

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Zwicker v. Canada (Attorney General)*, 2023 NSSC 44

**Date:** 20230210

**Docket:** Hfx No.458648

**Registry:** Halifax

**Between:**

Ryan Zwicker

Plaintiff

v.

The Attorney General of Canada,  
Representing His Majesty the King in the Right of Canada

Defendant

**Judge:** The Honourable Justice D. Timothy Gabriel

**Heard:** February 28; March 1 – 3, 7 – 10; June 6 – 7, 2022 in Halifax,  
Nova Scotia

**Counsel:** Michael Dull and Basia Sowinski, for the Plaintiff  
Heidi Collicutt and Corinne Bedford (March 1- 3, 7 -9, 2022)  
and Ami Assignon (March 10; June 6 – 7, 2022), for the  
Defendant

**By the Court:**

[1] The Plaintiff, Ryan Zwicker, was convicted of possession of narcotics for the purpose of trafficking and received a 30-month sentence as a result. Although not his first conviction, it was his first federal sentence. He was admitted to the Canadian Federal Correctional Facility located in Springhill, Nova Scotia ("Springhill Institution" or "the Institution") on February 18, 2016. On February 25, 2016, while exiting his cell to participate in recreational time, he slipped. He says that he slipped on water that had accumulated on the floor outside of his cell. Falling backwards, he struck his head hard against the tiled concrete floor. He was rendered unconscious. Some witnesses described seizure activity while he was unconscious.

[2] Mr. Zwicker says that the Defendant, The Attorney General of Canada, failed to take reasonable care to prevent his injury from occurring. He argues that the Defendant is liable for his fall, as well as the losses and injuries that he has sustained as a consequence.

[3] The basis for the attribution of liability to the Defendant is said to be pursuant to the *Occupiers' Liability Act*, S.N.S. 1996, c. 27. This will be addressed after the evidence of the fall itself is considered. After an examination of the incident, the issue of liability, damages, and mitigation will also be discussed.

A. *The fall itself*

[4] Mr. Zwicker himself recalls nothing immediately prior to or after the fall. What he has gleaned about what happened has been derived from others who witnessed it. There were four witnesses who testified that they actually saw either the incident, or its immediate aftermath. The first such witness was Christian Allison.

[5] Mr. Allison testified that he was in the Springhill Institution on February 25, 2016, the day upon which Mr. Zwicker fell. He was there after having pled guilty to criminal offences involving possession of drugs and guns. He entered the Springhill Institution on January 11, 2016 and was released on January 13, 2022, approximately six weeks prior to his testimony in this proceeding.

[6] Both he and other witnesses testified that new arrivals were initially housed in an area known as "reception" for a period of time. The reason for this practice is to provide the Institution with information which will be helpful when the time

comes to assign more permanent lodging. During their time in reception, inmates are assessed for any behavioural or compatibility issues.

[7] As he described the reception area, Mr. Allison had recourse to a sketch of the area that had been authored by Kim Terrio, an employee of the Institution, who had testified at discovery but had not yet been called as a witness by the time of his testimony. All parties agreed that Ms. Terrio's sketch (*Exhibit "8"*) was roughly accurate with respect to the details of the area which it purports to depict, and could be used by Mr. Allison and all other witnesses whose testimony involved a discussion of the area as they testified. Ms. Terrio subsequently confirmed, when she testified, that she had authored the sketch.

[8] All witnesses who described the area were essentially consistent as to reception's physical dimensions. With specific reference to the orientation shown on Exhibit "8", at the bottom of the sketch, the control post is depicted. It is always manned by at least one guard and generally more. The control post is semicircular, elevated from the floor on a dais or platform, and surrounded by plexiglass. From it, the guards on duty have an expansive and unobstructed view of the environs, which consists of three ranges. "B" range is on the same level as the control post, and "C" range is on the upper level. "A" range is off to one side. The guards access C range using a flight of stairs from B.

[9] Mr. Allison testified that on February 25, 2016, both he and Mr. Zwicker were housed in B range. Returning to Exhibit "8", if one imagines reception as a "horseshoe-like" semicircle, whose centre emanates outward from the control post, with the closed portion furthest away, the cells would be situated on the outer (closed) rim of that "horseshoe". The middle or open area between the control post and cells is designated as a common area. Given this orientation, Mr. Allison's cell was located in the lower quadrant of the left side of the horseshoe, which placed it also on the left-hand side of the control post. Mr. Zwicker's cell would have been at or near the "top" of the horseshoe, on the far right.

[10] Mr. Allison described reception as the hardest time of an inmate's sentence. While the Institution learns what it needs to know about the inmates housed there, before assigning them a more permanent location, they are generally kept locked in their cells, except for about two hours of recreation per day, excluding mealtimes. If the area happens to be in lockdown (for some reason) they could miss some or all of their recreation time.

[11] Upon walking into reception, to the inmates' right is the kitchenette where they would obtain their meals, which they generally bring back to their cells to consume. To the inmates' left is the control post, from which vantage the guards may observe everything.

[12] When granted recreation time, generally B and C range (downstairs and upstairs) would go one after the other. The normal routine was that (after supper was over) one day B range would go first and complete one hour of their recreation time, during which time the inmates would have the opportunity to go outside in the yard if they wished. When their hour was up, they would return to their cells, and would be followed by C range. When C range inmates completed their one hour outside, they returned to their cells, and B range was let out for another hour, this time inside the reception area. C range would receive its one "inside" hour after B inmates returned to their cells. The next day the order might be reversed.

[13] Mr. Allison testified that it is not unusual for inmates to have styrofoam cups with which to make hot beverages. Some inmates keep them in their cells, some obtain them from the kitchenette. It was quite common for inmates, when passing by the kitchenette on route to the exit to the "yard" in which they spend their outdoor recreation time, to make a hot beverage such as cocoa, coffee, or tea to take with them, particularly on cold days.

[14] Inmates would often enter reception via doors depicted on the far bottom right of Exhibit "8", directly beside the control post. They would then walk up the right side of the "horseshoe" to the kitchenette, where many stop to obtain a hot beverage. Whether they stop there or not, they will continue past the kitchenette, keeping to the right. They progress to the top of the "horseshoe", passing Mr. Zwicker's cell in the process, walk along the top of it and exit to the yard on the top left thereof. When they return from the yard, obviously their route would be reversed.

[15] Ordinarily, guards do rounds every hour. Sometimes, circumstances may require more frequent rounds. To do a round, two guards exit the control post bubble. One of their colleagues remains behind at the post to oversee the area in general. They will move around the bottom level checking on individual cells. The guards carry a baton with them which electronically records (or logs) the time at which they pass individual posts during each round. Generally speaking, they would usually complete a round on the (lower) B level, then proceed upstairs to do C.

[16] Mr. Allison testified that he remembered the Plaintiff's fall clearly, since he was standing by his cell door at the time, waiting for it to open. He explained that

the guards start opening doors on the right-hand side of reception, which is opposite to the side he was on. They open a few at a time. As soon as Mr. Zwicker's door opened up, Mr. Allison observed him exit, pass about two cell doors, and slip and fall to the ground.

[17] More specifically, he said the Plaintiff took a couple of steps, and his feet shot out from under him, actually going above his head in mid-air and, as he came down, he hit the back of his head quite violently on the tiled flooring. He appeared to have been unable to catch himself or otherwise check his fall.

[18] Immediately after the fall, Mr. Allison recalls that Mr. Zwicker did not look conscious, and appeared to be convulsing. Other inmates who had already been let out of their cells started to congregate where Mr. Zwicker lay.

[19] Guards also came, within seconds. They directed everyone to return to their cells while awaiting an ambulance for Mr. Zwicker. Mr. Allison himself recalls that he had not been let out of his cell by the time the fall occurred. While he does not recall the precise time of the fall, he thought that the 6 o'clock evening news was still in progress. He guessed that it took the ambulance attendants about 35 minutes to arrive. He then recalled seeing them place the Plaintiff on a stretcher with a neck brace and taking him to the hospital.

[20] Mr. Allison could not shed any light upon the cause of the fall from his vantage in the cell. He did not recall seeing Mr. Zwicker carrying anything like coffee, and he was not running, although he might have been rushing. He added that when the doors open, most inmates will move quickly. They are anxious to get out of their cells. He said that Mr. Zwicker was wearing a jacket, so he assumed that the Plaintiff's intention was go outside.

[21] Trevor DeWolfe was another witness who testified that he had observed Mr. Zwicker's fall. He did time at the Springhill Institution between January and November 2016 for two break and enters. He agreed that the Terrio sketch (*Exhibit "8"*) was a reasonably accurate representation of the reception area as a whole.

[22] He described his cell as being a few cell doors down from that of Mr. Zwicker, along the top portion of the horseshoe-like reception area. Like Mr. Allison, he was double-bunked with a cellmate. He had a clear view of Mr. Zwicker's fall, as he had been let out of his cell and happened to be in the area and looking in the direction when it occurred.

[23] Mr. DeWolfe recollected that the Plaintiff was wearing a jacket and institutional footwear. He observed Mr. Zwicker walking and not carrying anything when he exited his cell. He was standing in the area marked TD3 on Exhibit "8". He recalls Mr. Zwicker's legs suddenly just flew high up in the air, and his head struck the tile floor, which appeared to be wet. He said the tile itself was a "light colour", but he could not be more specific.

[24] Immediately after the fall, he saw blood in the vicinity of the Plaintiff. Mr. DeWolfe did not try to get closer. There did appear to be a sheen of liquid that he thought was water in the vicinity of the fall. Mr. DeWolfe was unable to provide an indication of dimensions such as the size or the depth of the liquid on the floor. Nor did he have knowledge as to its origin, or how long it had been there.

[25] He said the guards took a couple of minutes to get there. The "code" was called, meaning that the inmates had to return to their cells while the ambulance attendants were awaited.

[26] Another witness who testified that he observed Mr. Zwicker after he fell was Scott Devereaux. Mr. Devereaux recalled that he entered the Institution in late 2015, and was still being housed in Reception on February 25, 2016, when the Plaintiff's fall took place. All in all, he was incarcerated for a little over a year before his release.

[27] Although he was moved to a few different cells in reception, he did recall where he was housed at the time of the Plaintiff's fall. He described the location of his cell with reference to Exhibit "8" which has the guards' control post at the bottom of the diagram. Moving along the side of B range to the right of the control post (he testified) one encounters showers, and then his cell (at the time), sequentially. He said that if one continued up away from the control post along the right side of the perimeter, one would encounter Mr. Zwicker's cell.

[28] He, too, described reception as an uncomfortable place. The meal routine generally involved getting breakfast between 7:00 – 8:00 a.m., lunch between 11:30 a.m. to 12:30 p.m., and supper around 4:30 - 5:00 p.m. Mr. Devereaux testified that the usual approach was for the guards to let out a few cells at a time. The inmates would go to the kitchenette, obtain their meals, and return to their cells to eat then. Then a few more cells would be opened up, and the process would be repeated until everyone had his meal.

[29] Mr. Devereaux indicated that he did not see the actual fall itself. He did see the immediate aftermath, after having, he recollects, just completed his own recreation time. In fact, he felt he had been in the area of the ping-pong table in the common area shortly before the incident. This was in a corner of the common area near Mr. Zwicker's cell.

[30] He described Mr. Zwicker as lying on the floor making moaning and squealing sounds while unconscious, and that his legs were "kicking". Mr. Devereaux further described the Plaintiff as laying in water. He saw lots of blood as well. It appeared to be flowing from Mr. Zwicker's head. Mr. Zwicker had not travelled very far after leaving his cell. He was wearing his jacket, so Mr. Devereaux assumed that the Plaintiff had just completed his recreation time. Inmates on the same range would ordinarily begin and complete their recreation at the same time.

[31] He also described a puddle of liquid in the vicinity of Mr. Zwicker as he lay on the tiled floor. When asked to describe its dimensions, Mr. Devereaux said it extended about half a foot out from the wall, and, lengthwise, appeared to cover the area in front of four to five cells.

[32] Mr. Devereaux quickly made his way back towards his own cell. Everyone was then told to lock up, in any event. He said that he had assumed that Mr. Zwicker had slipped in the liquid, but felt it was also possible that he had been assaulted.

[33] After returning to his cell, he watched as the paramedics arrived and took Mr. Zwicker to the hospital. He said that he was trying to figure out what had happened. He said the water on the floor in the vicinity of Mr. Zwicker's, and the neighbouring cells, had been there for more than an hour, perhaps as much as two hours prior to the fall.

[34] Indeed, before exiting his cell for recreation that evening, Mr. Devereaux testified that he had placed some towels on the floor inside the bars of his own cell. He explained that he had done so because he had heard some rumours that certain individuals were planning to flood a sink or a toilet that day. He also said he saw some water on the floor before beginning his recreation, and was concerned about it infiltrating his cell. He added that, when he did get back to his cell after the fall, there was indeed some water on the floor of the interior, and he sopped it up with the towels. He did not, however, observe either a toilet or a sink overflow that day, or anything else which could shed any light upon the origin of the water.

[35] Mr. Devereaux was not asked, nor did he say, whether he attempted to alert anyone as to the existence of the hazard beforehand. He said that he did not observe whether the guards walked through the puddle when doing rounds prior to the Plaintiff's fall, but felt that they would have had to, since the water was all around the perimeter of the cells, in that area.

[36] He also testified that he ended up cleaning the area of the fall afterward. By the time he mopped it up, he said that the liquid appeared to be "reddish", because there seemed to be blood in it. He did not notice an odour. He gave no indication whether the parameters of the pool, or its depth, had changed by the time he mopped it up.

[37] This brings us to the testimony of Timothy Thomas. He was the only Corrections Officer (of the three on duty at the time of the Plaintiff's fall) to testify. Mr. Thomas did not observe the fall itself, only the aftermath.

[38] He began his employment with the Institution on May 7, 2010, and, by February 25, 2016, had attained his "CX-1" designation. His job duties at the time included performing security rounds, observation of the inmates from the cage, seeing to unit routine, and facilitating inmate recreation. As his designation has changed over the years, he now carries additional responsibilities.

[39] At the time, however, the ordinary routine included doing rounds once per hour. The goal or objective of rounds is (usually) to check for "live breathing bodies", take inmate requests, and ensure safety. All staff on the units conduct them, and at that time, the practice would be that two officers would do each individual round, while one remained in the observation booth. Rounds could be increased in frequency if there were concerns with respect to the potential for certain types of misconduct, or could be staggered so that timing of the rounds would be less predictable.

[40] Mr. Thomas described a "Dyster" system, consisting of an electronic wand and the various electronic checkpoint posts interspersed throughout each range. Each guard participating in the round carried a wand which was used to swipe the checkpoint at the commencement, and each of the other checkpoints as they were passed during the course of the round. The time at which the guards had checked the cells between each respective checkpoint was thereby automatically recorded.

[41] On February 25, 2016, Mr. Thomas' shift began at 1830 hrs., or 6:30 p.m. Recreational time for the inmates had already commenced by this time. This is



reflected in the logbook for the day (found at page 157 of the joint exhibit book - hereinafter referred to as Exhibit "1"). Specifically, the entry at 1830 hrs. reflects Mr. Thomas' presence "on post", which is to say, on the unit.

