided as he entered the parkade. The Plaintiff alleges that the damage occurred because the door's sensor systems malfunctioned and that the Defendant knew they were malfunctioning, yet allowed the door to be used. The Defendant denies the door's sensor systems malfunctioned and alleges the damage occurred because of the Plaintiff's own negligence in not waiting before entry, to make sure the door was not about to descend, in failing to activate his remote control to halt the descending door and in continuing into the parkade when the descending door contacted his vehicle thereby causing most of his damage.

[2] Neither party called expert evidence with respect to the operation of the parkade door. Its operations were described by the Plaintiff, the President of the Defendant corporation, who is also a long time resident of the complex, the site manager, who had occupied that position for three years prior to the incident and the condominium manager. The door was described as operating like any household garage door with a simple mechanism. It can be opened and closed by the parkade users' remote controls. If the remote control is pressed (activated) while the door is open, the door will close; if pressed while the door is closed, the door will open; if pressed when the door is closing, the door will stop and with the next activation will open; if the remote

control is pressed when the door is opening, the door will stop and with the next activation the door will close. The door has two safety features which will automatically stop and reverse a closing door if an obstacle is encountered - a sensor beam near to the ground, which if crossed by an obstacle, will stop and reverse a closing door and a pressure sensing feature in the door itself which, on contact with an obstacle, will stop and reverse a closing door until the obstacle is cleared. When a door is opened it will stay open 10 to 15 seconds before closing, long enough for a vehicle to enter but short enough for security purposes.

[3] The Plaintiff testified that there have been "so many times" when a door will descend when a vehicle is under it but on those occasions, the door "always" reverses. He described those occasions as including times when an entering vehicle has to suddenly stop and wait for an exiting vehicle, when the ramp's upward slope becomes icy and a vehicle entering cannot get traction and when a driver of a vehicle has followed closely or "piggy-backed" a vehicle for which the door was opened rather than open it himself (a maneuver the Defendant alleged the Plaintiff did on this occasion, which the Plaintiff denies, but which, in any event, is not particularly relevant to the issue of whether the sensors malfunctioned).

[4] The parkade is accessed from an alley and is back from and at right angles to the alley and its entry inclines upward. The Plaintiff's approach to the parkade was down the alley while the entry to the parkade is up. When the Plaintiff was "partly" down the alley, he pushed his remote control to open the parkade door. He could not see whether the door was open until he was in front of it, at which time the door was fully open. He had seen no vehicles or lights, which would have indicated to him that the door had been opened for other vehicles exiting or entering the parkade, so he proceeded up into the parkade. As he was almost half way into the parkade, he heard the noise of the door descending. He "grabbed" his remote control and "was pressing it" but the door continued to descend. He did not stop his vehicle but continued into the parkade, assuming from past experience, that the door would stop and reverse. He stated that "when I heard the door coming down I thought well no big deal because it always goes back up." Instead, the door impacted his vehicle when he was more than two thirds of the way into the parkade. Again, he did not stop, but in his words, "probably sped up," continued "hitting" his remote control, "panicking and pressing" ... "trying to get that door to go back up." The Plaintiff testified that through his rear view mirror, he saw the vehicle's roof racks being "dragged" from the rails to land outside the parkade and the door continue down. The site manager, who viewed the video surveillance tape of the incident, recalls seeing the door reversing and then descending after contacting the Plaintiff's vehicle. The video was automatically erased before the Plaintiff viewed it but the Plaintiff recalls the site manager had, in several conversations with him about the incident, confirmed his recollection that the door did not reverse after impact. The Plaintiff's evidence was clear and credible as to what he could remember and when he could not remember something clearly, he said so. The site manager's evidence was not as clear, seeming somewhat confused, particularly, as to his description of the Plaintiff's vehicle and the point at where the door impacted it. It also differed from what the Plaintiff testified the site manager had told him previously, which the site manager could not recall and did not deny. The video does not give an accurate portrayal of elapsed time and it may be that what the site manager saw occurred after

what the Plaintiff had described. I conclude that the Plaintiff's recollection as to the door continuing to descend immediately after it cleared the truck is more reliable.

[5] The Plaintiff parked his vehicle and then used his remote control to open the door and retrieve the roof racks. The rails on which the racks had been attached were loosened and there were scrapes running between where the racks had been. The Plaintiff's vehicle which he referred to as "his truck" is a Chrysler Pacifica with roof rails running longitudinally. No actual measurements were given in evidence but the rails were described by the Plaintiff and pictorially as commencing more than half way from the front of the relatively long vehicle. The roof racks sit on the rails, the first one located above the middle of the rear door about two thirds of the distance from the front of the truck and the second one located almost at the back of the truck.

