SUPREME COURT OF NOVA SCOTIA
Citation: ***Mielke v. Harbour Ridge Apartment Suites Ltd.***, 2011 NSSC 313

Date: 20110815
Docket: Hfx. No. 275515
Registry: Halifax

Between:

Christopher Thomas Mielke

Plaintiff

v.

Harbour Ridge Apartment Suites Ltd.

Defendant

Judge: The Honourable Justice Peter P. Rosinski.

Heard: June 13, 14, 2011, in Halifax, Nova Scotia

Counsel: Richard Bureau, for the Plaintiff
J. W. Stephen Johnston, for the Defendant

By the Court:

[1] On December 23, 2000, Brad Rossong and Craig DeWolfe had finished their shift as bartender and cook at The Keg restaurant on Market Street in Halifax. Everyone was in a good cheer since the following two days were work free, and a chance to visit with friends and family over Christmas.

[2] Chris Mielke was working as a waiter that night at The Keg. He, Brad and Craig all intended to go to Tom's Little Havana, a cigar bar (at that time) on Doyle Street in Halifax for some after work relaxation and Christmas cheer.

[3] At about 11:00 p.m., Craig and Brad were walking up the sidewalk on Market Street in front of an apartment building. That building, under construction, though apparently largely completed, was owned by Harbour Ridge Apartment Suites Ltd. Chris had emerged from the restaurant shortly after they left, and could see them approximately 100 feet away in the distance.

[4] In an effort to catch up to them, he accelerated himself over Prince Street and onto the same sidewalk on Market street where they were in the process of walking towards Tom's Little Havana Cigar Bar. As he got to the front of the apartment building under construction, his foot stepped on something that caused his foot to roll forward suddenly and unexpectedly causing a rupture of his Achilles tendon.

[5] Whether his fall and injuries are to any degree the legal responsibility of Harbour Ridge will be revealed in these reasons which follow the two day trial.

The Pleadings

[6] On December 22, 2006, Chris Mielke filed an Originating Notice (Action) with an attached Statement of Claim. In it, he claimed that Harbour Ridge was careless and negligent in their failure to keep and maintain the property free of unsafe conditions, and in a condition that persons present on the sidewalk in front of the property were alerted to be vigilant by the display of signs and the erection of barriers or fencing. He alleged that Harbour Ridge had a duty to take reasonable care, and it failed to do so by not keeping the public access way bordering the property free from debris and materials. Mr. Mielke relies upon the *Occupiers Liability Act* SNS 1996 C. 27 as amended.

[7] In his pre-trial submissions he claims general damages, past loss of wages, lost housekeeping capacity, prejudgment interest, special damages and costs.

[8] On March 7, 2007, Harbour Ridge filed a Defence in which it pleaded in essence that it did not breach any standard of care it had in relation to Mr. Mielke, and that any injuries he suffered could have been avoided by the exercise of reasonable care by Mr. Mielke, and that if any injury was suffered by him, the claim for damages is remote and he has failed to mitigate those losses. The Defendant also seeks costs.

The Evidence Heard At Trial

[9] It was noted that Brad Rossong was unavailable as a result of the effects of the severely debilitating disease known by the acronym ALS. Mr. Mielke and Mr. DeWolfe both testified for the Plaintiff. Tanya Weddleton, a friend to the three men also testified. She went to Tom's Little Havana between 12:00 and 12:30 a.m., December 24, 2000, where she discovered Mr. Mielke had already taken a cab to the emergency department of the Queen Elizabeth II Hospital. She learned of this through Mr. Rossong and Mr. DeWolfe who were there.

[10] In addition to a Joint Book of Exhibits which was filed by consent as Exhibit #4, there is also Exhibit #1, #2 and #3 which were photographs of the sidewalk area in question; Exhibits #5, #6 and #7 which were the original T4 slips for Mr. Mielke for the years 1999, 2000 and 2001; and Exhibit #8 and #9 which were hand drawn by Ms. Weddleton showing where she recalls a concrete barrier being placed somewhat parallel to Prince Street at the corner of Prince and Market Street on the night in question, and her estimation of the average size of gravel which she saw on two occasions - i.e. between 2:00 a.m. and 3:00 a.m. on December 24, and 10:00 and 11:00 a.m. on December 24, 2000, on the sidewalk in front of the apartment building under construction.

[11] The Defendant presented Mounir Haddad who is a developer and was specifically involved as such in a hands on way in relation to the construction of the apartment building in question. Mr. Douglas Bowdridge, owner of Metro Safety Services Ltd. and Occupational Health and Safety Consulting Service also testified in relation to that company's involvement with the construction site.

Summary of Witnesses Evidence-Liability

<u>The Evidence presented by the Plaintiff</u>

Christopher Mielke

[12] Mr. Mielke was born on December 20, 1961, and has been living at 1263 Queen Street for many years. From there he has walked the downtown area to a great number of restaurants where he has been a waiter as far back as 1979. From 1999 forward, he worked as a waiter at The Keg restaurant on Market Street.