[42] Mr. Thomas identified the activity report which describes the various rounds performed by the guards during the evening and night time hours of February 25, 2016. The relevant portion is reproduced below:

Schedule #5 RRC Round: 1-RRC

Date	Time	Checkpoint	Comments
25 Feb 2016	18:51:13	RRC-A-Range	
	19:45:21	RRC Start	Guard
	19:49:41	RRC-B-Range West	
	19:50:04	RRC-B-Range East	
	19:50:58	RRC-C-Range East	
	19:51:23	RRC-C-Range West	

*(Exhibit "1", volume 1, pp. 97-98)*

[43] When alerted to the fall, Mr. Thomas was in the guards' control post. His other two colleagues were doing rounds. He had just observed them complete their round of C range, upstairs, which was fully visible from his vantage. This would place the fall as having occurred at approximately 7:50 p.m. that evening, six minutes before the ambulance attendants are noted as having arrived. This, it will be recalled, is at odds with the observation of Mr. Allison who felt that it could have been as long as 35 minutes before their arrival.

[44] Interestingly, the institutional footage, which would have recorded the actual slip and fall, and the exact time at which it occurred, was not available. It had been "overwritten" pursuant to the extant institutional policy with respect to the retention of video footage.

[45] This policy required footage to be retained only for a minimum of six days, enough time so that it could be reviewed. If the review revealed that an assault had been committed, it would be retained for longer than that, to facilitate an investigation and any ensuing criminal legal process.

[46] Security Intelligence Officer, Neil Rideout, did not see the actual fall, nor did he actually see the Plaintiff in the aftermath of the incident, at least not directly. He

did, however, have the opportunity to review the video security footage. He was the only witness that testified to having done so.

[47] His duties, on February 25, 2016 (predictably) related to security intelligence. This involved investigating incidents, gathering as much information as possible, from as many sources as were available, putting the data together, and analysing it. He would often make recommendations based on that information for the general safety of inmates, as well as with respect to proactive measures which could be undertaken to prevent drug infiltration and/or violent gang activity at the Institution.

[48] On February 25, 2016, Mr. Rideout was at the Institution at the time of the Plaintiff's fall. He was working late on an unrelated matter. He had a recollection of viewing the video, but nothing else. Because he happened to be there at the time, someone from reception "would have asked" him to review the film and determine what could be seen regarding an injury in that area. He said, "I would have pulled up the tape and quickly confirmed that he [Mr. Zwicker] was not assaulted, and that would have ended my involvement".

[49] Mr. Rideout testified that he was able to confirm that there had been no assaultive behaviour directed at the Plaintiff, and that if he had not happened to be on duty that night he may not have been involved in any aspect of the incident or its aftermath. In any event, he explained that situations where offenders are injured as a result of something other than an assault were beyond his purview.

[50] His observations were not committed to writing, however, until almost two months had elapsed. This is because he became aware (around that time) that Mr. Zwicker intended to (or might) bring legal proceedings as a result of what had happened.

[51] Mr. Rideout explained that there are many "overt" cameras in the reception range. Occasionally, use of covert cameras is made in accordance with the relevant Commissioner's Directive, in situations where overt video surveillance either has proven to be ineffective, or was unlikely to be effective having regard to the situation in question. To his knowledge, there were no covert cameras in reception on the date in question, and no footage from a covert camera had captured this incident.

[52] Mr. Rideout explained that overt cameras often fulfil a preventative or deterrent role. In his experience, people act more appropriately when they know that their actions are being recorded. Moreover, if a particular officer's view is impeded when something occurs, for example, in reception, he or she could simply review

the film footage, as each unit is equipped with monitors for that purpose. Everything is recorded automatically for a six-day period.

[53] CRC Commissioners Directive 568 – 8 was referenced. This was extant on February 25, 2016. It provides authority for use of surveillance equipment at the institution. Its purpose is said to be:

To establish and define the requirements and procedures for the installation and use of surveillance equipment to safeguard the safety and security of all individuals and government assets.

Ensure that surveillance respects the rights of individuals to a reasonable expectation of privacy is guaranteed in the *Canadian Charter of Rights and Freedoms and the Privacy Act*.

(Exhibit "1", volume 2, p. 305)

[54] The relevant portions of that Directive provide as follows:

#### Evidence

10. Only those portions of the video recording believed to contain evidence pertinent to a serious misconduct are to be viewed. Every effort will be made to respect the privacy of, and minimize the impact on, persons not specifically involved in the investigation.

11. When a recording is to be disclosed to law enforcement agency, only the portion related to the incident(s) will be provided.

12. The authenticity and integrity of the recording system will be established and the copy of the recording will be protected in order for the electronic document be used as evidence.

#### Retention

13. Overt video recordings are to be retained for a minimum of 144 hours (six days). The Institutional Head has the authority to order their retention for an extended period in case the records are required:

- a. as evidence in a potential criminal investigation
- b. as evidence in a potential CSC investigation at the national, regional or local levels, or
- c. for reasons other than an investigation.

14. Covert video surveillance recordings are to be retained for a minimum of 30 days. if no incident is recorded, they must be overridden or destroyed after that time.

15. When evidence in a video recording is used for investigation, or administrative action and decision, the evidence must be retained by the Departmental Security Officer for a period of two years starting from the date of the last action taken.

*(Exhibit "1", volume 2, p. 307)*

[Emphasis in original]

[55] This is what Mr. Rideout wrote of the incident on April 19, 2016, almost two months after it had occurred:

The writer (SIO N. Rideout) was working late on 25 February when staff attended the SIO office to review video to see how Zwicker #211498x had become injured. The writer remembers viewing the video and seeing Zwicker leave his cell quickly upon the cells opening up. Within steps from his cell he went down on his back extremely quickly, a few offenders gathered around and stood back when staff arrived within a very short time.

The incident was so quick that the writer remembers playing it a few times in slow motion to confirm what occurred. Based on the review of the tape, the offender went directly backwards on the floor did not appear to catch himself or break his fall in any way. Also noted was, no other offender touched Zwicker prior to the fall.


*(Exhibit "1", volume 1, p. 161)*

[56] Mr. Rideout testified that there is a classification system for injuries insofar as they were considered either serious or non-serious. But, as he said, "I'm a security guy". He went on to add that he did not even know that Mr. Zwicker was taken to hospital as a result of the injury on February 25, 2016, and that he would not have been involved in categorizing the injury sustained in this incident, or any of the sequelae. In situations such as this, he said, "nobody except healthcare decides serious and non-serious. They have a definition that I am not aware of. It would go from their senior manager in that department – if they saw a role for me I'd have to perform that role."

[57] When questioned as to the extent of his discretion to retain and preserve surveillance tapes, he agreed that he possessed it, but it is not unfettered. "Yes, I can retain it, but under strict guidance. Surveillance for hearing or video is not willy-nilly – it's privacy. You get what you need and can justify having and you stick to that. An offender file – everyone has a file. I have no business going through other offenders' files that are not specific to me. It is information I have access to, but is not my responsibility." And, a little further on, "Once I came to believe he was not assaulted, I felt I had no role."

[58] Mr. Rideout concluded by indicating that he did not complete the incident report related to Mr. Zwicker's fall, although he has been involved in the preparation of incident reports many times in the ordinary course of his duties. He said the usual routine would be for the SIO beginning shift the next morning to collect the Statement/Observation Reports ("SOR") generated as a result of any incident(s) occurring the previous day and use them to prepare the incident report(s). They are then passed along to CSC, in order that they may be made aware of what has happened.

[59] Three SOR forms related to this incident were completed by each of the Corrections Officers on duty the evening of February 25, 2016. The first was completed by Nicholas Bauer. Mr. Bauer was not called to testify. His SOR is dated February 25, 2016. It is reproduced below:

		<input type="checkbox"/> A <input checked="" type="checkbox"/> B <input type="checkbox"/> C	
<b>STATEMENT/OBSERVATION REPORT</b> <small>NOTE: Refer to Form CSC/CCO 0475-01 for instructions on completion and handling of this form</small>		<b>RAPPORT D'OBSERVATION OU DÉCLARATION</b> <small>NOTE: Référez au formulaire CSC/CCO 0475-01 pour les instructions pour remplir et classer ce formulaire</small>	
Institution - Établissement <b>Springhill</b>		Completing Operational Unit - Unité opérationnelle ayant rédigé le rapport <b>RRC</b>	Region - Région <b>ATL</b>
Subject - Objet <b>241 0572</b>		Tracking Number Numéro de suivi	
		Date and time report written Date et heure rapport écrit (YYYY-MM-DD) (Time - Heures)	Date and time of incident/observation Date et heure de l'incident ou l'observation (YYYY-MM-DD) (Time - Heures)
		<b>2016-02-25</b>	<b>21:00</b>
		<b>2016-02-25</b>	<b>1950</b>
<b>STATEMENT/OBSERVATION - DÉCLARATION OU OBSERVATION</b> On 2016-02-25 This writer, CX-01 Bauer, was working in Reception when the following occurred. At approximately 19:50hrs during a security round this writer was notified by the control officer that I/M Zwicker required medical attention. This writer Responded and provided first aid until EMS arrived on site. Correctional Manager notified. End of report.			

(Exhibit "1", volume 1, p. 158)

[60] The second was prepared by Richard Pyke, who did not testify either. Counsel for the Defendant indicated that he was not employed by CSC any longer. Counsel for the Plaintiff confirmed that this was his information as well. He also confirmed that Mr. Pyke was living and working locally, and that his whereabouts were known. This is what his statement said:

**Correctional Service Canada / Service correctionnel Canada**

A  
 B  
 C

ONCE COMPLETED / UNE FOIS REMPLI

2016-02-25

<b>STATEMENT / OBSERVATION REPORT</b> <small>NOTE: Refer to Form CSC/MCC 8876-01 for instructions on completion and handling of this form.</small>		<b>RAPPORT D'OBSERVATION OU DÉCLARATION</b> <small>NOTE: Référez au formulaire CSC/MCC 8876-01 pour les instructions pour remplir et classer ce formulaire.</small>		PUT AWAY ON FILE - CLASSER AU DOSSIER See Distribution - Voir la distribution (See Instruction Page - Voir la page d'instructions)	
Institution - Établissement Springhill		Completing Operational Unit - Unité opérationnelle ayant rédigé le rapport RRC		Tracking Number / Numéro de suivi [ ]	
Subject - Objet I/M Zwicker Medical Emergency		Region - Région ATL		Date and time report written / Date et heure rapport écrit (YYYY-MM-DD) (Time - Heure) 2016-02-25 21:05	
				Date and time of incident/observation / Date et heure de l'incident ou l'observation (YYYY-MM-DD) (Time - Heure) 2016-02-25 1950	

**STATEMENT/OBSERVATION - DÉCLARATION OU OBSERVATION**

On 2016-02-25 at approximately 1950 hours I, CX-1 Pyke was doing a security round on A Range of Reception when the control officer called us back to the control post. Inmate SWICKER was on the ground on B Range and required medical attention. CK-1 Bauer responded and performed first aid while I contacted the Correctional Manager from the control post. I informed her that we had a medical emergency and we required an ambulance. MCCP was informed of the situation as well. This ends my involvement in this situation.

(Exhibit "1", volume 1, p. 159)

[61] As pointed out earlier, the only Corrections Officer who was on duty that evening to testify was Tim Thomas, and his SOR appears next:

**Correctional Service Canada / Service correctionnel Canada**

A  
 B  
 C

ONCE COMPLETED / UNE FOIS REMPLI

2016-02-25

<b>OFFICER'S STATEMENT / OBSERVATION REPORT</b> <small>NOTE: Completion and handling instructions on last page.</small>		<b>RAPPORT D'OBSERVATION OU DÉCLARATION D'UN AGENT</b> <small>NOTE: Instructions pour remplir et classer ce formulaire à la dernière page.</small>		PUT AWAY ON FILE - CLASSER AU DOSSIER See Distribution - Voir la distribution (See Instruction Page - Voir la page d'instructions)	
Completing Operational Unit / Unité opérationnelle ayant rédigé le rapport Springhill Institution		Region - Région ATL		Tracking Number / Numéro de suivi [ ]	
Subject - Objet I/M Zwicker Injury				Date and time of report / Date et heure du rapport (YYYY-MM-DD) (Time - Heure) 2016-02-25 2300	
				Date and time of incident/observation / Date et heure de l'incident ou l'observation (YYYY-MM-DD) (Time - Heure) 2016-02-25 1950	

**STATEMENT/OBSERVATION - DÉCLARATION OU OBSERVATION**

On the above date and time while working in the RRC this writer was observing staff completing a security round on the A range when it was brought to my attention that an inmate had fallen and injured himself. Staff responded to the inmate on the B range floor where he was momentarily unresponsive but breathing. Other inmates in the area claimed that he had slipped and fallen hitting his head on the floor on the way down. I/M Zwicker was disoriented and in pain, and had no idea where he was. An ambulance was called and I/M Zwicker was maintained in the recovery position until it arrived. SIO Neil Rideout was on site and review the camera footage and confirmed that I/M Zwicker had in fact fallen, ruling out the possibility of an assault. End of report.

(Exhibit "1", volume 1, p. 160)

[62] The actual institutional incident report related to the Plaintiff's slip and fall was apparently prepared by SIO Ardena Austin, who did not testify either. She did not sign it, but appears to have prepared the document at 10:26 the next morning. It, too, is reproduced below:

Government of Canada Page 1  
**PROTECTED 'B' ONCE COMPLETED**  
 A  B  C  
**PERSONAL INFORMATION BANK**

INSTITUTIONAL INCIDENT REPORT FOR SIO/RHQ/NIHQ PUT AWAY ON FILE - SEE DISTRIBUTION

THIS DOCUMENT CONTAINS INFORMATION WHICH IS EXEMPT UNDER THE PRIVACY ACT, OR CLOSURE OF THAT INFORMATION TO A PERSON NOT HAVING A NEED TO KNOW OR PROHIBITED MATTERS RELATED TO ITS RELEASE MUST BE REFERRED TO THE PREVENTIVE SECURITY DIVISION OF CSO.

Incident number: EN20162100000071 Facility: 21000 SPRINGHILL INSTITUTION  
 Incident date & time: 2016-02-26 10:50 AST Version number: 1

Incident type(s)/Sub-type(s)/Location(s):  
**MISCELLANEOUS - MEDICAL EMERGENCY (NOT ATTRIBUTABLE TO ASSAULTIVE BEHAVIOUR) - SPRINGHILL INSTITUTION/LIVING UNIT/Common Room/RRC**

Use of force: NO

Media Attention:  
 Incident Type/Sub-type: MISCELLANEOUS - MEDICAL EMERGENCY (NOT ATTRIBUTABLE TO ASSAULTIVE BEHAVIOUR)  
 Media contact: NO Media attention types:

Comments:

OFFENDERS		
FPB	NAME	ROLE
0911577	ZWICKER, RYAN	VICTIM

Synopsis:  
 Staff noted offender Zwicker no FPB, in the RRC had slipped and fallen on the B range common area. Staff responded and provided first aid and an ambulance was contacted for transport to outside hospital for further medical assessment. He was returned later that night.

Current situation:  
 Springhill Institution remains in normal operation. The full complement of staff were on site as per the staffing matrix.

Summary narrative:  
 Version 1 2016-02-26  
 The SIO was called in to review the video to ensure offender Zwicker had fallen and was not assaulted. It was confirmed to be an accident due to slipping on the floor and falling, striking his head.

**OFFENDER(S) INVOLVED**

FPB: Name: ZWICKER, RYAN  
 Incident type/Sub-type/Location:  
**MISCELLANEOUS - MEDICAL EMERGENCY (NOT ATTRIBUTABLE TO ASSAULTIVE BEHAVIOUR) - SPRINGHILL INSTITUTION/LIVING UNIT/Common Room/RRC**  
 Role: VICTIM Involvement qualifier:

Injury Details:  
 Cause of injury: ACCIDENT Severity of injury: NON-SERIOUS BODILY INJURY  
 Deemed serious bodily injury by health care practitioner: NO  
 Injury description: Slip and fall

Reported by: AUSTIN, ARDENA Title: SECURITY INTELLIGENCE OFFICER Date/Time: 2016-02-26 10:26 AST

Signature \_\_\_\_\_ Date \_\_\_\_\_

(Exhibit "1", volume 1, p. 162)

[63] I was satisfied on the basis of the testimony of Mr. Rideout and that of Kim Terrio (whose evidence will be discussed later in these reasons) that the incident report, and SOR's upon which it was based, were admissible as business records, even though three of the four people who authored them did not testify. Any wider significance attributable to the failure of these individuals to testify will be discussed further on.