[6] The Plaintiff testified that he tried to "recreate" the accident and he could not because, in his words, "the sensors always worked."

[7] Notwithstanding his experience that the sensors had "always worked perfectly" before the accident to reverse a descending door when an obstacle was underneath it, the Plaintiff alleged others said that it did not always do so. He also alleged that just before his accident, a similar accident happened with another vehicle, that the door had been closed for repairs the previous week and repairs had been scheduled for the day after the accident. He posits from all that that the sensors had not been working, had not been repaired and had malfunctioned when he drove into the parkade. He further posits having heard from "a couple of repair shops" that the sensor beam could malfunction if out of alignment or if dusty, that someone realigned the beam or removed the dust after the accident so that while the sensor beam had malfunctioned at the time of the accident, it worked properly when he and the site manager tested it.

[8] Evidence was given on behalf of the Defendant that although the door had been closed a week prior to the accident to effect a repair, the repair was not to the sensors, but to a disengaged chain, that no repairs had been scheduled for the day after the accident, that no repairs were made to the sensors either before or after the accident, that the sensors were tested the day after the accident and were working properly and that the other incident the Plaintiff spoke of involved a vehicle which slid into a closing door at the front of the complex, where the entry descends when the driver of that vehicle tried to "race" a closing door and that no such other incident had occurred in the witnesses' memories. This evidence was not challenged by cross-examination or otherwise by the Plaintiff.

[9] The court can give no credence to the hearsay comments the Plaintiff heard from others. None of them testified at trial, so that their comments were not under oath, not fully explained in context, and not tested for credibility. I conclude from the evidence of the Plaintiff and the Defendant's President as to their long time experiences with the door, and the evidence of the managers that the sensors had not malfunctioned before or after the Plaintiff's accident and that if the sensors malfunctioned on the day of the Plaintiff's accident, it was a one time event.

[10] Pursuant to section 37 of the *Condominium Property Act*, R.S.A., 2000, c.22, the Defendant is responsible for the control, management and administration of the parkade, thus being its "occupier" under the *Occupiers' Liability Act*, R.S.A., 2000, c.O-4. That *Act* requires an occupier to take reasonable care in all the circumstance, that those permitted to use its premises will be reasonably safe. This does not mean that an occupier insures the safety of users of its premises, being liable for any and all damage they may suffer while on the premises. It means an occupier is liable if such damage arises from its failure to take reasonable care to make the premises reasonably safe. The standard applied to an occupier is reasonableness, not perfection. The premises must be reasonably safe - not completely safe - for a user of its premises who is also taking reasonable care for his own safety.



[11] For the Defendant to be found liable for the damage to the Plaintiff's vehicle, the Plaintiff must prove through evidence that, on a balance of probabilities, the damage occurred because the sensors malfunctioned and that the malfunction occurred because the Defendant failed in its duty to take reasonable care for the reasonable safety of the parkade's users. In carrying out that duty of care with respect to machinery, such as the door, the Defendant is required to appropriately inspect and maintain it, perform any needed repairs and respond appropriately to problems such as, for example, restricting the door's use if there are any unresolved safety issues. If the Court were to conclude that the damage occurred from malfunctioning sensors and that the malfunction had occurred because of the Defendant's failure to take reasonable care of the door, it would also have to determine from the evidence whether any of the damage was also caused by the Plaintiff and if so, assess liability for the damage between the two parties as required by the *Contributory Negligence Act*, R.S.A. 2000, c.27, s.15.

[12] Has the Plaintiff so proven? The first stage of that analysis is to determine whether the evidence shows the accident happened because of a malfunction of the sensors. Circumstantial evidence can be used by the Plaintiff to discharge his onus. An inference of malfunction could be drawn from the fact that the sensors did not reverse the closing door. That inference can be neutralized or negatived by other evidence. The evidence that, in the memory of the witnesses including the Plaintiff, no sensors had failed, no accident of the kind in question here had happened and that the sensors had operated properly after the accident, goes a long way to neutralizing or negativing that inference, as does the Plaintiff's description of the accident.

[13] The Plaintiff activated his remote control as he was proceeding down the alley, not when he was directly in front of the door, so that when he arrived he did not know how long the door had been open or whether it was about to begin its descent. As is now known from hindsight, the door was about to descend. This should have been no surprise to the Plaintiff given that some time would have elapsed as he made his way down the alley "pushing" his remote and navigating the right hand turn required to enter the parkade.