[13] He recalled, as he was asked to describe it, the three phases of construction of the building in question. The first phase involved the excavation or the "hole in the ground" at which time the entire area exceeding the perimeter of the excavation was barricaded with cement barriers and substantial fencing. There were also signs and yellow tape. During the second phase which involved the pouring of concrete and the creation of the building structure, he noted the extent of the barricading of the street stayed roughly the same except temporarily barriers would be removed to allow trucks and deliveries of equipment and materials. He noticed many concrete barriers along the curb side on Market Street so that no pedestrians could use the sidewalk on the apartment building side during phase 2.

[14] During phase 3, which was finishing of the inside of the building, he noted that the sidewalk was still sufficiently blocked by barriers, concrete and/or wooden such that pedestrians were forced to walk on the sidewalk on the other side of Market Street to get by the building. He estimated that the building was completed in approximately April 2001.

[15] On December 23, 2000, he left the restaurant at about 11:15 - 11:30 p.m. He had one or two beers with other staff before he left. Up until this point, earlier in the week, the sidewalk in question was still cordoned off. According to his evidence, on December 23, "the way was clear, barricades were out of the way" and he recalled, to the extent that a few were there, that they were parallel to Market Street along the curb but there were no barriers which would keep pedestrians from using the sidewalk.

[16] He testified it "wasn't bright but wasn't dark either - it was somewhere in the middle". He admitted he "hurried along" at a "fast walk" to catch up the 60 to

100 feet he was away from Mr. DeWolfe and Mr. Rossong. His sense of the site at that point in time was that any construction work appeared to be taking place "inside". In cross examination, it was put to him that in the emergency outpatient reports or medical reports he was variously described by those parties as "jogging", "running" or that he "stepped awkwardly off curb". He has responded by noting that he would not normally run because as a result of an accident in 1996, he had badly damaged vertebrae in his back causing him to be unable to run.

[17] He testified that he did not see the debris until he fell on it. He agreed that he walked "normally as if it was just another sidewalk in Halifax", and that he "assumed it was safe because the barriers were removed". He was asked whether in the week before the incident there was anything unusual or unsafe apparent about the site. His answer was that the site was cordoned off.

[18] He described the footprint of the debris in which he had fallen as starting around the parking meter shown in Exhibit #2 (photo of Market Street and the apartment building) up until the end of the building in question. He described it as "lots of debris, gravel, dried cement, twigs and pieces of wood". Outside of that footprint of debris, the rest of the sidewalk was relatively clear.

[19] The weather conditions were admitted by the parties (according to Tab 13 of the Joint Book of Exhibits) to be no precipitation, approximately -3 to -9 degrees Celsius with scattered clouds at 11:00 p.m. and similarly in the times approximate thereto.

[20] He estimated that Mr. Rossong and Mr. DeWolfe were near where the green mark "X" in front of the building in question, in photograph Exhibit #3 when he exited The Keg restaurant (also shown in photo Exhibit #3).

[21] He had not noticed any signs on December 23, 2000 either. He testified that generally he walked up and down Market Street on his way home on a daily basis.

[22] He conceded after possibly two beer at The Keg, he may possibly have had two shooters at Tom's Little Havana, but certainly did not consider himself intoxicated at any time. When asked whether the cut in the curb to allow the vehicular traffic to enter the garage of the building in question could have contributed to his fall, he was steadfast that it had no effect "at all" and noted

among other things that he fell “in the middle of the sidewalk” where the cut in the curb is no longer present.

[23] He hobbled with the help of his friends to Tom’s Little Havana where they discovered the Achilles tendon was separated and no longer functioning. He then took a cab to the emergency department of the Queen Elizabeth II Hospital. At approximately 2:30 - 3:00 a.m., he was sent home with a soft cast that allowed his toes to be free but went up just below his knee. Ms. Weddleton had come to the hospital and drove him home at which point he realized he lost his keys. Then the two drove in her car to see if he had lost them in front of the building in question. She did not find them.

[24] On December 26, he had surgery and then was placed in a wheelchair and used it or crutches for approximately six weeks. Afterwards, until approximately April 2001, he used a cane as needed. His absence from work is summarized at Tab 9, Exhibit #4. He resumed his regular duties in the second week of June 2001, as a waiter, and in his testimony considered he was completely healed by December 23, 2001.

Tanya Weddleton

[25] Ms. Weddleton completed her Bachelor of Arts degree at Saint Mary’s University and attended a human resources course there as well. She is presently a supervisor at Manulife Financial.

[26] She has known Mr. Mielke for 16 years and described him as a “personable and active guy”. She noted he was an especially avid bicyclist.

[27] On December 23, 2000, she attended Tom’s Little Havana Cigar Bar at about 12 - 12:30 a.m. She expected to meet Mr. Mielke and others there. When she became aware that he had gone to the hospital, she went to see him at the Queen Elizabeth II hospital and stayed with him until approximately 2:00 a.m. - 3:00 a.m. She confirmed in re-examination that there were no signs that Mr. Mielke was intoxicated. Mr. Mielke realized that he could not find his keys and so the two of them drove to Market Street to see if they had fallen from his pocket there. He was unable to walk on his own so she got out of her car to see if she could find his keys.