[64] Next, I will consider the evidence of Kim Terrio.

[65] Ms. Terrio was the first witness called by the Defendant. As previously indicated, she confirmed that she had authored the sketch which was entered as Exhibit "8".

[66] She stated that she works in Management Services at the Institution and, to be specific, she is the Assistant Warden. She described the general way that inmates are processed in reception, and added that, after an inmate's time in reception is completed, if they are classified as medium security, they would either stay at Springhill, go to the Dorchester Institution, or be transferred out of province.

[67] When discussing the meal delivery for the inmates, she indicated that the meals are delivered to the kitchenette in bulk. People come through, collect their meal and generally take it back to their cells. Sometimes, an inmate will eat it in the common area. The kitchenette contains, among other things, a milk dispensing machine, coffee urns, bins holding food, and machines which dispense water, including hot water.

[68] With respect to clothing, inmates are issued institutional garb, including undergarments and black sneakers. They are permitted, however, to wear their own footwear if they wish. They are not permitted any such discretion with respect to their other attire – it must be standard issue.

[69] Describing B range, she estimated that it contains approximately 20 cells. Cleaning supplies are kept in the cleaner's closets, which are accessible to all inmates (when they are out of their cells) and/or inmate cleaners. The latter are trained by institutional services employees. Springhill also employs third-party cleaners.

[70] Ms. Terrio explained that inmate cleaners are expected to keep the common areas, hallways, and control post staff washrooms clean. They are also expected to mop and wax floors and wipe down handrails. One of the advantages possessed by



an inmate cleaner is that they are out of their cells the whole day, except during lockdowns.

[71] The daily routine would include mopping the floor at least twice daily, in addition to other duties noted above. They would also attend to specific jobs as requested by the corrections officers.

[72] For example, in the case of an inmate accidentally spilling his coffee, three cleaning possibilities exist. The inmate could clean it up himself. A correction officer could ask an inmate cleaner to do so. Or the inmate cleaner could clean it up later, either when it came to his attention, or while otherwise mopping the floor as part of his daily cleaning routine.

[73] Larger problems, such as a flood caused by toilet overflow or a leaky faucet, would be directed to institutional maintenance people. That process would be initiated either by an inmate complaint or by a corrections officer when the problem becomes known. Other examples of situations in which institutional maintenance people would involve themselves include problems with electrical outlets, plugged toilets, faulty light fixtures, and the like. In the event of an urgent matter, maintenance would be asked to come right away.

[74] When a request is made for institutional maintenance personnel, it is logged in a "cog" system and tracked. When the problem has been satisfactorily addressed, this is also logged. Those records are accessible. No such records of any such requests exist for February 25, 2016, to Ms. Terrio's knowledge.

[75] Ms. Terrio explained that she was pretty confident in the time noted in the logbook (*Exhibit "1", volume 1, p. 157*) that the ambulance would have arrived at 1950 hours (7:50 p.m.) to take Mr. Zwicker to the hospital. She subsequently agreed that it was difficult to tell whether the notation was "1950" or "1956" hours. She did add that it would be common practice for an ambulance to be called when it was felt that a medical emergency had taken place. She further indicated that the term medical emergency could apply to situations where the inmate did not ultimately end up going to an outside hospital. In this case, Mr. Zwicker obviously did. She also explained the process by which the aforementioned Statement of Observation Reports (SOR's) would be prepared by all staff who were either involved in, or had observed the incident. These forms must be completed prior to the staff member's end of shift if at all possible, and if it is not possible to do so prior to the end of shift, the reason for the delay must be explained.

[76] During cross-examination, Ms. Terrio's attention was directed to the "Classification of Inmate Injuries" CSC form which was prepared in the aftermath of Mr. Zwicker's fall. The form was signed by Laurie Embree, R.N. (presumably at the hospital) at 10:02 p.m., February 26, 2016. It was also signed by Susan Beaton, A/CHS, on March 9, 2016 at 3:30 p.m. (*Exhibit "1", volume 1, p. 140*). Neither signatory testified. Ms. Terrio was not asked what the initials "A/CHS" signified. Presumably, they stand for "Acting Chief of Health Services".

[77] Handwritten on the form are the words: "slipped on water hit head – followed medically". Ms. Terrio was unable to determine the identity of the author of the note by the handwriting. The only thing she was able to say was that it was not hers.

[78] The form itself, among other things, contains two boxes. One is to be checked in the case of "non-serious bodily injury". The other is to be checked in the case of "serious bodily injury". Neither box is checked on this form. Ms. Terrio testified that this particular form, procedurally, is always prepared before that determination is made by health services.

[79] Ms. Terrio offered some elaboration. She explained that Health Services would be involved in the classification of the incident involved, specifically whether it was "serious bodily injury" or not. In the case of the former, a more elevated investigative onus is born by the Institution. She did not appear to be fully conversant with either the process or criteria used when such determinations are made, but it would not be made immediately. She said that she did not personally observe anything to suggest that Mr. Zwicker's injuries had been classified as serious. She also added that this does not mean that they were not classified as such.

[80] Her attention was drawn to the fact that the form indicates that the injury occurred at 2015 hrs., which is 8:15 p.m. This is at least 19, if not 25, minutes after the ambulance attendants are noted in the logbook as having already arrived in response to the fall to attend to Mr. Zwicker's injuries. She speculated that human error could account for the various time discrepancies noted but acknowledged that she could not say precisely when Mr. Zwicker's fall had occurred, particularly on the basis of the documentation to which her attention had been directed. Obviously, she herself had not witnessed it.

[81] She drew a distinction between health services determinations as to whether an incident involved "serious bodily injury" or "nonserious bodily injury", and whether the incident itself it constituted a "medical emergency". As noted earlier,

she was of the view that any time an ambulance was called constituted a "medical emergency" whether or not the inmate ended up, ultimately, being taken to hospital.

[82] Mr. Zwicker's incident, she agreed, would have amounted to what the institution considers to be a "medical emergency". She also agreed that the institution would be obliged to complete a "Response to Medical Emergency Form" and also to conduct a debriefing with the staff members who were involved or observed the incident.

[83] As to the form, she testified that she did not recall seeing it. As to the debrief, she indicated that it is not a document debriefing. Rather, the process is basically for the benefit of staff to make sure they are okay and discuss what happened and what went on. She agreed that the video would be reviewed, but that would not be part of the debriefing process.

[84] From Ms. Terrio's testimony, we now move (at present) to consider some of Mr. Zwicker's post-incident progress notes, as maintained by CSC. For instance, the entry for February 26, 2016, as transcribed, indicates:

16-02-26 (1005) Seen in health services after being sent to outside hospital last h.s. Arrived walking with ice pack sitting on (Rt) shoulder. BP 162/85 P. 70 R 18 O2 sat 99% RIA. States has a sore stiff neck and can't turn his head to the (Rt). Lump noted to back of (Rt) side of head. Not red, 0 abrasions noted. PERL. Neuro vitals stable. States nauseous and vomited x3 since last h.s. Same unwitnessed. When asked what happened he stated he doesn't know. "All I know is I woke up in an ambulance". States CX told him he slipped and fell, hitting his head. Will reassess as needed. Aware to notify H.S. if symptoms worsen or no improvement. Asked writer to call his mother. Informed he needed to sign release of info to have any personal info disclosed to his mother. Release of info signed and placed on chart. Stated inmates on range informed his mother of his fall and OSH visit. Informed would notify mother he was O.K. IM very worried about mothers [sic] stress.

16-02-26 (1015) Inquired if IM was still having rectal bleeding. Informed that bleeding has stopped. "It was a hemhorroid [sic]" and cream helped. On Dr wait list for assessment regarding knew pain/clicking.

*(Exhibit "1", volume 1, pp. 108 – 109)*

[85] Then, on February 28, 2016:

16-2-28 (1030) Offender seen re multiple IIM requests concerned about head inj + follow up. Offender aware that he will be seeing Dr. Begin in the next medical clinic, neuro vitals reassessed. All WNL. Offender reports that his "Trust issues" are the reason for submitting multiple requests. Reassurance given. Suggested to rest with no reading, writing or watching tv preferably with lights out or eyes covered from light. Also to alternate heat + cold on neck + encouraged to move neck as tolerated to help loosen tight sore muscles.

*(Exhibit "1", volume 1, pp. 109 – 110)*

[86] On March 2, 2016, the Plaintiff was seen by Dr. Begin, the Institutional doctor, who made the following notation:

16-03-2 Fell outside his cell Feb. 25/16. Told he slipped on water. Fell + struck the back of his head – doesn't remember the fall. Vomiting after he regained consciousness and daily 1 – 2 episodes per day since. Neck sore – can't turn to the right.  
Gets nauseated and can't concentrate when reading. Vision somewhat blurry. No visual acuity chart in health care.  
Book CT head + neck ASAP.

*(Exhibit "1", volume 1, p. 110)*

[87] A requisition form was filled out in furtherance of the direction provided by the doctor. It simply states:

Clinical Information and diagnosis:

Fell hit back of head with LOC. Has been vomiting daily since, blurred vision. Can't move his neck to the right.

Examination requested:

CT Head + neck

*(Exhibit "1", volume 1, p. 124)*

[88] Another progress note indicates that the CT scan of Mr. Zwicker's head and neck, which Dr. Begin had wanted booked "ASAP", was scheduled to take place on March 3, 2016, at 815 hrs. at Colchester County Hospital.

[89] This testing was performed, and the results were noted in the Diagnostic Imaging Report prepared by Dr. Susan E Thompson, MD, FRCPC, who did not testify. The body of the report contains the following information:

CLINICAL HISTORY: Head and neck from fall.

COMPARISON STUDY: Skull and cervical spine. February 25, 2016

FINDINGS: Thin section axial scans were performed through the brain without intravenous contrast.

There is preservation of normal gray-white matter differentiation. The CSF spacing is normal.

There is no evidence of focal edema, mass effect or midline shift. No acute or chronic intracranial hemorrhage or territorial ischemic change is noted. The dural venous sinuses appear patent.

The skull base is unremarkable. 14 cm soft tissue density with rounded margins is noted contiguous with the anteosuperolateral margin of the right maxillary antra. The superior bony

margin and the floor of the orbit is intact. Findings most likely represent mucous retention cyst or polyp.

IMPRESSION: No acute abnormalities noted.

ADDENDUM:

EXAM: CT OF THE CERVICAL SPINE WITHOUT CONTRAST

FINDINGS: Thin section axial scans were performed from the cervical junction to the cervical

thoracic junction, without contrast. Coronal and sagittal reconstructions were obtained.

There is preservation of alignment and disc spacing. The posterior elements are intact. Odontoid, craniocervical junction and cervicothoracic junction is unremarkable. Prevertebral soft tissues are normal.

IMPRESSION: No acute abnormalities noted.

*(Exhibit "1", volume 1, pp. 84-85)*

[90] Next, we consider some of the inmate request forms that were filed by Mr. Zwicker just after his slip and fall. For example, two days after the fall, he wrote to the "Health Care Nurse" on CSC inmate request form saying:

Would confirmation [sic] for the two request forms I have sent in today as my memory and nervous [sic] are bad and I do not remember putting them in the healthcare box but I do remember filling them out. I have vomited twice today and feel nautious [sic-nauseous]. Neck very sore and will not turn to the right without extreme pain and strain.

*(Exhibit "1", volume 1, p. 137)*

[91] On February 28, 2016, he wrote to the "Health Care Doctor" saying:

I would like an injury report done as I am not exactly sure of the extent of my head injury. My neck is very sore and I have a constant headache. My vision seems to be affected and cannot turn neck to right.

*(Exhibit "1", volume 1, p. 136)*

[92] Also on February 28, 2016, to the "RRC Supervisor":

I am requesting phone time Monday 29th of February during business hours. I need to contact my lawyer in regards to my case and paperwork. Thank you.

*(Exhibit "1", volume 1, p. 154)*

[93] Then, on February 29, 2016, again to the "RRC supervisor":

Can I please use day phone to call my Legal Aid lawyer. Thanks.

*(Exhibit "1", volume 1, p. 155)*

[94] On March 5, 2016 Mr. Zwicker wrote to "Health Care Optometrist":

My vision seems to be getting worse and would like to have some testing done in regards to reading and far sight. I believe I may need glasses.

*(Exhibit "1", volume 1, p. 156)*

[95] The dialogue continued on March 17, 2016, with the inmate's request form sent to "Doctor – Physiotherapy" which said:

I am in pain. My neck mussels [sic] feel very tight with limited mobility turning my neck. I am not seeking drugs. I want to get physiotherapy as I am scared to work out in the gym or do anything strenuous that will make my neck worse. I also have a cracked rib I believe is I cannot breathe deep without pain, a sharp pain in my right side. I hope to hear a respons [sic] to this request as I feel like I have been forgotten or ignored.

*(Exhibit "1", volume 1, p. 135)*

[96] The next day a response was indicated, presumably by the Department, as the writer was never identified, saying:

Your CT scan of head/neck showed no abnormalities. I will assess you for a [illegible] injury. Will issue Tylenol for discomfort and discuss with Dr. Begin Tues.

(Exhibit "1", volume 1, p. 135 - bottom)

[97] This is not even nearly all of the correspondence between Mr. Zwicker and the Institution in the temporal vicinity of the slip and fall. It does suffice, however, to contextualize one issue which will arise when the extent of the duty of care owed by the Institution to the Plaintiff is considered. I will elaborate further on this below.

### **Is the Defendant liable for Mr. Zwicker's slip and fall?**

[98] In order to first address this question, the issue arises as to what complexion I should put on the fact that the Institution did not retain the video footage of the slip and fall, but rather allowed it to be overwritten six days later. The Plaintiff urges that the Court should draw an adverse inference against the Defendant, which is to say, that it is responsible for the spoliation of that videotaped evidence.

#### *A. Did the Defendant commit spoliation in the circumstances of this case?*

[99] In *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353, the Court provided a convenient summary of the facts and conclusion in *St. Louis v. Canada*, (1896), 25 SCR 649, which is considered the leading case on the topic. Conrad, J.A. distilled the facts and conclusions expressed in *St. Louis* thus:

16. Canadian courts have followed a fairly conservative path, consistent with the one applied by the English courts. The leading case is the decision of the Supreme Court of Canada in *St. Louis* in which the court held that when it is shown that evidence has been intentionally destroyed a rebuttable presumption of fact arises that the evidence would tell against the spoliator. In *St. Louis*, the appellant performed work under contract for the Crown. When the work was done he sued claiming he had not been paid the full amount for his services. Prior to the instigation of the suit, the appellant's employees intentionally, but innocently, destroyed time sheets and pay records relevant to proving the extent of the work done. The Exchequer Court invoked the presumption *omnia praesumuntur contra spoliatorem* to hold it could be presumed that the deliberate destruction of the evidence was designed to cover up a fraud. The judge dismissed the action.