[14] The Plaintiff testified that when he heard the door descending, he "hit" his remote control and that "you have to hit it in the right spot." He admitted that his remote control was "taped-up" and that "if you hit it and it doesn't work, you change where you are hitting and then you make it work once you hit the right spot." However, when the door did not reverse, rather

than hitting the remote control again, in the event he had not hit the right spot to make it work, he continued into the parkade relying on his previous experience that the sensors would reverse the door.

[15] I am limited by the absence of any expert evidence as to how the sensors should operate which may have assisted the court in reconstructing the events and making a clear determination of how the damage occurred. However, it is the Plaintiff's onus to prove his claim; he must show, from cogent evidence, that it is more likely than not that the Defendant failed in its duty of care to him. If the evidence merely shows that the Defendant may have been at fault, the claim must fail. While it is possible to conclude that the sensors failed, it is just as probable they did not and that the damage did not result from malfunctioning sensors. When the door began to descend, the Plaintiff had already partially entered the parkade but the sensor beam did not stop and reverse the door. One could conclude that the sensor beam malfunctioned but it is an equally probable conclusion, given the Plaintiff's evidence of how far he had entered when he heard the door begin its descent, that his front wheels had already passed the sensor beam when the door began to descend so that the beam passed between his wheels sensing nothing. When the door impacted the Plaintiff's truck, the pressure sensing device should have stopped and reversed the door. It did not. One could conclude that the pressure sensor on the door malfunctioned; however, that is not the only conclusion. Given the evidence of how the racks sat atop the rails, it may be that the pressure sensor was not activated because the bottom of the door had not yet contacted the truck's roof to activate the sensor, when the truck moving forward, pushed the racks into the side of the door. It may also be that if the pressure sensing device did contact the door, the action of the rails pushing against the door as the truck continued forward somehow caught the door, preventing it from reversing and that when the racks "cleared" as the door reached the back of the truck, the door descended because there was then no obstruction. It is also probable that when the Plaintiff heard the door contacting the truck and pressed his remote, in his self described "panic," he pressed the control's "wrong spot" or, if he was pressing the "right spot" continually, opposing messages were sent to the controls. The evidence discloses more than one probability.

[16] Had the Plaintiff stopped when he heard the door impacting, the racks would not have been torn off and there would have been less damage.

[17] As well, even if the sensors malfunctioned when the Plaintiff entered the parkade, they were functioning properly before and after the accident. The Plaintiff's allegation that the sensor beam was somehow tampered with is pure speculation. The Defendant, not being aware of or having any cause to be aware of any malfunction in the door with which the Plaintiff collided, which would have required any action on its part, cannot be said to have failed in its duty of care.

[18] The law does not create a presumption of negligence (failure to take reasonable care for the safety of others) and consequent liability for damage, against an occupier from the mere fact that a person is injured, or property is damaged, on its premises. There must also be evidence of some act or failure to act on the part of the occupier, either direct or reasonably inferred, which

caused the injury or damage complained of before liability can be established. This fundamental principle is sometimes overlooked by Plaintiffs who may presume that when an accident occurs on an occupier's premises it is assumed that the occupier has failed to take reasonable care for users' safety. The Plaintiff's claim seems premised on this as well as on the incorrect information he received from others who were not called to testify. Accidents can happen without fault. This accident may well have been caused by "the perfect storm" occasioned when the Plaintiff's particular vehicle entered the parkade just as the door was about to descend and the ensuing actions of the Plaintiff. I cannot conclude from the evidence why the accident occurred but I can conclude that it has not been shown to have occurred because of any failure on the part of the Defendant to take reasonable care for the safety of the Plaintiff.

[19] The Plaintiff adduced credible evidence in support of the amount of his claim. While the Defendant alleged the amount of the claim was "excessive," it did not adduce any evidence supporting that allegation nor any argument other than a vague comment of personal experience with vehicle repair bills. Had I found the Defendant liable for the Plaintiff's damages, I would have assessed the damages at the amount of his claim.

[20] The Plaintiff's claim is accordingly dismissed. Should the successful party wish to apply for costs it may do so on application to me, within 30 days of this date.

Heard on the 15th day of June, 2009.
Dated at the City of Edmonton, Alberta this 23rd day of July, 2009.

M.M. Donnelly
A Judge of the Provincial Court of Alberta

**Appearances:**

NO COUNSEL
for the Plaintiff

NO COUNSEL
for the Defendant