[28] She described on photograph Exhibit #2, indicating the “X” identified the area of the debris that Mr. Mielke described as having caused him to fall. On photograph Exhibit #1, she stated she placed her vehicle where the pink circle is shown. She shone the headlights of her vehicle on that area hoping to find the keys.

[29] She described the area as not very well lit, and it was not until she stepped onto the sidewalk that she realized the extent of the dirt and debris and loose gravel including two by four pieces of wood ends. She described it as appearing to be the remains of a pile of construction debris that had been there and moved.

[30] In cross examination she stated that there were “quite a few” such end pieces of two by fours among the debris. She described that debris as being mostly near where the blue “X” appears on the Exhibit towards the fence where there was some tailing off of the debris towards Sackville Street.

[31] In direct examination she confirmed she had spent about 10 to 15 minutes walking up and down in front of the building. In cross examination she indicated she had walked approximately 15 feet in either direction along the sidewalk where Mr. Mielke had indicated he had fallen in front of the building (which location was consistent with his testimony in Court).

[32] When asked about the size of the crushed gravel among the debris, Ms. Weddleton drew a diagram - Exhibit #9.

[33] She testified that there was so much debris that you could not help but walk into it if you were walking on the sidewalk. She considered it accurately described as “a layer of gravel” (which she estimated to be ½ inch to one inch in depth) with there being “an inch or two between pieces”. There was so much debris that when she was asked in cross examination whether she had noticed the slope of the curve leading to the garage entrance, she answered the area was so covered in dirt that she did not notice.

[34] She did not find Mr. Mielke’s keys, so she returned by herself between 10:30 a.m. and 11:00 a.m. on December 24. She walked from The Keg entrance all the way up to Sackville Street along Market Street in front of the building. She noted that she was “quite frequently” in the area due to her work and social life at that time.

[35] When asked what physical barriers were present that would prevent pedestrians from walking on the sidewalk in front of the building owned by the Defendants in December 2000, she indicated that around December 23, 2000, there was only one barrier, there was no sign and no caution tape. She drew the location of the concrete barrier as Exhibit #8 and verbally indicated it was at the corner of Prince and Market streets but placed on an angle so that one could access through the "cut in the curb" on the sidewalk on Market Street from the sidewalk on Prince Street. She estimated that concrete barrier to be eight to 10 feet long, three feet high and two feet wide.

[36] Although in the daylight she could see the debris from five to 10 feet away, in the darkness of the early morning hours she did not see it until she stepped onto the debris on the sidewalk, even with the assistance of her car headlights. She testified that the streetlight on the other side of Market Street alone did not provide sufficient light for her to look for the keys in the early morning hours.

[37] As to his recovery, she characterized Mr. Mielke as "not a complainer". She confirmed Mr. Mielke had a soft cast on after he left the hospital on December 24, until he had his surgery on December 26. He spent December 24 at her home and then returned to his own home. After the surgery he again had a soft cast, so he was required to keep his leg elevated and to place no weight upon it. Consequently, he spent a lot of time in bed. He stayed with her for seven to 10 days and thereafter, at his own home. She helped him with everything he needed done in order to maintain himself and his home, and had similarly taken care of him when he was in her home recovering.

[38] She would visit him every couple of days, and take him by car to doctors and physiotherapist appointments. Initially, he had a wheelchair and after a few months of casts, he became more mobile. She recalls that he returned to work around the end of April 2001 part time, and as a result of that lesser income earning stream, she and a number of his friends helped him out financially so he could pay his rent and other expenses. She estimated he was back to his previous lifestyle after seven to eight months.

Craig DeWolfe

[39] Mr. DeWolfe started working at The Keg restaurant while he was a student and worked himself up to cook. He is presently also a student at the Nova Scotia Community College taking a civil engineering technology course.

[40] He has known Mr. Mielke for approximately 13 years and has worked with him over those years at times. He described Mr. Mielke as “outgoing” and “into sports”.

[41] Mr. DeWolfe lived on Edward Street and walked to work at The Keg very frequently. Although he could not be specific as to how often he walked on Market Street in front of the Defendant’s property, he did have many opportunities to observe the area and noted that the street and sidewalk were completely open for approximately three to four weeks before Mr. Mielke fell on December 23, 2000. Once the sidewalk was open he used the sidewalk when headed in that direction. He characterized it as a “not very clean construction site” and had seen debris on the sidewalk in front of the Defendant’s building “several times”. It was in the nature of “construction debris” on December 23, 2000.

[42] Since the sidewalk in front of the Defendant’s building had been replaced after the outside construction seemed finished, and there were no signs to his recollection or barriers that impeded his progress as a pedestrian on that sidewalk. Mr. DeWolfe thought it safe to walk across it on December 23, 2000. He did not recall any light emanating from the newly constructed building. He also did not recall any fence being present that day, in contrast to the more recent photographs entered as Exhibits #1, #2 and #3.

[43] On December 23, Mr. Mielke, Mr. Rossong and Mr. DeWolfe ended their shifts between 10:00 and 11:00 p.m. The restaurant was to be closed for the next two days and everyone was thinking about Christmas. At approximately 11:00 p.m., Mr. Rossong and Mr. DeWolfe walked up Market Street ahead of Mr. Mielke, who followed about a minute later.