17. An unanimous Supreme Court overturned this decision, finding that the intentional destruction of evidence will give rise to a rebuttable presumption of fact that the evidence would not assist the party that destroyed the evidence. The court found, however, that even though the appellant had destroyed documents prior to litigation he was not a spoliator, because the destruction, while intentional in the sense it was not accidental, was done in the regular course of business before litigation was contemplated. "Why punish the appellant," Girouard J. asked rhetorically, "for the innocent doings of the time-keepers, who alone and without any suggestion from the appellant have destroyed the so-called original material, or at least the greatest portion of it, as mere waste paper." (at 677). The court also found, in the alternative, that the presumption, if applied, had been rebutted by the provision of other evidence which documented the disputed work in question.

18. *St. Louis*, therefore, stands for the following proposition. Spoilation in law does not occur merely because evidence has been destroyed. Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavourable to the party destroying it. This presumption is rebuttable by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him.

[Emphasis added]

[100] After reviewing additional authorities, the Court in *McDougall* concluded:

In conclusion, therefore, I would summarize the Canadian law of spoliation in the following way:

1. Spoliation currently refers to the intentional destruction of relevant evidence when litigation is existing or pending.
2. The principal remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the spoliator. The presumption can be rebutted by evidence showing the spoliator did not intend, by destroying the evidence, to affect the litigation, or by other evidence to prove or repel the case.
3. Outside this general framework other remedies may be available -- even where evidence has been unintentionally destroyed. Remedial authority for these remedies is found in the court's rules of procedure and its inherent ability to prevent abuse of process, and remedies may include such relief as the exclusion of expert reports and the denial of costs.
4. The courts have not yet found that the intentional destruction of evidence gives rise to an intentional tort, nor that there is a duty to preserve evidence



for purposes of the law of negligence, although these issues, in most jurisdictions, remain open.

5. Generally, the issues of whether spoliation has occurred, and what remedy should be given if it has, are matters best left for trial where the trial judge can consider all of the facts and fashion the most appropriate response.

6. Pre-trial relief may be available in the exceptional case where a party is particularly disadvantaged by the destruction of evidence. But generally this is accomplished through the applicable rules of court, or the court's general discretion with respect to costs and the control of abuse of process.

[101] In *Ben-Margi v. Paiva*, 2021 ONSC 6975, the Court placed emphasis upon the necessity for intent, which must accompany the other act(s) said to constitute spoliation of evidence, referring to "...the [need for] intentional destruction, mutilation, alteration, or concealment of evidence" (*para.* 22).

[102] In the instant case, Mr. Zwicker appears to have done everything that he could to alert the institutional authorities that he had been injured, and that he felt that his injuries were a consequence of the slip and fall which had occurred on February 25, 2016. This is particularly so when one considers the limited means at his disposal.

[103] The problem appears to lie in the fact that there is/was no policy (at least none was referenced during the course of the evidence in this case) requiring that the Institution retain video footage for longer than six days, other than when an inmate has been assaulted. Nor is there evidence of a policy which requires that when the video has captured evidence of injury to an inmate, to liaise with healthcare (or any other department for that matter) prior to the tape being overwritten, a process which effectively destroys it.

[104] Certainly, one might observe that the six-day minimum preservation policy appears to be rather scant. This is particularly so when one considers the multitude of departments with which an individual such as Mr. Zwicker must communicate in order to obtain the necessary attention. Merely in the examples noted above, he can be seen corresponding with physiotherapy, healthcare, a doctor, a nurse, and the RRC supervisor. In some of the notes, he was seeking attention to some of his ailments, in others, he was seeking access to a lawyer.

[105] With that having been said, the Plaintiff carries the onus of establishing that relevant evidence has been intentionally destroyed or rendered inaccessible, under circumstances which permit an inference to be drawn that it was intended to affect

the litigation which has ensued. I listened carefully to the evidence, particularly that of Neil Rideout, Kim Terrio, and Tim Thomas, in conjunction with the relevant documentary evidence. I concluded that while the tape was overwritten as a result of inattention on the part of various institutional employees, it occurred because of actions which might be considered careless, or negligent. It does not appear to have been done for the purpose of rendering the contents inaccessible.

[106] Finally, given the numerous demands upon the attention of the people involved, it is probable that, in the aftermath of his fall, Mr. Zwicker's situation was never really given much overall consideration. To the extent that anyone did think of him and/or his injuries, it appeared to be a case of "Health Care is following him".

[107] Because there was no internal policy mandating its preservation, the tape was overwritten, and it does not appear that anyone even thought twice about it. At least, this was the case until almost two months had elapsed, at which time Mr. Rideout was asked to make a note of what he had observed on February 25, 2016, when he reviewed the videotape.

[108] I conclude that the rebuttable presumption referenced in cases like *St. Louis*, *McDougall*, and *Ben-Margi* does not arise here. However, the conduct of the Institution with respect to the videotape has other implications, and raises other considerations. Some of these will be considered below.

*B. Liability under the Occupiers' Liability Act, S.N.S. 1996 c. 27, s.1, as amended 2019, c. 9, s. 9*

*i) The law*

[109] The relevant provisions of the *Occupiers' Liability Act*, S.N.S. 1996 c. 27, s.1, as amended 2019, c. 9, s. 9 (hereinafter "the Act") follow:

2. In this Act,

(a) "occupier" means an occupier at common law and includes

(i) a person who is in physical possession of premises, or

(ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on the premises or the persons allowed to enter the premises,

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

(b) "premises" includes

- (i) land and structures, or either of them, except portable structures and equipment,
- (ii) water,
- (iii) ships and vessels,
- (iv) notwithstanding subclause (i), trailers and portable structures designed or used for a residence, business or shelter,
- (v) railway cars, vehicles and aircraft, except while in operation.

3. This Act applies in place of the rules of common law for the purpose of determining the duty of care that an occupier of premises owes persons entering on the premises in respect of damages to them or their property.

4(1). An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.

(2) The duty created by subsection (1) applies in respect of

- (a) the condition of the premises;
- (b) activities on the premises; and
- (c) the conduct of third parties on the premises.

(3) Without restricting the generality of subsection (1), in determining whether the duty of care created by subsection (1) has been discharged, consideration shall be given to

- (a) the knowledge that the occupier has or ought to have of the likelihood of persons or property being on the premises;
- (b) the circumstances of the entry into the premises;
- (c) the age of the person entering the premises;
- (d) the ability of the person entering the premises to appreciate the danger;
- (e) the effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk; and
- (f) whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.

(4) Nothing in this Section relieves an occupier of premises of any duty to exercise, in a particular case, a higher standard of care that, in such case, is required of the occupier by virtue of any law imposing special standards of care on particular classes of premises.

...

11(1). Subject to subsection (2), this Act is binding on Her Majesty in right of the Province and in right of Canada.

(2) This Act does not apply to Her Majesty in right of the Province or in right of Canada as the occupier of

(a) a public highway or a public road;

(b) drainage works; or

(c) a river, stream, watercourse, lake or other body of water except those areas thereof that have been specially developed by Her Majesty for recreational swimming or for the launching and landing of boats.

[110] Most modern decisions involving occupiers' liability claims refer to the rationale espoused in *Waldick v. Malcolm*, [1991] 2 SCR 456, noting specifically that "...the goals of [Provincial occupiers' liability legislation] are to promote, and indeed, require where circumstances warrant, positive action on the part of occupiers to make their premises reasonably safe" (*para. 45*).

[111] This was interpreted by our Court of Appeal, in *Miller v. Royal Bank of Canada*, 2008 NSCA 118, to constitute an obligation on the part of the occupier "...to take such care in all of the circumstances of the case as is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises" (*para. 11*).

[112] In the subsequent case of *Langille v. Bernier*, 2010 NSSC 402, Justice Bourgeois (as she was then) canvassed the authorities and cited with approval the following principles:

15. Agreeing that the legislation was intended to codify the somewhat confusing common law regarding the standard of care, and in particular remove the concept of "unusual hazard", McLellan, J. quoted with approval the Newfoundland Court of Appeal's view of the standard of reasonable care in *M. (L.J.) v. M. (K.A)*, 2001 NSSF 16. There, Cameron, J. writing for the Court stated:

As already noted, in the common law jurisdictions in Canada a generally consistent approach to occupier's liability has emerged, one which is compatible with *Stacey*. The following is not an attempt to create an exhaustive list but a collection of principles which emerge from the cases under the current, generally accepted view of occupier's liability and which are relevant to the law in this province, post *Stacey*:

1. There is a positive obligation upon occupiers to ensure that those who come onto their properties are reasonably safe;
2. The onus is on the plaintiff to prove on a balance of probabilities that the defendant failed to meet the standard of reasonable care -- the fact of the injury in and of itself does not create a presumption of negligence -- the plaintiff must point to some act or failure to act on the part of the defendant which resulted in her injury;
3. When faced with a prima facie case of negligence, the occupier can generally discharge the evidential burden by establishing he has a regular regime of inspection, maintenance and monitoring sufficient to achieve a reasonable balance between what is practical in the circumstances and what is commensurate with reasonably perceived potential risk to those lawfully on the property. An occupier's conduct in this regard is to be judged not by the result of his efforts (i.e. whether or not the plaintiff was injured) but by the efforts themselves;
4. The occupier is not a guarantor or insurer of the safety of persons coming on his premises. (Citations removed)

[113] It is noteworthy that an occupier's duty of care appears to be less stringent than that which had been imposed at common law under the general law of negligence. Of further note is that the effect of section 4(1) of the Act is almost identical to its legislative counterpart in Ontario. Indeed, section 3(1)(a) of the Ontario *Occupiers' Liability Act* defines the obligation of an occupier of premises using the exact words that are found in our Act. The only difference is that the latter makes specific provision to include "...an occupier at common law" (s. 2). The practical effect of this similarity is that cases decided in Ontario may be appropriately referenced when the Nova Scotia legislation is considered.

[114] Canadian courts have previously found liability on the part of the Crown pursuant to occupiers' liability legislation in respect of correctional facilities. For example, *Latta v. Ontario*, [2004] OTC 802 (ONSC), involved an inmate fall. In the course of its analysis, the Court imposed liability pursuant to this legislative regime.

[115] Similarly, in *Bryant v. Canada*, (1984) 26 ACWS (2d) 454 (FC), a case decided under the (then extant) Ontario legislation, the Federal Court found the correctional facility liable for an accident involving one of its inmates. As Strayer, J. noted:

3. I am satisfied that the defendant is liable for negligence. I believe that this is the result whether one views this as a matter of negligence in the operation of ongoing activities [or] the preparation of meals ...

...

6. Even if one views this as a matter of occupiers' liability having regard to the state of the kitchen floor, I would conclude that the same duty of care applies. The law of Ontario which would define the nature of the liability here is now found in the *Occupiers' Liability Act*, R.S.O. 1980, c. 322. Section 3 of that Act imposes a duty on the occupier to take reasonable care that the persons on the premises are reasonably safe. For the same reasons I have stated above I would be prepared to hold that the defendant did not exercise that degree of care.

[116] Although s. 3(1) of British Columbia's *Occupiers' Liability Act*, RSBC 1979, c. 303 is nuanced somewhat differently than that of Nova Scotia, for present purposes their essentials are apposite. The former merely provides that an occupiers' duty extends, not only to the person on the premises, but also to "... property on the premises of a person, whether or not that person himself enters on the premises...".

[117] British Columbia's Supreme Court has imposed liability on the Crown in circumstances where an inmate has sustained an injury at a correctional facility. One example occurred in *Baba v. British Columbia, et al.*, (1994), 51 AWS (3d) 758 (BCSC), albeit a case involving the Provincial Crown.

[118] In *Baba*, the Plaintiff was convicted of impaired driving and sentenced to 60 days imprisonment to be served intermittently on weekends. As a consequence, he was sent to the New Haven facility during the weekend of Saturday, January 18, 1992. Some ice and snow had accumulated on the ground, as well as the road and sidewalks. After proceeding up the stairs to a gymnasium on the premises he returned via the same stairs. At about the second or third step from the top his leg slipped and he fell backwards to the bottom of the stairway, injuring his hand and his elbow.

[119] MacKinnon, J. succinctly concluded:

38. I find the steps of the Defendant New Haven were icy on January 18, 1992 and that it failed to take reasonable care for the safety of the inmates. *Malcolm v. Waldick*, [1991] 2 SCR 456, (SCC).

39. The Plaintiff fell down the icy stairs and suffered injury.

[120] It is conceded by the Defendant that its obligations, for the purpose of this case, are set forth in the Act. On the basis of the aforementioned authorities, this was an appropriate concession.

ii) *Has the Plaintiff established, on a balance of probabilities, that the Defendant failed to meet its standard of reasonable care?*

[121] Interestingly, the Defendant does not concede that Mr. Zwicker slipped as a result of a wet floor. It points to the fact that Plaintiff himself does not remember what happened before he fell, and argues that the credibility of those witnesses who testified that the floor was wet in the area of his fall, is lacking.

[122] Corrections Officer Timothy Thomas, as previously noted, was the only one (of the three corrections officers who were on duty on February 25, 2016, when Mr. Zwicker fell) to testify. He was the one who remained behind in the booth while his two colleagues did rounds just before the fall occurred. I found his testimony to be somewhat guarded at times.

[123] For example, he testified that he attended to Mr. Zwicker once he became aware that the Plaintiff had fallen. He observed the latter to be, at first, "momentarily unconscious – he was momentarily unresponsive...". He appeared to disagree that the Plaintiff exhibited seizure activity. Rather he indicated that if Mr. Zwicker was demonstrating seizure activity with which he was familiar, he would have documented it.

[124] He testified that he placed Mr. Zwicker in the "recovery position", which means that he sat him up so as to alleviate the risk of the latter's aspiration of vomit. He stated that he did not recall observing anything on the floor in the Plaintiff's vicinity. Had he noticed anything like liquid, he said that he would have noted it in the SOR.

[125] When asked again (on redirect) about liquid in the area, Mr. Thomas testified that he had been offering assistance to Mr. Zwicker and that his own clothing was fine afterward, without any waste or soiling on it. Had this not been the case, he said that he would have been required to change his uniform, and have the soiled one cleaned. Instead, he was able to work the remaining seven hours of the shift without doing so. I felt he was choosing his words very carefully as he said this.

[126] Mr. Thomas did not say, for example, what would have happened if his uniform became wet merely from exposure to water. Nor did he say whether or not

his uniform was, in fact, wet at all from contact with water, which could be expected to evaporate as the shift wore on. Nor was he asked.

[127] The Court was not provided with the recollections of the other two corrections officers, (the ones who actually did the rounds just before the fall) who were on duty at the time. From the SOR's that were filed, as previously discussed, we know these two individuals to have been Nick Bauer and Richard Pyke. The latter was no longer employed at the Institution by the time of trial, but I am satisfied that his whereabouts were known and that either side could have called him had they wished. Obviously, this applies with respect to Mr. Bauer as well.

[128] I consider further the testimony of Christian Allison, Trevor DeWolfe, and Scott Devereaux, two of whom spoke to the presence of liquid on the floor in the area of the fall. The former indicated that he observed the fall itself, and said that the Plaintiff's feet went high up into the air. He appeared to have slipped on something, but Allison was unable to say what that "something" was because of the distance between his cell and the area in which the fall occurred.

[129] Mr. DeWolfe, however, also witnessed the fall. He said his memory was not great but there was water on the floor, he saw the Plaintiff's feet go up in the air and observed him hit his head on the floor. He did not remember what shoes Mr. Zwicker was wearing, and rather thought that he was wearing a jacket. He testified that Mr. Zwicker's foot slipped on a wet floor "I could see it visibly".

[130] Then there was Scott Devereaux. Recall that he described a puddle of water in the vicinity of Mr. Zwicker as he lay on the floor. He described it as about half a foot out from the wall and extending for about four to five cell lengths. Moreover, he said the water had been there for a long time, at least an hour and perhaps as long as two hours before Mr. Zwicker stepped in it and fell. He did not see any way in which the two guards who conducted their rounds just prior to Mr. Zwicker's fall could have avoided walking in it. Concerned about water infiltrating his own cell, Devereaux testified that he took the precaution of laying towels at the entrance of his cell. After the Plaintiff's injury, when he returned to his own cell, he noted that these towels were wet.

[131] Mr. Devereaux also testified that he was involved in cleaning up the liquid in the aftermath of the fall. This is another reason why he would have a more specific memory of the volume of liquid and the dimensions of the pool than the other witnesses.



[132] If there was ever an investigation by the Institution as to how, why, or what led to the Plaintiff's fall, it is not apparent on the basis of the evidence that was led. Certainly none of the witnesses who testified on behalf of the Defendant were able to provide any indication in this respect, nor were they able to advert or refer to anything which was documented during the course of such an investigation.

[133] Yet the "Classification of Inmate Injuries" CSC form earlier referenced (*Exhibit "1", volume 1, p. 140*) signed by both Lori Embree, RN, and also Susan Beaton, A/CHS, neither of whom testified, bears the handwritten notation "slipped on water hit head – followed medically". [Emphasis added]

[134] On a balance of probabilities, I conclude that the Plaintiff slipped and fell on wet floor, that the volume and dimensions of the liquid were approximately as described by Mr. Devereaux, and that the water had been on the floor when the two guards did their rounds of level B, just minutes before Mr. Zwicker fell.

[135] The Institution itself appears to have accepted this as the effective cause of Mr. Zwicker's injuries, as evidenced by the handwritten notation on the Classification of Inmate Injuries CSC Form maintained by Health Services.

[136] In making these findings, I am satisfied the Plaintiff has discharged his onus to establish (on a *prima facie* basis) that the Defendant has failed to meet the standard of reasonable care which he was entitled to expect.

(iii) *Has the Respondent discharged its evidentiary burden to establish that it has a regular scheme of inspection, maintenance and monitoring sufficient to achieve a reasonable balance between what is practical in the circumstances and what is commensurate with reasonably perceived potential risk to those at the Institution?*

[137] It has not. I will explain.

[138] I will begin with what Assistant Warden, Kim Terrio, had to say, on direct, about it. Selected portions of her testimony follow:

HEIDI COLLICUTT: You referenced earlier a cleaning closet, when we were talking about Exhibit "8". Who all could access a cleaning closet?

KIM TERRIO: All inmates can access a cleaning closet, as well as staff.

HEIDI COLLICUTT: How would the reception range be cleaned?

KIM TERRIO: ... as one of their jobs. So, in Reception we hire inmate cleaners and they would be trained by our Institutional Services employee. ... Springhill Institution does offer a third-party cleaning program but it is not available to the inmates in reception because they are only there for a short time. So, the inmate cleaners are responsible to clean the common areas, each individual inmate cleans their own area.

HEIDI COLLICUTT: When you talk about common areas, what would those be?

KIM TERRIO: So, that would be the large area as described here in the document. The common areas, the hallways, as well as the cleaner does clean up on the control post and cleans the staff washrooms, as well.

HEIDI COLLICUTT: Can you describe, to ... the expectations of the cleaner?

KIM TERRIO: So, the cleaners are out throughout the whole day. They have the liberty to be out and cleaning. It is one of the advantages to being the inmate cleaner because you get a lot of out of cell time. So, the expectation is that they mop the floors daily, twice a day, that they wax the floors, they wipe down the handrails, that sort of thing. So, they are the cleaner for that unit.

[Emphasis added]

[139] Then, on cross-examination:

MICHAEL DULL: Could you identify anywhere in this policy document, which dictates the frequency and the conduct of these regular rounds anywhere which explicitly states that staff are required to inspect for and/or address possible safety hazards during such rounds?

KIM TERRIO: No, these rounds are to count inmates.

MICHAEL DULL: Okay. And I asked you if there was any other policy document which dictates how staff are to be conducting rounds and you have indicated no.

...

MICHAEL DULL: Is there a Springhill document that has not been produced in this litigation? Is there a Springhill document?

KIM TERRIO: It would be a standing order and I am not aware of such document that would outline what a correctional officer is to look for on their rounds other than the formal counts.

[140] And also:

...

MICHAEL DULL: How much are inmate cleaners paid?

KIM TERRIO: Depends on their level?

MICHAEL DULL: You're an inmate cleaner in reception, you just got to prison, how much are you paid?

KIM TERRIO: They would start out at "C" level pay and I do not know the exact amount, top level pay is \$6.20 a day.

MICHAEL DULL: So, the cleaner in reception would be getting paid less than \$6.00 per day?

KIM TERRIO: That is correct, yes...It is a Correctional Service Canada priority to employ inmates. Part of their correctional plan, part of their correctional plan to get them out of the Institution quicker is to ensure that they are employed in meaningful employment or programming. So, yes, they are hired as an inmate cleaner, that is one of the jobs.

...

MICHAEL DULL: If an inmate cleaner isn't doing his job in reception range, who's responsibility is it to ensure that he is doing his job?

KIM TERRIO: The correctional officers observe, as well as the Institutional Services employee, does a weekly walk through to speak with the inmate cleaner and ensure that he is maintaining the cleanliness of the Institution.

MICHAEL DULL: Is it the case in reception range that guards just don't clean as part of their job responsibilities?

KIM TERRIO: Correctional officers do not clean the Institution.

MICHAEL DULL: So, if hypothetically there is a puddle of water, guards, that is not part of their job to clean it up?

KIM TERRIO: That is correct, yes.

MICHAEL DULL: But it is part of their job to advise the cleaners to clean it up?  
KIM TERRIO: When an employee of the Correctional Service of Canada identifies a hazard, it is their duty to identify the hazard and ensure it is corrected.

...

MICHAEL DULL: The unit had, anyone who walked that unit had access to "slippery when wet" signs in the cleaner's closet, correct?

KIM TERRIO: Correct.

MICHAEL DULL: Guards said, look, its not part of their responsibility to mop up messes, but they could put up slippery when wet signs with relative ease, correct?

KIM TERRIO: If they see it, yes.

MICHAEL DULL: You mentioned that the cleaner's closet is open all the time, yes?

KIM TERRIO: Yes.

MICHAEL DULL: What's in there? Is there a mop in there?

KIM TERRIO: There's mops, there's buckets.

MICHAEL DULL: Anybody can access it if they are sort of let out of their cell. Anybody can access it?

KIM TERRIO: Yes.

MICHAEL DULL: We heard some testimony earlier this week of an inmate who said that on his rec, after Mr. Zwicker's fall, he got him up and he cleaned up a puddle. That is feasible to you, correct? He would have access to a mop, if he chose to mop up the mess?

KIM TERRIO: If he chose to mop up a mess, he has access to a mop, yes.

[Emphasis added]

[141] Then we consider the direct evidence of Tim Thomas on the topic.

HEIDI COLLICUT: As a correctional officer working in reception, can you describe your understanding of how that unit was cleaned?

TIMOTHY THOMAS: We have, at the time, would have had three range cleaners that lived in C1, 2 and 3 upstairs and they were released after mealtimes in the daytime to clean the housing unit. So, after breakfast they would clean from the breakfast time to approximately the lunch hour. And then after the lunch hour they would clean from approximately, a short time after the lunch hour until count which would be at approximately 1630 hours.

HEIDI COLLICUT: And in your observation, what sorts of tasks would they do?

TIMOTHY THOMAS: They were tasked with cleaning the floors, like mopping, sweeping, floor stairs, also cleaning the showers. They also served the meals which at the time were done kind of cafeteria style. It is a little bit different now but at the time they would have dished out the meals depending on what was being served. So that would be the gist of what they would have as regular duties, would be cleaning showers, sweeping and mopping the floors and the stairs and that would be it as far as their regular duties. Emptying the garbage, just regular custodial work.

...

HEIDI COLLICUT: What would occur on the unit if there was something that needed cleaning outside of these times?

TIMOTHY THOMAS: If it was a biological hazard like blood, then we would have to call in a contracted staff. If it was a regular spill or something that was like a regular occurrence, like, that they would have normally done or the offender cleaners could do, we would release one or more of the cleaners from the cells in the upstairs and then ask them to do it.

HEIDI COLLICUT: In your experience, how are hazards like a spill on the floor handled?

TIMOTHY THOMAS: Sometimes the offender who created the spill would clean it themselves if they were already out. Otherwise, we would ask the inmate cleaners to do it.

HEIDI COLLICUT: Can you describe what happens if you were to encounter something on the floor during a round?

TIMOTHY THOMAS: Depending on what it was, we would immediately ask for it to be cleaned. If it was hazardous, it would be a hazard for me as well, doing the rounds. So, we would want it taken care of immediately. We also have an engineering and maintenance department. So, if it was like a plumbing issue or a roof leak, or anything like that they would have to be contacted to do it. So, if it was during regular business hours, 8 to 4, they are onsite. We would just call them and they would attend the unit. After hours, they would have to be called in, overtime, or if possible, they were onsite, they would just come.

HEIDI COLLICUT: Can you describe any personal knowledge or recollection you have of a maintenance issue from February 25, 2016?

TIMOTHY THOMAS: I do not recall any maintenance issues from my shift that day.

[Emphasis added]

[142] On cross-examination, Mr. Thomas said:

MICHAEL DULL: Is it, from your perspective as a correctional officer at Springhill for 12 years, is it one of your obligations to address puddles of water or slipping hazards in common areas?

TIMOTHY THOMAS: It would have been, yes. If it is a hazard for any offender on an unit, it is also a hazard for me, so it is something we would have to addressed for sure. If there is water on the range floor, I have to be on the range floor to conduct rounds and for other reason, so, a hazard for offenders is also a hazard for me.

MICHAEL DULL: Yes, so part of your job is to address the hazard in an appropriate way?

TIMOTHY THOMAS: It would be to report it for sure. It wouldn't be for me to deal with, in the sense of like, it would never be me that would be cleaning it but it would be reported immediately, yes.

MICHAEL DULL: Ya, reported to the unit cleaner?

TIMOTHY THOMAS: The duty correctional manager or the unit cleaner, it would be highly dependent what the situation was.

MICHAEL DULL: And that is one of your job obligations to report puddles of water or slipping hazards?

TIMOTHY THOMAS: I am not sure if that is an obligation that is outlined in any policy but that...

MICHAEL DULL: Ya, I haven't seen it either and ...

TIMOTHY THOMAS: That is certainly ...

MICHAEL DULL: Sort of like an unspoken

TIMOTHY THOMAS: It would be something that I would do because it is the right thing to do. Especially, if I can speak to my experience in the units, to leave an obstruction or a mess like that can cause tension. So, it is not something that we would just neglect. And also, it is part of being effective at your job is running the unit. So, if there is things that need to be done, I would like to think that I perform my job at a high level and it is not something that would have caused me really any grief, I would have got that or anything like that, taken care of within the best of my ability. There is obviously things that happen in there that I cannot deal with, plumbing issues, leaking roofs, it is a large facility. I have encountered pretty much every scenario you can probably imagine as far as infrastructure or deterioration, so the management of those incidents is different every time but there is certainly things we would do as far as being a staff member in a housing unit. I don't want to go on record as saying infrastructure issues are common but I have encountered them frequently in my career, for sure.

...

MICHAEL DULL: Okay. So, you would agree with me, based on the best evidence or your best recollection today, you were notified of Mr. Zwicker's medical emergency within a minute of two of 1952 hrs?

TIMOTHY THOMAS: That would, based on my OSOR and the documentation that I have in front of me, it would have been approximately around that time, yes.

MICHAEL DULL: Yup. And then you would agree with me that your colleagues, back to page 97, would have walked over the area that Mr. Zwicker fell in and around 1950 hrs?

TIMOTHY THOMAS: Yes. They would have walked directly in front of his cell. I am not sure where he resided, what cell number it was. It was on the back area in some area. But, the exact cell number I do not recall but they would have had to walk directly in front of his cell, yes.

...

MICHAEL DULL: So, you can't sit here today and tell us whether there was water on the floor at that time when guards walked over immediately before Mr. Zwicker's fall?

TIMOTHY THOMAS: That is nothing I would be able to testify to, no. I wasn't on the floor for the security rounds so I cannot speak to the condition of the floor.

[Emphasis added]

[143] Having considered the above and all of the evidence tendered with respect to the system maintained by the Institution, I concluded that Respondent has not discharged its evidentiary burden. I am well aware that one of the Institution's major functions is to house convicted offenders, some of whom may potentially pose a risk to other inmates, staff, or even themselves. Such a burden or responsibility must necessarily consume a substantial portion of the resources available to the Institution.

[144] With that having been said, and while Mr. Thomas was clear as to what he personally would do in the event that he became aware of a hazard such as liquid on the floor, there was no particular policy referenced prescribing a particular course of conduct, individual responsibility, nor the alacrity with which a hazard, once discovered, must be addressed. It is also fair to mention, yet again, that Mr. Thomas was the only one of the three guards on duty who did not perform rounds prior to Mr. Zwicker's slip and fall that evening. As a consequence, what he would do, personally, when confronted with such a situation, does little to advance the Respondent's position.

[145] The absence of a policy governing the conduct of the staff on duty when a hazard is discovered is critical. One need only reference the role which the absence of a policy dictating its preservation played in the videotape of the slip and fall being "overwritten". I acknowledge that CSC has myriad policies already, and it is not possible to conceive, much less regulate, every possible situation that could potentially arise in an institution as large as Springhill. However, it does not require either hindsight or clairvoyance to foresee that a wet floor would pose a significant risk to inmates and staff alike, particularly while inmates are being let out of their cells for recreation time.

[146] I have earlier concluded that the dimensions of the water on the floor were approximately as described by Scott Devereaux. Mr. Devereaux's recollection may have been somewhat off when he testified that the water had been on the floor between one and two hours prior to the fall. It may also have been somewhat off when he testified that he was just returning from recreation at the time of his fall – after all, he was on the same range as Mr. Zwicker, so there is no way that he himself could be just returning from recreation time, with Mr. Zwicker only just leaving his cell to begin his.

[147] However, I believed him when he indicated that, in any event, the water was flowing by his cell door before he was let out for recreation that evening, and that

the volume was sufficient to cause him to put towels by the entrance to attempt to prevent its incursion into his cell, and that he was the one who cleaned it up afterward. I am also satisfied on a balance of probabilities, that the water was there when the two guards (who did not testify) performed their rounds just prior to the fall. They could not, under ordinary circumstances, have missed it.

[148] Perhaps Messrs. Bower and/or Pyke intended to report it upon completion of rounds. Perhaps it was their intention that recreation time be halted until the water was cleaned up. Perhaps they intended to put up a “wet floor” warning sign. Perhaps they did not notice it because something else was going on that required immediate attention – something of which Mr. Thomas was unaware. We do not know. But there was no policy mandating that they follow a particular course of conduct when they saw such a significant hazard. And the water was left to lie there, while the inmates were being let out of their cells for recreation. The risk of an injury like the one sustained by Mr. Zwicker had risen exponentially.

[149] As a consequence, the Defendant has not established that it has a regular system of inspection, maintenance, and/or monitoring, let alone one which achieves a reasonable balance between what is practical in circumstances and what is commensurate with a reasonably perceived potential risk to those at the institution. Liability is established.

*(iv) Was Mr. Zwicker contributorily negligent?*

[150] The onus of establishing contributory negligence falls squarely upon the Defendant in these circumstances. There were some attempts on the part of counsel to suggest that Mr. Zwicker was rushing as he came out of his cell. This was premised solely upon the way one of the Plaintiff's witnesses (Mr. Allison) responded to a question, which suggested that Mr. Zwicker “might have been rushing”. That witness also went on to say that inmates are always quick about it when they are let out of their cells for recreation, given that they are only allowed out approximately two hours each day (outside of meals) during their stay in reception.