[44] Mr. Rossong and Mr. DeWolfe were slightly past the Defendant’s building when they heard Mr. Mielke say “wait up”, at which point they turned without carefully observing Mr. Mielke’s progress. Nevertheless, Mr. DeWolfe described it as a “brisk walk”, as if one was “just getting across the street before the light changes”. Although not directly seeing Mr. Mielke fall, Mr. DeWolfe noticed

immediately that he had fallen in front of the Defendant's building - and more specifically, near the first garage door as one approaches from Prince Street.

[45] Mr. DeWolfe and Mr. Rossong returned to help Mr. Mielke who they assumed had perhaps sprained his ankle. Mr. DeWolfe described the sidewalk condition as follows:

1. There was "construction debris" all over the sidewalk "just by the garage doors";

2. Mr. Mielke fell in the area in front of the second garage door as one is proceeding from Prince Street;

3. Mr. Mielke fell in the middle of the sidewalk where debris was present and what he characterized as the center panel of the three panels of concrete that constituted the width of the sidewalk;

4. He noticed the debris as Mr. Rossong and he were walking over it, and observed it was much worse in front of the garage areas. It looked like garbage from small "broken bits" of wood, nails, gravel and "like it had not been properly cleaned", it included wood and shovel sized debris;

5. He estimated the pattern of debris to be about five feet by four feet in width;

6. In spite of the width and constituent elements of the debris, he testified that it was not until he was one to two feet away from it that he could actually see the debris on December 23, 2000.

[46] Mr. DeWolfe and Mr. Rossong carried Mr. Mielke to Tom's Little Havana Cigar Bar, thinking his injury was not serious. Mr. DeWolfe observed that Mr. Mielke had a lot of discomfort and ultimately he reached down and noticed that Mr. Mielke's tendon was no longer in place. They sent Mr. Mielke to the hospital in a cab.

[47] As to Mr. Mielke's recovery, Mr. DeWolfe did not see him much in the period of three to four months afterwards because Mr. Mielke was house ridden, using a wheelchair initially and crutches later. During that interval, Mr. DeWolfe also helped to raise money to pay for Mr. Mielke's rent and other expenses that were accumulating. He estimated he first saw Mr. Mielke again in March 2001 and that he returned to work in May / June of 2001, first as a host for two weeks, and thereafter as a waiter.

[48] Mr. DeWolfe was adamant that Mr. Mielke did not fall near the cut in the curb which would allow vehicles entry onto the sidewalk and to pass through the garage doors.

The Evidence Presented By The Defendants

Mounir Haddad

[49] In December 2000, Mr. Haddad was an officer of Harbour Ridge Apartments Suites Ltd., and described himself as a general contractor and project manager / developer.

[50] The building in question began with excavation in May or June of 2000 and was completed, he believes, in July or August 2001, based on his estimation that such projects usually require 12 to 14 months to complete. He was at a distinct disadvantage because, although he was made aware of Mr. Mielke's civil suit within seven months of December 23, 2000, he was unable to find any hard copy or electronic records to assist him in pinpointing details such as what was the status of the project on December 23, 2000, and specifically what program the corporate Defendant set out to ensure the safety of the building and sidewalk in front of it.

[51] From memory, which he admitted was vague and would not be terribly reliable, he testified that he did hire two individuals to ensure safety. He hired Wayne Earl who was an overall safety coordinator, and an eccentric gentleman he identified as Robert Zohr (sp?). Mr. Zohr was instructed by Mr. Haddad that he wanted 'that site cleaned from top to bottom". Mr. Zohr had a small mobile shed which he used as his home which was placed inside the construction project in the case at Bar. Mr. Haddad was unsure however, when Mr. Zohr and his shed left the premises in question herein.

[52] Mr. Haddad also advised that the corporate Defendant hired Edward Bowdridge who was the retired Chief Fire Inspector of Halifax and who had his own construction safety business called “Metro Safety”. Mr. Haddad described his job as being “make sure sites are safe”. Mr. Bowdridge trained Wayne Earl who was to be more of an “on the ground” safety supervisor.

[53] Mr. Haddad made reference to his practice as a developer, and that his business had therefore general policies or programs to ensure that their work sites were kept clean. Nevertheless, he was unable to produce any documentation to support his position, that in relation to **this** job site, there were specific measures taken regarding safety on-site. He was therefore also unable to provide confirmation that there were checklists as to when cleanings of the sidewalk for example, at the premises in question, were conducted, if at all. He did acknowledge that only Mr. Zohr cleaned the site, and that he is unaware of where Mr. Zohr is at present. He also acknowledged in cross examination that Mr. Zohr was not at the site all the time, as he was generally expected to work 40 to 50 hours per week. He did admit that items such as two by four stud debris, gravel, and nails are “part of construction materials” that one would expect to be present on a site such as the premises in question.

[54] Mr. Haddad could not recall specifically if he was on-site December 23, 2000, or in fact what was the condition of the sidewalk during the time around December 23, 2000.