[151] Far from detracting from the responsibility of the Defendant, in my view, this heightens it. The Institution would know that inmates in reception would be very anxious to leave their cells for their recreation period, and would be, if anything, more vulnerable to accident as a result of a hazard such as a wet floor.



[152] I, therefore, did not find this to be an adequate basis upon which to attribute contributory negligence to the Plaintiff.

[153] While on the topic of contributory negligence, I note (rather ironically and in passing) that reference was also made (at one point) to an inmate request form filled out by Mr. Zwicker which he had dated February 26, 2016, but the Institution, when it was received, had date stamped February 24, 2016. In it, Mr. Zwicker expressed some concerns about his footwear.

[154] The implications are obvious. If Mr. Zwicker dated it incorrectly, and the Institution's date stamp was correct, we have the Plaintiff expressing concern about his allocated footwear the day before he slipped and fell. If the Institution got it wrong, then his concern was expressed a day after the fall occurred. Ms. Terrio, in her evidence, was unable to say who had it wrong.

[155] In any event, the Defendant has not established contributory negligence on the part of Ryan Zwicker. It bears responsibility for 100% of the damages caused by its tortious conduct, subject to the issue of mitigation, which has yet to be discussed.

## **Damages**

### **A. Mr. Zwicker "pre" and post accident**

#### *(i) Heather Zwicker*

[156] Heather May Zwicker is the Plaintiff's mother. It was noteworthy that Mr. Zwicker's counsel asked that the Plaintiff be excused while she testified, as he felt that he would become too emotional as he heard her speak about his life.

[157] Mrs. Zwicker testified that she resides in Halifax with her husband of 41 years, Warren Zwicker. Warren has retired after a 30-year career with Bell Canada as an electrical engineer, and, for a time, with Halifax Regional Municipality. Warren did not testify, but Mrs. Zwicker described his relationship with the Plaintiff (his son) as strained.

[158] His mother's evidence portrayed the Plaintiff as a challenge. He was a middle child, diagnosed with asthma at approximately the age of two years, which resulted in his hospitalization on more than one occasion. He also had attention deficit hyperactivity disorder, or "ADHD" as it is commonly known. She recalled him being diagnosed with this latter malady when he was in about grade three or four,

and she said that it was "very bad". He just could not sit still in school or concentrate. In fact, he had difficulty keeping still at the dinner table, to her recollection.

[159] The severity of this affliction was vitiated somewhat when he was prescribed Ritalin. This drug also seemed to help moderate his asthma. His real outlet came from participation in tae kwon do. It seemed to add structure to the Plaintiff's life, and did a great deal for his self-confidence, since he seemed to have real talent. He began participating four to five times a week, including in many tournaments.

[160] However, asthma acted as a constraint. On one occasion, at the age of 15, while participating at a tournament in Moncton, he had an attack and fell to the floor. He had to be removed from the tournament and never participated in the sport again. He did not feel that his lungs were good enough to warrant participation against top-level opponents.

[161] Heather Zwicker noticed a change in her son's disposition soon thereafter. Once again, he began skipping classes at school and dodging homework. Although he did manage to graduate from St. Agnes Junior High, his self-esteem was, in her view, very low. He dropped out of Queen Elizabeth High School in grade 10.

[162] This led to friction with his father, who wanted the Plaintiff to get a job since he was not going to school. Instead, Ryan Zwicker left home. He "surfed couches" for a while. He would call his mother regularly, when he needed money. She did not really know what he was doing or with whom he was involved at that time. She was unaware of any efforts on her son's part to find employment at that time. She said, "I enabled him, I know that now. It caused a lot of friction with my husband when I gave him money".

[163] She had always known that her son's dream was to be a chef. She described him as always having been obsessed with the culinary arts. She even referred to a picture of Ryan, at the age of seven, making a pie (*Exhibit "2"*). She said that, as a teenager, Ryan often made meals for the family, including shepard's pie, fish cakes, tea biscuits, chicken – "he could do it all".

[164] Mrs. Zwicker recalled Ryan's first job, when he was 19 or 20 years old, as a dishwasher in a restaurant. She described her son as working his way from dishwasher up to prep cook, then junior chef, and sous chef. Mrs. Zwicker said her son worked at "a lot of good restaurants downtown, also in Bridgewater". He had said many times to her that his goal was to have his own restaurant someday.

[165] She acknowledged that her son had one criminal conviction prior to the one that landed him at the Springhill Institution in 2016. As she explained it, a man had slapped her, and when Ryan found out about it, he found him and "put a beating on him". This was about 20 years ago. She thinks that he served about one year of jail time for the assault.

[166] Ms. Zwicker acknowledged on cross-examination that she felt responsible for what happened on that occasion. She said that she should never have told Ryan about what had happened, because he had anger issues, and she also did not know whether or not he was on drugs at that time. She later learned that he also had a "cocaine conviction" around the time of the attack.

[167] To her knowledge, in 2016 Ryan was not hanging around with "great people". He was using cocaine, and began selling it. He was caught and arrested, in fact, he was arrested at her home.

[168] At the time of his slip and fall in February 2016, Mrs. Zwicker herself was in the hospital and had been there for several weeks. Ryan did not immediately tell her much about his mishap at the time, and she feels that it was because he did not want to worry her. She had been diagnosed with "incurable cancer", although it subsequently went into remission and remains so.

[169] When he did discuss the details with her, he said "something about a puddle and going down". He added that he was dizzy and his head hurt. In Exhibit "4" the Court was shown a picture of Ms. Zwicker while she was in the hospital. Two guards from the Institution brought Mr. Zwicker in to visit with her. She could see that "he was not the same", he kept walking around the room telling her that his head hurts. He seemed angry, confused and agitated. He also had problems with his memory, and did not socialize.

[170] Upon his release, the Plaintiff lived at home for about a month and then told her he was going to Toronto to get away from local people whom he considered to be a bad influence. He slept a lot and seemed angry, sometimes slamming doors. Her husband Warren, who was also battling significant health issues at the time, could not handle the constantly charged atmosphere that his son brought with him, so Ryan had to go. She added that her husband genuinely loves their son, but did not like the man that he had become.

[171] She recalls that Ryan lived, for a time, in the home of a former girlfriend, the mother of his children, who was a nurse and worked shiftwork. She understood the

arrangement was going to be that he would provide childcare while she worked and live in the basement. That did not last very long. Ryan advised her that his ex-girlfriend found him to be too agitated and irritable, and asked him to leave.

[172] On cross-examination Ms. Zwicker elaborated upon her son's teenage years, describing him as "edgy and frustrated when anticipating a tournament". He was also frustrated in school and, in her words, "he didn't learn very well". She went on to say that he was considered bright, but simply could not focus.

[173] While not being able to pinpoint the exact time, she felt that her son began using drugs around the time he was couch surfing, after having dropped out of high school and left the family home. She said it was around that time she noticed that he did not seem like the same child anymore, he seemed like he was "lost and didn't care". She added "I feel like he became frustrated when he could not live up to who his dad thought he should be".

[174] The witness described an attempt to place Ryan in a drug addiction facility in a day program. She said he attended a couple of times then refused to go back, he wanted to, in her words, continue smoking marijuana. She continued "there could have been other substances at the time, but I wasn't aware if there were."

[175] On more than one occasion, she acknowledged that she made incorrect statements to Provincial authorities concerning Ryan. At times, she was falsely claiming that Ryan was living with her and her husband in their home and paying rent, while he was unemployed. This was an attempt to facilitate her son's receipt of "welfare" monies. Some of these entries were dated June 26, 2008, May 28, 2008, July 3, 2008, July 2, 2014, and January 6, 2017.

[176] She acknowledged that this was untrue, and that, during some of these intervals, if her son lived with them, it would be for very brief, intermittent episodes, often merely a matter of days, and he did not pay rent. She explained the 2008 entries in the following way: "I put it in there because my money was running out, and I wanted to help him get some money". She added that she did not want to see her son "couch surf forever".

[177] Mrs. Zwicker recalled a number of restaurant positions held by her son before he went to prison in 2016. She recalled him working at the Press Gang restaurant as a junior chef, Cafe Chianti, Salty's, "another Italian restaurant", and also a restaurant in Lunenburg for a summer.

[178] Approximately three years ago she was aware that he had conceived an idea called "Cut the Prep". She understood him to have come up with the concept as an outlet to provide custom-made meals, restaurant style, for delivery to customers. The concept was that he would create special dinners, made to order, including keto-friendly meals, and for other type of diets, such as diabetic ones. He has been doing this since his release from prison, and she has seen some of his work, since he sent some meals down from Toronto for his children once the business started. She described seeing meals consisting of chicken, salmon, steak, spaghetti and meatballs, most of which included plenty of vegetables, and rice or mashed potatoes. She said the food compares very favourably to restaurant quality.

[179] Besides pursuing the "Cut the Prep" business in Toronto, Mrs. Zwicker is also aware that her son "buys and sells things". She described him as a hoarder who obtains books, CDs, pictures, figurines and clothing which he then sells through accounts with Amazon, eBay, Facebook, and others. She is aware that he takes pictures of the items that he is able to locate, sells them and packages them for delivery. His only other outlet is raising fish, and she described him as having lots of fish tanks, which he has shown her online. She is unaware of any other activities in which he engages and is unaware of Ryan having any friends up there. In fact, she said that he moved to Toronto to get away from his friends locally.

[180] Mrs. Zwicker also acknowledged that her son stays in touch with her on a weekly basis, usually by text. He often contacts her when he needs money for medication. She added that he used to be a real funny guy, a lot of fun to be around, hanging out with his buddies, and they would occasionally throw a ball around.

[181] This brings us to Mr. Zwicker's testimony.

(ii) *Ryan Zwicker (Part 1)*

[182] Mr. Zwicker was born on October 3, 1980. At the time of his testimony, he was 41 years of age. He currently lives in Toronto and has been there for approximately the last three and a half years, in an apartment below a corner store. He currently works in a restaurant called Via Allegro, an Italian restaurant in Etobicoke, Ontario, albeit on a part-time basis. He also earns money selling salvaged and/or purchased items on websites such as Amazon, Kijiji, and some others. He calls this his "Brick and Order" business.

[183] He said he is not currently in a relationship, but is the father of two boys, Ryan, age 17, and Dylan, age 13. His relationship with their mother, Ashley Andrews, he described as "not good", however, he added that they are "not enemies".

[184] He said he grew up in Halifax and there were six people in his household, including his grandfather. Thirteen years of his childhood were spent living in a home on Chebucto Road. Until completion of junior high, he attended St. Agnes School.

[185] The Plaintiff described school as "terrible", allowing that he did enjoy some things, but could not sit still, which caused him to get into a lot of trouble. He said he was "too hyper", always wanting to run around. This he attributed to the diagnosis of ADHD, which the family received when he was between nine and twelve years of age. The Ritalin, which the doctor had prescribed, was problematic as well. Mr. Zwicker recalled experiencing side effects such as stomach pain, loss of appetite, and the like.

[186] The other trouble which plagued him was asthma. He claimed to have been hospitalized because of it "most of my childhood", with some hospital visits lasting as long as a month at a time. He also recalled being provided with a panoply of masks, puffers, and steroids to combat it. He said this particular condition is manageable now, and that he has not participated in sports since he left tae kwon do at age 15.

[187] As a child, Mr. Zwicker described participating in tae kwon do, track and field and volleyball as a child. He singled out tae kwon do as something he especially enjoyed doing, said he attended for instruction every Monday, Wednesday, Friday, and sometimes on Saturdays, and also participated in tournaments. He won a number of medals.

[188] At the age of 15, he described himself as realizing that he could not finish the fights anymore because of the severity of his asthmatic condition. This caused him to be both "devastated and embarrassed". He hung on and graduated junior high, and did start at Queen Elizabeth High School that fall, but did not finish grade 10. He had stopped going to classes and, instead, would hang out with his friends at the high school during the day.

[189] This led to his being kicked out of his home as described by his mother during her testimony, which caused him to be "hurt and angry". That notwithstanding, Mr. Zwicker said that he had friends who could get him a bed for a time, and, as a

consequence, he always had a roof over his head. As he put it, "I had to do what I had to do".

[190] After about a year of this, his girlfriend's father rented him an apartment on Morris Street in Halifax. Although this provided him with some measure of stability in terms of his housing, it is also when his trouble with the law appears to have started. He began supplementing the income derived from social assistance by robbing drug dealers. He also started selling marijuana.

[191] Mr. Zwicker confirmed that he had his first "legal" job at the age of 20 or 21, when his first son, Dylan, was born. He was living, by that time, in downtown Halifax, but claimed not to remember the specifics. The job was at the Café Chianti, where he began as a dishwasher. He worked in that capacity for approximately six months.

[192] He then progressed to the position of prep cook and said that his duties were to do things like peel shrimp, potatoes and other vegetables. He said he had no formal education as a chef, but learned by watching how things were done. For example, he said he learned at this time how to make mayonnaise, caesar salad dressing, some other sauces and desserts, as well as some cooking techniques. From there he progressed to the grill station, and after that to the position of sous-chef.

[193] He said he stopped dealing drugs while he was at the Café Chianti, and was living off and on with his girlfriend Ashley, and their son Dylan. He said he was trying to be responsible for his son.

[194] The Plaintiff also said that it was while he was working there that he went to jail for the first time. He described the situation as being one where his mother had been assaulted, and he punched the assailant in the face and broke his jaw, dislodging his own shoulder in the process. He was convicted of assault with a weapon because, in his words, the victim said that Mr. Zwicker had "hit him with a bat". A letter directed to social services by his lawyer dated July 17, 2003, describes him as awaiting his preliminary inquiry, having been released from custody "upon entering into a Recognizance with certain conditions" in the meantime (*Exhibit Book, volume 2, p. 557*).

[195] The Plaintiff testified that he eventually did his time in jail and went back to work at Café Chianti. He estimated that he worked, left, and went back to that establishment approximately four or five times between the years 2002 to 2006.

[196] He was shown his social assistance file, which included a one page resume (*Exhibit "1", volume 2, p. 524*). He did not recollect having seen it before. It described, among other things, his tenure at Café Chianti, as well as working at a call centre between 2000 and 2001, during the course of which it said that he was able to "increase my commissions by 200% after one year, an earlier four-year stint as a "steam cleaner", and, before that, a two-year period working at the Metro Centre as a canteen employee, during the course of which he dealt with "high volume sales, kept track of float, profits and sales, developed excellent skills in sales..."

[197] When asked how could this square with his earlier testimony that he got his first legal job in 2001, the Plaintiff responded, "do you want to know what I said [in the resume] or what I did?".

[198] From his first job, Mr. Zwicker went on to do others. He worked at Bish, initially starting as a dishwasher and, again, worked his way up to cook, at A Mano, which was a restaurant specializing in pizza and Italian cuisine, the Press Gang, Salty's (for two seasons), the Fleur De Sol, Rope Loft, Sage, and Nectar restaurants, before his incarceration in 2016.

[199] When asked why he had so many different employers, he mentioned three principal reasons. First, some places did not have good chefs. He did not consider some to be very well-organized, and some he felt were just not very good at the craft. He was not interested in learning from those types of individuals.

[200] Second, he described employment in the restaurant industry as "mostly seasonal".

[201] Finally, he described himself as a someone who likes to move around a lot. He said his goal was "to work at as many nice restaurants as possible to learn as much as he could".