[55] He confirmed that Mr. Edward Bowdridge passed away approximately four years ago.

Douglas Bowdridge

[56] Douglas took over his father’s business “Metro Safety” which now is incorporated as Metro Safety Services Ltd. Douglas has been working with his father’s business since he finished high school in approximately 1999 - 2000. He himself obtained credentials in the field of Occupational Health and Safety.

[57] He recounted the general practices that his company suggests developer clients put into practice to ensure safety on their sites. One of those cautions is that

clients keep all their site related documentation for a period of at least three years after completion of the project.

[58] A search of his company's records revealed none in relation to this project. There is not even a record of his company, or his father being retained by the Defendant corporation for this project. Consequently, he was unable to testify as to the specifics of any safety program at the premises in question.

[59] The Defendant called no further evidence, and the Plaintiff called no rebuttal evidence.

Credibility and Findings of Fact

[60] I carefully followed the evidence of each witness, and considered the nature and manner of their testimony, as well as the internal and external consistency of their evidence in light of all the evidence.

[61] I conclude that, generally speaking, all the witnesses were credible (honest and reliable).

[62] The Plaintiff's witness' evidence is fairly accorded more weight in my view however. This is so because they were personally present at the location of the incident on December 23, 2000, and had opportunity to, and cause to, take specific note of the condition of the construction site on an ongoing basis around December 23, 2000. I found their evidence to be measured, evidencing no obvious bias, and their recollection to be quite good. While Mr. Haddad may generally approach his projects conscientiously from a safety / cleanliness perspective, in this case I find little weight should be given to his evidence, because he had no records to assist him in his recollection, and had no reliable precise recollection otherwise of the condition of the premises around the month of December 2000, or what specific programs were in place to ensure safety. Moreover he, and the Defendant, had not been alerted to the fact of Mr. Mielke falling on the sidewalk on December 23, 2000 until about four to seven months later.

[63] I find myself satisfied on a balance of probabilities that:

1. The premises where Mr. Mielke fell were the Defendant's responsibility on December 23, 2000 as the Defendant was not

only an "occupier" (there were "special circumstances" of control exercised by the Defendants - *Bowden v. Withrow's Pharmacy* 2008 NSSC 252, para. 43 - 52) but had a duty to the Plaintiff under the *Occupiers Liability Act*. I note that the Defendant, independent of my finding, acknowledged in its Brief: "...that they were in care and control of the sidewalk at the time of the fall, notwithstanding that the sidewalk was owned by Halifax Regional Municipality." (p.9 Defendant's Brief);

2. A significant amount of construction related debris was left on the side walk area by the persons working on the Defendant's property / construction area;

3. The sidewalk was suggestively left open to pedestrians, without remarkable obstruction by barriers, or notice of any danger by signage or other means;

4. The Defendant breached the requisite standard of care by allowing debris to accumulate in foreseeably dangerous circumstances. The debris constituted a danger to pedestrians passing over the sidewalk on December 23, 2000, in view of all the circumstances, including the dim lighting, the location and nature of the debris, it being in an area in which pedestrians would not recognize that danger before they were upon it;

5. Mr. Mielke would not have fallen, but for the conduct of the Defendant in not maintaining the sidewalk in a reasonably safe condition - thus the Defendant's negligence caused Mr. Mielke's injuries;

6. There is not evidence more likely than not, that the Defendant had an organized program of regular inspection, cleaning / maintenance for the sidewalk directly in front of its property / construction area;

7. Mr. Mielke was in no way negligent in causing his injuries. I accept his evidence specifically as to his manner of traversing the sidewalk (“ a fast walk”), his description of the condition of and the location on the sidewalk where he fell, and reasons that he concluded (the debris) he was caused to fall. I found him to be a very credible witness;

8. The Defendant is therefore liable for its negligence to Mr. Mielke.

[64] I observe that the Defendant argued that the Court should be mindful of “the effect of the Plaintiff’s total and absolute failure to notify the Defendant in a timely manner” (para. 10 Defendant’s Brief) On the other hand, the Defendant, which was I find aware of the (potential) claim within three to five months of December 23, 2000 yet, did not capture by recorded statements or otherwise the evidence of Robert Zohr, Edward Bowdridge or Mounir Haddad. Nor did the Defendant, as Mr. Bowdridge testified, follow their company’s usual advice which is a standard industry practice, to maintain records for at least three years after project completion. Had the Defendant maintained its project records, they would have had them for the chosen time period after project completion in approximately June 2001, and would have had them available at trial.

[65] It is noteworthy that the Defendant, a sophisticated business enterprise, has not produced any records or statement, from Edward Bowdridge, or Robert Zohr; not produced Robert Zohr, nor any of its own project records to substantiate its evidentiary claims. These shortcomings are not materially caused by the Plaintiff’s lack of reporting the incident in a more timely manner. I find nothing untoward about the timing of the Plaintiff’s reporting the incident to the Defendant or other authorities.

Assessment of Damages

[66] As I have remarked, I found all the Plaintiff’s witnesses generally credible, and that finding extends to their testimony regarding the facts relevant to an assessment of damages.

[67] I will state at the outset that the damages claimed are not remote, nor did Mr. Mielke fail to mitigate those losses. If anything I conclude that Mr. Mielke is "not a complainer", as Ms. Weddleton opined. He did not exaggerate his injury, nor did he malinger in his return to work. I find he was especially candid in his testimony, and tended to downplay the effect of the injury.

[68] Mr. Mielke testified, and, in conjunction with the evidence of the Plaintiff's witnesses and the medical evidence in the Joint Book of Exhibits herein, I accept on a balance of probabilities that:

1. On December 23, 2000, Mr. Mielke ruptured his Achilles tendon as a direct consequence of the Defendant's negligence. Mr. DeWolfe said that Mr. Mielke "had a lot of discomfort" while in his presence that day and that Mr. Mielke could not stand on his own; and I find that Mr. Mielke experienced a constant throbbing pain at the back of his right heel which radiated up to behind the knee.

2. Mr. Mielke had intermittent pain associated with that injury from December 23, 2000, until about the latter part of the month of February 2001, when he had his third cast removed, and was no longer experiencing "setbacks" such as painful swelling in his toes and feet;

3. Mr. Mielke went to the Emergency Department of the hospital at 12:30 a.m., December 24, 2000, and with Ms. Weddleton when she went to the scene of his fall, and then home to her house for a day. He had a first soft cast applied December 24, 2000 and had surgery December 26. Initially he was bedridden. He spent several days at Ms. Weddleton's home recuperating as he was unable to take care of himself or his home. Thereafter he was at home and remained in need of assistance because he could not put weight on the foot and unable to use crutches, and was required to keep it elevated. That situation persisted for quite some time.

4. Mr. Mielke had applied to his leg three hard casts, each for a two week duration, after removal of which his tendon was re-evaluated by medical staff. After initially being bedridden, he required a wheelchair, and after that he used crutches, for approximately six weeks in total, before using a cane as needed.

5. Mr. Mielke attended physiotherapy 11 times between February 9, 2001 and May 2, 2001. By March 6, 2001 he still had a slow "gait with slight limp and cane". He made good progress except his flexibility was still compromised on May 1, 2001, which appears to have been his last scheduled appointment.

6. Mr. Mielke switched from crutches to using a cane in April 2001. He returned to work in a reduced capacity in mid April 2001;

7. By December 2001, Mr. Mielke considered himself completely healed - although he testified that even now "most of the time it's fine" - very close to, but not quite the same mobility of movement in the leg / ankle area as before the injury;

8. Mr. Mielke was off work from December 26, 2000 to mid April 2001 when he started as a host for two weeks (earning the same wage as a waiter but negligible tips); thereafter, as a limited capacity waiter with a smaller section (three tables) and less tips, he worked for a month, after which he returned to his five table norm - he lost no income after June 1, 2001 due to the injury. He also received EI starting January 7, 2001 for 15 weeks at $77 / week and ending April 21, 2001 per Joint Exhibit Book Tab 5 and 6.

9. Although Mr. Mielke did not declare his entire amount of tips received as a waiter on his income tax forms, he estimated he received an average $400.00 per week - I specifically accept this evidence because he has made a career as a waiter; he lives

alone and exclusively is responsible for his budgeting, and he is very likely able to accurately estimate that amount without documentation as a result. He testified in redirect that as a result of an income tax audit for the year 2002, his tips were assessed at about $18,000.00 (if we take his estimated $400.00/ week in tips - at that rate he would have had to work 45 weeks to earn $18,000.00. I conclude that $400.00 per week is a reasonable estimate of his tip income).

10. I heard evidence that Mr. Mielke, before the injury, was a very active guy, who would bicycle from April to October each year, go to the gym four to five times per week and swim in the pool sometimes four to five times per week. During the period December 24, 2000 to June 1, 2001, I find he was prevented by this injury from engaging in these many and important activities. Ms. Weddleton confirmed in her testimony it was seven to eight months before Mr. Mielke was back to his previous lifestyle.

[69] Damages are intended to put a Plaintiff in the position he/she would have been in had the negligence not occurred. Thus all reasonably foreseeable (though not too remote) losses are compensable.

[70] Generally recoverable amounts relate to:

Damages for both past and future losses; and within each of these categories, both pecuniary (to compensate for financial losses such as lost wages, diminished future earning capacity, medical care costs, etc.) and non-pecuniary damages (to compensate for intangible losses such as pain and suffering, loss of enjoyment of life etc.).

[71] There is a further distinction between:

Special damages which compensate for losses and expenses that occur before trial; and general damages which compensate for losses that are likely to occur in the future.

[72] In the case at Bar, the evidence regarding the course of Mr. Mielke's recovery is not disputed. The significant dispute lies with the assessment of general damages, loss of wages, and to a lesser extent, lost housekeeping capacity.