[202] Careerwise, his objective was a hybrid. Mr. Zwicker said that he wanted to "get rich, be a chef, and own a restaurant". He became emotional as he said this.

[203] He went on to describe other periods of incarceration, before 2016. He attributed his troubles with the law as stemming from a combination of drug addiction, anger, relationship problems, and not being able to see his children regularly.



[204] He was asked about his history of substance abuse. He said it began at age 13 when he was smoking marijuana. From there, he progressed to using harder substances, and went from LSD, to ecstasy, and finally to cocaine. Drugs, he said, especially cocaine, "ruined my life". His girlfriend, the mother of his children, left him, and his crime escalated. He began trafficking cocaine to support his habit, which in turn led to his arrest late in 2015, and his consequent incarceration early the following year.

[205] He described a cycle of work, (sometimes) for nine months of the year, employment insurance, and social assistance. When asked why he needed social assistance if he was working and getting EI, his answer was to the effect that it was probably because he was doing drugs and having a bad time. When asked if drug addiction got in the way of his working career he responded "yes and no", and went on to describe himself as "a high functioning drug addict".

[206] Mr. Zwicker discussed his attempts to upgrade his education and talked about a three year period when he went to an adult learning program at Nova Scotia Community College. For the first two years he took the standard Adult Learning Program, then for the final year took small engine repair "because I had a Harley-Davidson that I wanted to work on".

[207] He acknowledged that he could have taken cooking courses but did not. As he put it, he was not interested in "going to learn from a NSCC chef", and that he took small engine repair so that..."then I didn't have to yell at a chef who was a Gordon Ramsay wannabe".

[208] When he passed his small engine repair course, the Plaintiff indicated that NSCC required him to go to a work placement for six weeks. Instead, he went back to cooking "... but I found a guy to say that I'd worked at a garage selling dirt bikes... I snuck out of that one".

[209] In 2010, he worked for approximately six to eight weeks at a junkyard, then left because "...it wasn't for me". He then got a job at Fleur du Sol restaurant. He earned \$14,835.00 in T4 income and \$18,234.00 from employment insurance. When asked why he consistently received so much employment insurance, he attributed to "... either being laid off or on drugs".

[210] The Plaintiff described an incident which led to him being both stabbed in the knee and incarcerated, and also an attempt at detox. The first occurred in 2011, the second in 2012.

[211] The injuries arose as a result of a confrontation with "...a crazy man with a serrated knife". During the confrontation, the Plaintiff testified that he grabbed a hammer and threw it at him, in the course of which he was stabbed. While attempting to "front kick" the man, Mr. Zwicker fell backwards and hit his head, the consequent injuries required staples to close the head wounds. His testimony was that he was not diagnosed with any head trauma at the time.

[212] As to the detox attempt, Annapolis Valley Health (Soldiers Memorial Hospital) Addiction Services (hereinafter referred to as " Middleton Detox") admission form (*Exhibit "1", volume 2, p. 264*) discharge summary describes the Plaintiff as a poly substance drug user, and goes on to summarize his history as follows:

Presently using methadone 30 to 40 mg daily x 2 months (was snorting dilaudid prior to this). MJ daily – 5 grams. Crack 2 g daily. 1/2 bottle wine each week + sometimes takes more diazepam than is prescribed.

[213] The form goes on to describe what it calls "pertinent info":

Client has no fixed address. Stays at various places. Has eight-year-old son – sees him on weekends. Is on social assistance.

[214] After mentioning that it is Mr. Zwicker's first time in detox, the following notation appears:

Back pain issues. Asthma – uses Puffer. Last summer – was stabbed in (R) knee and hit his head and required staples in his head. Anxiety – on diazepam... Has anger issues – assault charges.

[215] That section then finishes by referring to the Plaintiff's diagnosis of ADHD, and that he is not currently on any medication for that malady. His admission date is noted to be March 9, 2012. Four days later he was discharged. His discharge summary (*pp. 269 – 270*) indicates that he was "dismissed for inappropriate sexual behaviour with a female co-client on detox unit".

[216] In 2014, during which time he had T4 earnings of \$15,970.00, Mr. Zwicker could not recall exactly where he was working but thought it was either Salty's or the Press Gang, maybe both. He indicated that, although Chefs got tipped at some of the places that he worked, he did not declare this undocumented income. The "tip pool" consists of between 3 - 5% of food sales, and the higher the employee is in the cooking hierarchy of the restaurant, the larger one's share of that pool.

[217] Mr. Zwicker's reassessment for 2015 shows T4 income of \$25,292.00. It has already been noted that he was arrested sometime during that year, and incarcerated in February 2016, after having pled guilty to possession of cocaine for the purpose of trafficking.

[218] When the time came to go to jail, he said that he was "kind of excited about it – it would give me a break from drugs and the people that I was hanging around." He went on to say that he looked at it as an opportunity to "have a vacation and get healthy". He also said that he knew that as a first-time federal inmate, he would likely get paroled within six months to a year, so it was a "free detox". He said he entered prison "high" and left sober. He testified that the last time he used crack was the day he went into jail, that this was true for opiates as well, and that he cannot remember the last time used cocaine.

[219] When asked about marijuana, Mr. Zwicker acknowledged, "I use it all the time, I used it today". He added that he found it beneficial for his ADHD, and that his mother uses it every day as well. When asked whether it affects his memory, his response was "they say it does".

[220] At this point, the Court broke for lunch. His counsel was requested to consult with the Plaintiff to determine whether he should continue with his testimony given his consumption of marijuana earlier that day, and to explain the obvious problems which the consumption of an intoxicant prior to testimony creates. When the trial resumed, the Court was assured by counsel that the Plaintiff's consumption had been of a quantity whereby he was fit to resume his testimony.

[221] Mr. Zwicker described February 25, 2016, the day of his fall, as a typical day, which is to say, he was in lockdown for 22 hours of the day. Inmates were allowed to get out to get their meals for lunch and supper, from the kitchenette, which meals were generally consumed in their cells. Breakfast was brought to the cell door. Recreation, when they received it, consisted of two hours per day, one hour could be spent outside, and one hour had to be spent inside.

[222] Inmates were given three outfits, and shoes. There was no discretion with respect to clothing – one of the prisoner outfits had to be worn at all times, however they could wear their own individual shoes if they wished, rather than the prison issued footwear. Outdoor clothing for the prisoners was provided as well, consisting of a large orange jacket, with a hat and gloves.

[223] The Plaintiff testified that the last thing he remembered prior to the fall was putting on his jacket and getting ready to exit his cell to go for recreation. The next thing he recalls is being in an ambulance accompanied by some prison guards. He was scared and thought he was dreaming. He was experiencing a lot of pain in his neck and back. He remembers that he was still shackled and wearing a neck brace, lying on a stretcher, and was told by the guards that nobody had assaulted him.

[224] Mr. Zwicker said things gradually became clearer while he was in the hospital. He recalls that, while there, the guards came back and told him that they had watched the tapes and that he had not been assaulted, rather that he had fallen. He recalls nothing of the triage assessment. He thought that he received an x-ray and a CT scan. He recalls a doctor telling him that he would be "just fine". From some of the other things that were said to them that night he had the impression that hospital staff considered him to be indulging in "drug-seeking behaviour". He was returned to the institution that same night, before midnight.

[225] Upon his return, Mr. Zwicker recalls that his cellmate was concerned about his condition and they talked about it, but he could not recall much of that conversation, except that he was told that he had fallen in a puddle of water. He forced himself to stay awake that night, because he was scared to go to sleep, and described a very large bump, which he described as an "egg", on the back of his head.

[226] The next day he was sore and initially it was mostly his neck which was bothering him. He described feelings of nausea, and in fact vomited a few times. He was also very tired. When he complained of his sore neck, he recalled two or three of the guards laughing and making offensive jokes at his expense.

[227] When he spoke with his mother, she suggested that he call a lawyer. Initially, he did not want to, because he felt there might be repercussions. The Plaintiff thought, for example, such an initiative might result in the Institution "maxing" his sentence out, or engaging in other retaliatory behaviour, especially after having heard some of the guards making fun of him. Instead, his mother contacted a lawyer for him.

[228] On February 27, 2016, the Plaintiff filled out in Inmate's Request form ("IRF"):

Would confirmation [sic] for the two request forms I have sent in today as my memory and nervous [sic] are bad and I don't remember putting them in the

healthcare box but do remember filling them out. I have vomited twice today and feel nauseous [sic]. Neck very sore and won't turn to the right without extreme pain and strain.

*(Exhibit "1", volume 1, p. 137)*

[229] As we have earlier seen, the next day he filled out another IRF:

I would like an injury report done as I am not exactly sure of the extent of my head injury. My neck is very sore and I have a constant headache. My vision seems to be affected and can't turn neck to right.

*(Exhibit "1", volume 1, p. 136)*

[230] He felt he was not getting the medical attention that he required, and that he was being treated poorly in general. Even though it was his mother's idea, he came around to the idea of speaking to a lawyer. He filled out another IRF, on February 28, 2016, requesting phone time on February 29, 2016, during business hours, to "contact my lawyer in regards to my case and paperwork" (*Exhibit 1, volume 1, p. 154*). This was in relation to his injury, since he was not going through any form of criminal appeal at the time.

[231] Meanwhile, the Institution's Health Services records show that he had been seen by that department upon admission (February 18, 2016) noting that he was on prescription medication for anxiety, ADHD, and asthma. The note that day goes on to refer to Mr. Zwicker as being extremely anxious about the change in his medication from Valium to clonazepam, and that he reported that the Valium worked for him in that it treated his symptoms and kept him from getting into other stuff. It referenced the Plaintiff's expressed concern that he would have a seizure if taken off of Valium. Mr. Zwicker was felt to warrant an urgent referral to psychology due to his anxiety level, and was booked for an appointment with Dr. Aquino in early March.

[232] He was seen again on February 21, 2016 with respect to hemorrhoidal issues, and on February 23, 2016 with respect to concerns about an infectious disease, at which time he also discussed with Health Services the fact that Dr. Conter was his family physician, and that Dr. Conter had placed him on medications for anxiety and also for substance abuse issues. These issues are said to have arisen from the fact that he had "self medicated", and that he had been assessed by mental health at age 24 which "didn't work out". He claimed to have a fear of needles, was quite upset, and refused a flu shot, although he did agree to a chest x-ray.

[233] The next day, February 24, 2016 there is a notation "please obtain records, consults etc. re-his knee from Dr. Wong, Ortho, 902-473-7626." During his final visit before the slip and fall, on February 25, 2016, the records indicate that he had had blood drawn from his right arm, apparently to test for infectious diseases. Mr. Zwicker declined Chlamydia testing.

[234] February 26, 2016 is the date upon which the first notation after the Plaintiff's incident is made by Health Services. This entry reads as follows:

Seen in health services after being sent to outside hospital [yesterday]. Arrived walking with ice pack on right shoulder. Blood pressure 162/85 ...

States has a sore stiff neck and can't turn his head to the right. Lump noted to back of right side of head., Not read, 0 abrasions noted... Neuro vitals stable. States nauseous and vomited x3 since [yesterday]. Same unwitnessed. When asked what happened he stated he doesn't know "all I know is I woke up in an ambulance". States cx told him he slipped and fell, hit his head. Will reassess as needed. Aware to notify HS if symptoms worsen or no improvement. Asked writer to call his mother. Informed he needed to sign the release of info to have any personal info disclosed to his mother. Release info signed and placed on chart. Stated inmates on range informed his mother of his fall and OSH visit. Informed would notify his mother he was okay. IM very worried about mother's stress.

*(Exhibit "1", volume 1, p. 109)*

[235] On February 28 he was seen again by Health Services as a result of "multiple IM requests". He was told that he would be seeing the Institution's doctor (Dr. Begin) in the next medical clinic. He was told by the staff member to rest with no reading or watching TV, preferably with lights out or eyes covered from light, also to alternate hot and cold on his neck. He was also encouraged to move his neck if tolerated to help loosen his tight sore muscles.

[236] The next narrative in the chart is dated March 2, 2016, and was apparently made by Dr. Begin. In that entry, mention is made of all of the symptoms that he had earlier reported to Health Services, as well as the fact that he gets "nauseated and can't concentrate when reading. Vision somewhat blurry. No visual acuity chart in healthcare". The direction was given by the Doctor to "book CT head and neck ASAP".

[237] Mr. Zwicker testified that, while the nausea went away after approximately 7 to 10 days, the lump on the back of his head hung around for almost a month, and it was even longer than that before his lethargy or tiredness left him. His other symptoms persisted, and, in some cases, got worse.

[238] On March 4, 2016, the Plaintiff filled out another IMR seeking permission to use the phone to call a lawyer sometime between March 7-10 during business hours.

[239] The next day he wrote a two-page narrative (*Exhibit "1", volume 1, p. 260*) entitled "things I can remember from fall or injury in reception Feb 25/2016". He said he wanted to preserve what he could still remember so he could give it to his lawyer when he was put in touch with one. He said that he did this because of concerns about memory deterioration, or declining cognitive function, as a result of his accident. The following day, he filled out another IMR directed to "health care optometrist" whereby he complained that his vision was getting worse, that he needed some testing done, and might need glasses.

[240] Mr. Zwicker testified that at this time his vision appeared to be fluttering, almost vibrating or flickering. He also testified that his "neck is fine today" although he never received any treatment for it. An IMF dated March 28, 2016 (*Exhibit "1", volume 1, p.134*) shows Mr. Zwicker mentioning migraines, light-headedness when he stands up, soreness to the right side of his ribs, and that it hurts him to breathe. He was requesting physiotherapy, Tylenol and muscle relaxants until he can be seen by physio.

[241] On March 27, 2016 Mr. Zwicker testified that he had written a letter to Corrections Service Canada requesting a copy of the videotape of his fall, as he wanted to preserve it for a lawyer to look at. On May 31, 2016 he learned that the "video of injury from cameras on range RRC – B-17, dated February 25<sup>th</sup> 2016 – 8 PM" had not been retained since it involved a "non-security incident".

[242] By July 27, 2016 in an IMF, directed to "Health Care Doctor":

I am very worried about my memory and tiredness. I have a hard time in program using words to explain things. I feel like the words are on the tip of my tongue but won't come out. Also having hard time resting with noise and guards doing rounds.  
Speaker going off.

*(Exhibit "1", volume 1, p. 132)*

[243] On the stand, Mr. Zwicker testified that inmates experience constant interruption almost every half hour. He was unsuccessful in getting the lighting moderated in his cell, as the switches are controlled at the guard's station.

[244] After serving 10 months of his sentence, Mr. Zwicker was paroled to a halfway house on Brunswick Street in Halifax. He obtained a job at a bakery on

Gottingen Street. He had worked under the head chef at that establishment in the past. His first day on the job he showed up late. He was let go because "I wasn't up to his likings".

[245] Next, he worked for Chef Laughlin at the "Elliott and Vine" restaurant. Mr. Zwicker described it as a "working interview" whereby he worked for free in the hopes of obtaining employment. This arrangement lasted for approximately two to three days over New Year's and consisted of him doing some prep work and helping with the service. The work was "not the best" – his assigned tasks were monotonous and time-consuming, definitely not what he expected.

[246] After 54 days on parole, it was revoked. While it was common practice for those working in the food preparation industry to take their cutting knives home with them, to make sure that they were not misused, he was under conditions not to possess a weapon. The police searched his room, found his bag with the knife in it, and sent him back to Springhill. Both the Plaintiff and his mother made derogatory posts on Facebook about the police after this occurred. It was sometime in January 2017 by this time.