Lost Wages

[73] I find that Mr. Mielke would have earned $400.00 in tips each 24.5 hours per calendar week, and $139.65 in wages (at $5.70/hr). He had no income from December 24, 2000 to January 6, 2001 when he notionally started to receive $77.00 per week for 15 weeks (EI payments) which payments only actually were first received on February 5, 2001. (Joint Exhibit Book - Tabs 5 and 6)

[74] On a per week basis Mr. Mielke received (salary $139.65 - $77.00) $62.65 less per week or $62.65 x 15 = $939.75 total for those weeks.

[75] Mr. Mielke received EI benefits till approximately early April 2001. He returned to work in mid-April 2001.

[76] He worked reduced hours as a host for two weeks and on a reduced table (three rather than five) basis as a waiter for four weeks, returning as of June 1, 2001 to full duties with no loss of income thereafter.

[77] I estimate therefore that he lost ½ of his monthly wages for the first two weeks before he started as a host ($279.30 or $139.65 x 2); and received only negligible tips ($100.00 I infer) so lost $700.00 in tips in total for those two weeks he worked as a host and ($400.00 x 2) $800.00 for the two weeks in April he did not work and did not receive EI.

[78] Once he worked for a month (May 2001) as a reduced waiter, I find that he lost 2/5 of $400.00 weekly tips or $160.00/week = $640.00 for that month (although he received full salary again), thus earning $960.00 in tips.

In Summary Mielke Lost:

Tips: January 1, 2001 to June 1, 2001	
$400.00/week for 20 weeks	$8,000.00
less tips received (as host)	$100.00
less tips received (as reduced waiter)	$960.00
	$6,940.00
Wages: January 1, 2001 to June 1, 2001	
$139.65/week x 20 weeks	$2,793.00
less received amounts: EI	
$77.00 per week for 15 weeks	$1,155.00
less wages April 15 - June 1, 2001	
6 weeks worked at $139.65	$837.90
	$800.10
TOTAL	**$7,740.10**

[79] My calculations vary slightly from the Plaintiff's claims of $6,100.00 and $689.00, and more so from Defendant's ($4,000.00 total), but I am satisfied mine are proved on a balance of probabilities.

Lost Housekeeping

[80] Mr. Mielke was bedridden for about a week at least, and thereafter in a wheelchair, on crutches, and ultimately started using a cane by early March 2001.

[81] These circumstances made him unable, or much less able, to attend to his housekeeping for which he was exclusively responsible otherwise.

[82] I am satisfied on a balance of probabilities that Mr. Mielke did not have the financial means to hire housekeeping help, and only for that reason did not do so; and that he required housekeeping services for a month.

[83] I assess, in accordance with the principles in *Carter v. Anderson*, [1998] NSJ No. 183 (CA), as a nominal amount, $500.00 for this head of damages.

General Damages

[84] The Defendant cites as comparable cases: *Camp v. CIBC*, [1986] BCJ No. 767 (S.C.) where $12,000.00 were awarded for general damages for a ruptured Achilles tendon; *Vasseur v. Vasseur* 1994 Carswell NB 383 where $10,000.00 were awarded for general damages for a ruptured Achilles tendon.

[85] Using the Bank of Canada Inflation Calculator brings those amounts to 2011 dollars as follows:

approximately - $22,162.00 (*Camp)*

- $14,154.00 (*Vasseur*)

[86] The Plaintiff cites as comparable cases: *Taylor v. Jollimore and Scotia Fuels Ltd.*, [1989] NSJ No. 271 (a truck ran over and broke the Plaintiff's foot) where $16,000.00 were awarded in general damages; *Levy v. Brampton*, [2005] O.J. No. 2487 (which was a weather related slip and fall) where $27,500.00 were awarded in general damages for a fractured ankle; *Cox v. Marchen*, [2002] O.J. No. 3669 where $37,500.00 were awarded for general damages for a severed Achilles tendon.

[87] These amounts, adjusted by the Bank of Canada Inflation Calculator, would bring them to 2011 dollars:

- $25,865.00 (*Taylor*)
- $31,082.00 (*Levy*)
- $45,361.00 (*Cox*)

[88] While each case is unique, these 2011 dollar amounts previously awarded, given a sense of the range of fair and just awards that would be generally suitable in the case at Bar.

[89] I conclude that given Mr. Mielke's pre-injury circumstances, and the significant effect the injury had on his lifestyle and comfort, that an appropriate award for general damages is $35,000.00.

Prejudgment Interest

[90] Although counsel have agreed on the rates of prejudgment interest (2.5% per year for general damages; 5% per year for pecuniary damages such as past lost income) they disagree whether such prejudgment interest should be awarded from December 24, 2000 to present (Plaintiff's position) or only for four years of that entire time period (Defendant's position).

[91] This disagreement requires the Court to examine the Court's jurisdiction to award prejudgment interest, and consequently what rate of interest, and what time periods, such awards should attract.

[92] Section 41(i) and (k) of the *Judicature Act* R.S.N.S. 1989 c.240 source the Court's jurisdiction to award prejudgment interest.

[93] Under the *Civil Procedure Rules* (1972) Practice Memorandum #7 set out the appropriate process and considerations regarding prejudgment interest. It read:

> 1. **Judicature Act**
>
> Section 41 of the **Judicature Act**, R.S.N.S. 1985, c. 240, as amended, provides that in any proceeding for the recovery of any debt or damages the court shall include in the sum for which judgment is to be given, interest thereon at such rate as it thinks fit for a certain period. There are other provisions in the section with respect to the rate of interest and related matters.
>
> 2. Evidence to Calculate Rate of Interest.
>
> (a) Counsel shall strive to agree upon a rate prior to the conclusion of the trial, which rate the court may, but is not bound to accept.
>
> (b) In the event counsel cannot agree upon a rate prior to the conclusion of the trial, counsel should place before the court evidence upon which the court may arrive at a rate of interest which is proper. Such evidence shall include the prevailing rates of interest for the relevant period of time, which, it is suggested, be in the form of a table prepared and introduced into evidence showing the average rates of interest for one (1) year or two (2) year term deposits or treasury bills. The table shall show the various

rates existing during the relevant period and the calculation of the average rate.

(c) In certain cases (e.g. those involving claims for non-pecuniary losses), counsel should place before the court evidence of the rate of inflation (i.e., the increase in the consumer price index) for the relevant period of time, which, it is suggested, be in a form similar to evidence regarding the prevailing rates of interest.

(d) Wherever possible, such tables shall be introduced by agreement without the necessity of calling the person or persons who made the calculations.

3. Rate Where No Evidence

If counsel do not agree upon a rate and no evidence is presented, the court will set a rate with a view to doing reasonable justice to the parties.

4. Counsel are referred to *Bush v. Air Canada* (1992), 109 N.S.R. (2d) 91.

[94] In *Bush v. Air Canada* (1992), 109 N.S.R. (2d) 91 [1992] N.S.J. No. 17 (N.S.S.C. - A.D.) Justice Chipman noted that:

> The purpose of prejudgment interest is to attempt to place the plaintiff in the same position he or she would have been in had the award been paid on the day the cause of action arose.

[95] And later:

> ...It is not designed to penalize the defendant or to deprive the defendant of an undue windfall in being able to enjoy the money during the intervening period...

[96] He noted that double recovery should be avoided - i.e. that if the damages award is grossed up for inflation, then the prejudgment interest should not also be grossed up.

[97] Under Practice Memo #7, the rate was set based on "prevailing rates of interest...showing the average rates of interest for one or two year term deposits or treasury bills".

[98] For pecuniary damages such rates were appropriate, but for general or non pecuniary damages, it is appropriate to distinguish between the prevailing interest rates and the increase in the consumer price index. This is so because general damages are often effectively grossed up for inflation between the date of the wrong and the award of damages.

[99] Although, it has been customary to apply 2.5% prejudgment interest to general damages (and it does track the rate permitted for capitalizing the value of future pecuniary damages CPR (2009) 70.06), other rates are awarded depending on whether inflation was considered in quantifying the general damages. (See e.g. *Nichol v. Royal Canadian Legion Branch 138 Ashby* 2011 NSSC 210 per Bourgois J. at paras 2-4.

[100] In the case at Bar, inflation has been factored into the quantification of general damages therefore only the residual or real rate of return on those damages is appropriately awarded as prejudgment interest.

[101] I conclude 2.5% interest is an appropriate rate of prejudgment interset for general damages in the case at Bar.

[102] As to pecuniary damages, such as lost past income, counsel have agreed that 5% prejudgment interest is the appropriate interest rate. I observe that this rate tracks the rates permitted for prejudgment interest on liquidated claims - see CPR 2009 8.07(1)(d) and 70.07. For a discussion of what are "liquidated claims" see *Pick O'Sea Fisheries Ltd. v. National Utility Service (Canada) Ltd.*, [1995] NSJ No. 481 (C.A.) at paras 40-46 per Flinn J.A. for the Court.

[103] I conclude that 5% interest is an appropriate rate of prejudgment interest for past lost income claims in the case at Bar.

[104] Although interest could be assessed for the period December 24, 2000 to June 13, 2011 and I realize the burden to satisfy me that there has been "undue delay" rests on the Defendant here, I find it appropriate to only permit such interest for 6 years given the Plaintiff's initial delay in reporting the incident and starting the action (on December 22, 2006) and its relatively slow pace since then. (See i.e. Justice Hood's comments at paras. 57-67 in *Marsh v. Paquette* 2011 NSSC 70; and Justice Bourgeois' comments at paras 5-8 in *Nichol* (*supra*) and *Boutilier v. Pearcey*, 2011 NSSC 307 per MacAdam J.)

[105] In conclusion I assess damages as follows:

General Damages	**$35,000.00**
[106] Prejudgment interest at 2.5% for six years.	**$5,589.27**
Past Loss of Income	**$7,740.10**
[107] Prejudgment interest at 5% for six years	**$2,632.37**
Loss of Housekeeping (no prejudgment interest claimed)	**$500.00**
Special Damages (no prejudgment interest claimed)	
Capital Health District Medical Report	**$88.50**
Over the Counter Medication	**$100.00**
TOTAL	**$51,650.24**

Costs

[108] I will accept written submissions on costs by the Plaintiff on or before August 26, 2011 and by the Defendant on or before September 1, 2011.

Rosinski, J.