[247] Earlier, while on parole, he had met with Dr. Conter (his family physician) twice, on November 30, 2016, and December 24, 2016 respectively. The Doctor's notes of those visits (*Exhibit "1", volume 1, p. 68*) reflect that he had been advised by Mr. Zwicker that he had been drug-free for approximately 11 months, that he had sustained a "bad concussion" while incarcerated, and that he had two jobs while on parole. He received two prescriptions, including one for Valium. On December 24, 2016 visit, these prescriptions were renewed, and the Plaintiff received a referral to Dr. David King. I will segue briefly to consider Dr. King's evidence.

(iii) *Dr. King*

[248] Mr. Zwicker saw Dr. King on March 8, 2017 (his parole had been revoked by this time). In his report of that date, the neurologist noted:

He [Mr. Zwicker] comes in with a history of headaches they are daily and began last year after he had slipped, falling to the ground and he struck the left side of his head on concrete. He said that he was unconscious for half an hour.

Since then, besides his headaches, he has had frustration, anger, difficulty and concentration. He says the headaches are bilateral perhaps worst on the right than on the left side. They have a shooting pain, sharp pain and pulsating pain to them. He says there is no improvement. They are aggravated by concentration, writing,



cooking. He feels his memory has been affected. His attention deficit medicine seems to help him to some extent. He is photo phobic and coughing and sneezing aggravates his headache. The headaches don't necessarily get worse with walking but they do with bending over. He get some relief with darkness and sleep. He has had fatigue.

His treatment has included acupuncture with no benefit but he has had no other particular treatments that he is aware of.

Past: he had a left rotator cuff problem with surgery. Asthma. ADHD. Anxiety.

...

Functional Enquiry: He has headache, visual problems, balance problems with the headache. It is a bit of problem speaking since the head injury. Reading causes headache. He has some fatigue. Insomnia, depression and anxiety. His appetite is good. It is supposed to have a surgical treatment to his shoulder. His problems walking because of a right knee issue, he is to have a tendon transplant there.

#### Examination

Mental status: I didn't test his mental status in detail, but he is capable of giving a history. His language seemed intact.

Cranial nerves: His cranial nerves were normal, with no nystagmus. Convergence seemed to be normal. I didn't see any pupillary differences. There was no papilioedema.

*(Exhibit "1", volume 1, pp. 37-39)*

[249] Dr. King saw nothing noteworthy in his motor examination, sensory examination, reflexes, gait, and station, or as a result of any of the other tests that he performed. He concluded "this man has posttraumatic headaches, they are intracranial vascular and extra cranial vascular". He went on to ask Dr. Begin (the Plaintiff's treating physician at the Institution) "I assume his CT scan was normal?"

[250] Dr. King recommended treatment consisting of:

Would start with Sibellium 5 mg x 2 hrs with this man, despite the fact he has had some depression, this seems to be reactive to his circumstances. I would use the Sibellium for about 2 to 3 weeks to see whether or not it would be of benefit.

If he gets no benefit from this it would be best to discontinue this medication and try him on something else... I would be pleased to see him again should he fail to respond to the Sibellium.

[251] Mr. Zwicker testified that he recalled filling out some prescriptions after visiting Dr. King, and he thought that he might have "tried them", but if so, it was only for a short time, because they "didn't work". March 31, 2017 finds him filling

out another IMF directed to Dr. Begin (the Institutional physician), advising that he had been suffering from extreme headaches and had been given "new meds which seem to help but very little."

[252] Dr. King, when he testified, indicated that he had no independent recollection of Mr. Zwicker beyond his records. He explained that concussion is caused by trauma. It generally impacts either consciousness or the memory of the recipient of that trauma. The concussion is concluded when the impact upon either or both of these functions has resolved.

[253] Dr. King explained that his report dated March 8, 2017 came about as a result of a referral from the Plaintiff's family doctor, who would have sent a very brief referral letter along the lines of "please see this gentleman for headaches". As a consequence, he would have relied upon information provided by Mr. Zwicker, and all references to symptoms in his report were based upon the patient self reporting. He specifically indicated that he would not have been aware of Mr. Zwicker's history of poly substance abuse including opiates, nor was he aware of the history of anger and some violence that had preceded the injuries that Mr. Zwicker had received in this incident, the prior car accident wherein the airbags had deployed, or the 2011 incident whereby the Plaintiff had had an altercation with "the man with the knife" and injured his head requiring sutures. Dr. King was similarly unaware that Mr. Zwicker had previously been treated by his family physician for depression.

*(iv) Ryan Zwicker (Part 2)*

[254] Returning to Mr. Zwicker's testimony, he was released from Springhill for good in February 2018. He lived with his brother for a period of one to two months. Social assistance file records dated February 9, 2018 (*Exhibit "1", volume 2, p. 383*) make note of "medical conditions: asthma, a DHS, concussion, waiting for knee surgery. Says he had head trauma in February 2016 that resulted in brain injury. Should be taking 6 Rx but does not have funds to purchase. Family doctor is Howard Conter". He thought he might have gone one more time to visit with Dr. King before he went to Toronto for good, on October 4, 2018.

[255] Mr. Zwicker testified that he did not go back to work at this time as he had lost confidence. He expressed concern that he felt that he could not perform the same as he had before his injury. He was working on a meal preparation business, which eventually was pursued under the earlier discussed title "Cut the Prep". As

he put it, “this was something I could do on my time”. It was a business name, not an incorporated entity.

[256] He described the business concept as making “healthy TV dinners”. He had gotten into the business very quickly upon his release as he did not like the quality of the food his children were eating. Therefore, he started out making meals for them. The business did not go very well, but then again, he testified that he was doing it, at least at first, to build a brand and develop an idea. He said, “I knew the profits would come as long as I had a product people wanted.”

[257] The Plaintiff recalled receiving assistance from an individual named Rodney Small, who runs a program called “Seven Steps”, which is a support group for former inmates. Mr. Small had purchased some meals from him, and took him to an entrepreneur’s group, whereby he could make a presentation to the group and cook for them, as a means of attempting to secure investment in his business. On another occasion he cooked for another group of about 30 people, and it took him about 18 hours to get the meals prepared. He received \$300 for this work, out of which he had to pay for the food that comprised the meals. He testified that this was the biggest job that he ever secured in Nova Scotia, and the biggest single payment that he received while pursuing “Cut the Prep”.

[258] In 2018, again before relocating to Toronto, he lived for a period of time with his former girlfriend, the mother of his children. She was going through a divorce at the time and needed help in the form of someone to keep the house and look after the children while she was at work. He felt it could be a win-win situation, because he was also looking for a place to stay, and it would enable him to see his children on a daily basis.

[259] That situation did not work out. He said his ex thought that he was on drugs, and the boys were simply too much for him to handle. He would get angry at them. In his words, “she kicked me out”. He was still on parole at the time, and he recollected that his parole officer was not very happy that he did not have a place to stay, so he told him that he was staying with his mother. His period of parole supervision ended a short time later.

[260] Next, he went to Kentville to help a female acquaintance, named Sarah, start some soup kitchens. Sarah was trying to figure out how to make her non-profit soup kitchen work, and he at times acted as her chef. She had five such kitchens in total. Among other things, he helped her by developing a pickling process for some of her

produce. Another time, when she was having a fundraiser, he made borscht to assist her.

[261] Mr. Zwicker worked in Kentville until he received an invitation from to cook at a restaurant in Toronto. Both he and Lachlan Culjak testified that this did not work out very well either. The Plaintiff said that this was his first time in a restaurant kitchen after his release from Springhill approximately six months earlier. His symptoms had not improved since that time, and he was still experiencing memory loss. Prominently, he was “forgetting things”. For example, he mentioned that there is a technique for cutting citrus fruits into segments. He testified that he had forgotten how to do that. He said he was embarrassed and upset. Once again at this juncture, I break off from Mr. Zwicker’s to consider the evidence of Mr. Culjak and Marco Zandona.

(v) *Lachlan Culjak*

[262] Chef Culjak testified that Mr. Zwicker was, in 2018, not the same person that he had been when the two had first met, around 2003, while working at Café Chianti in Halifax. In 2003, he recalled Ryan as having started out as a dishwasher, and quickly moving up to the salad station. His perception of the Plaintiff at the time was that of a solid individual, who was energetic, sharp minded, and keen to learn. “You want people like that in every kitchen”. He asked a lot of questions, learned quickly, and retained the information he obtained. He recalled discussing with the Plaintiff the latter's goal to be a head chef in great restaurants.

[263] Culjak left Halifax in 2004, and reached out to the Plaintiff via Facebook in 2018. He was excited to have him come on board, but when he did, it was clear that Mr. Zwicker was not the same cook. His skills had diminished, his abilities did not seem to be what they had been before. He had a lot of trouble retaining directions, mixed up ingredients/weights/portions, and could not keep up with the pace. He seemed to be in a daze and was easily fatigued. This change became evident in the first couple of days.

(vi) *Marco Zandona*

[264] Marco Zandona also testified. He presently works at a restaurant called Via Allegro in Etobicoke, Ontario. He referred to it as a high-end Italian restaurant, with one of the biggest wine and scotch lists in the world. His responsibilities include

hiring and training staff, food costing, and overall restaurant management. At any given point in time, he employs 12 to 14 kitchen staff at various stations including the grill, pasta station, vegetable station, and dessert station. It is a very busy environment and everyone must work with “a sense of urgency”.

[265] Mr. Zandona said that he first met Mr. Zwicker in approximately March 2019, after having posted an ad looking for employees. The Plaintiff responded to that ad and provided a resumé. Mr. Zandona could see that he had worked for some good chefs in the past, and that he was very passionate about cooking. The Plaintiff had not advised Mr. Zandona that he had any limitations.

[266] It quickly became obvious to Mr. Zandona that Mr. Zwicker could not keep up. He could not maintain a consistent schedule, or show up on time. He also became frustrated during his shift. He found it hard to remember things and, over time, expressed frustrations with his abilities, or lack thereof. He tired very easily, but he soldiered through.

[267] Mr. Zwicker still works at Via Allegro. When he does work, it is at the grill station. They had tried to start him full time but that did not work out. The best fit for both parties was part-time work, because full-time was too much for him. He generally has to work with either Mr. Zandona, or one of the sous chefs, otherwise he would not be able to make it through a shift. On a physical level, other than the fatigue, he seems to be pretty good.

[268] The witness described Mr. Zwicker as one of the most passionate people in his employ. He said he enjoys working with him, since he is one of the only members of his staff who talks about food and cooking techniques in his spare time. He demonstrates a great knowledge of the industry and asks very intricate questions. He added that “most places would have let him go, but I enjoy his passion. Very few people have that passion.” However, with his limitations, Mr. Zandona said that he would not expect Mr. Zwicker to get much further than his current situation. When asked whether he had ever noticed Mr. Zwicker impaired by alcohol or drugs, his response was “I don't know what impairment looks like.”

(vii) *Ryan Zwicker (Part 3)*

[269] Returning to the Plaintiff's testimony, Mr. Zwicker was asked about Dr. Conter's medical records. Dr. Conter was his family doctor for about 25 to 30 years.

He went to him when he needed help and if he had health issues that need treatment. However, he has not seen Dr. Conter since his relocation to Toronto in October 2018, nor, other than meeting with Dr. Mitchell, the neurologist who provided her medical opinion regarding the Plaintiff (and whose evidence will be considered next) has he seen any other physician, since 2018.

[270] When asked about an entry in one of his records, he acknowledged that on February 21, 2016, while still incarcerated, he went to Health Services with respect to his shoulder. He acknowledged that he had had reconstructive surgery on his left shoulder some years before. The February 21, 2016 record indicated that he was experiencing a lot of pain from that surgery, which he testified that he does not now recall. “Knee also very sore” was also referenced in the note.

(viii) *Dr. Sara Mitchell*

[271] It is now convenient to consider to the evidence of neurologist, Dr. Sara Mitchell. At the request of Mr. Zwicker's counsel, she performed a neurological assessment of the Plaintiff on June 20, 2019. Her written report dated August 21, 2019, provided her opinion and conclusions with respect to the Plaintiff, as well as some recommendations for his future treatment. Dr. Mitchell also provided *viva voce* testimony (remotely) with respect to her qualifications.

[272] Her *viva voce* evidence on this point was required because of the Plaintiff's failure to provide a summary of her qualifications to Defence counsel, within the guidelines set forth in the *Civil Procedure Rules*. The Court's reasons for allowing this limited cross-examination were provided orally at an earlier pretrial Motion.

[273] Ultimately, Dr. Mitchell was qualified to provide opinion evidence in the field of neurology, and was found capable of giving opinion evidence on the subjects of injury and diseases of the nervous system (including the brain), their causes, diagnoses, prognoses and treatment, as well as the impact of mild traumatic brain injury on bodily functioning.

[274] Among other things, Dr. Mitchell's report outlined some of the information that she received either from or about the Plaintiff, which included a note authored by Dr. Emmanuel Aquino, psychiatrist at the Springhill institution, dated January 25, 2016:

Mr. Zwicker finds that since he has started his program, he cannot pay attention very well, that he is irritated by the repetition of the material presented, that is easily

bored and distracted. He denied any other mental health concerns (see eats and sleeps well, has supports, anxiety is not significant etc.) and identified no other needs for mental health services or intervention, apart from his request to see the psychiatrist about restarting his prescription for Vyvanese to manage his ADHD symptomatology. He noted that he asked to come off the Vyvanese when he was in RRC as he had no particular need for it but now that he is trying to complete his program and having difficulty doing so.

[275] The neurologist also referred to Dr. King's previously noted report of March 8, 2017, and also the seven sub-occipital injections subsequently administered to Mr. Zwicker on August 4, 2017. On that date, Dr. King had noted:

Mr. Zwicker disclosed that his mood was low upon his return due to the combination of being suspended and being on the TD range for three weeks with limited movement and recreation time and the constant worry over his mother's condition, however admits he feels much improved now and denied any thoughts, plans or intent to engage in any self injury or suicide behaviour, stating "I have two kids I would never do that to them". Subject wonders of the reason for him being suspended (forgetting to hand in his chef's knife's after work) may be due to memory problems resulting from the concussion he obtained caused by a fall he had when he first arrived as a newcomer in the RRC and had struck his head on the floor and would like to be further assessed CVs having any memory or cognitive deficits from same. He would also like to see the psychiatrist about his current medication for his ADHD to see if his dose of Vyvanese could be increased as he feels it "runs out by lunch time" and that he finds it helpful with his memory problem as well, he like to discuss "stress medication" with the psychiatrist and what options if any there is for him to help him cope with his current stress and concerns with outside stressors he has in his mind as it is affecting his sleep.

[276] After noting that Mr. Zwicker had described his school performance as "good" and that he had completed high school and a post-secondary college-level mechanics program (neither of which was true), Dr. Mitchell made note of the following:

#### SOCIAL HISTORY:

##### Developmental, Educational and Vocational History:

Mr. Zwicker is a 37-year-old right handed male. He is single and has two children, ages 15 and 10 years old. Mr. Zwicker was born in Halifax, Nova Scotia. He has two healthy siblings.

Mr. Zwicker describes his childhood as "good". He reached all of his developmental milestones. Mr. Zwicker reports that he was diagnosed with Attention Deficit Disorder (ADD) at approximately age 12 and was previously on

Ritalin for management of this. The main symptoms leading to this diagnosis of ADD were hyperactivity and inattention.

Mr. Zwicker describes his school performance as “good”. He completed high school and a post-secondary college level mechanics program.

Mr. Zwicker reports that he was incarcerated in February 2016 for cocaine possession, one week before the subject incident. He was incarcerated at a facility located in Springhill, Nova Scotia. At that time, Mr. Zwicker reports that he was working full-time as a chef. He reports that he was discharged from his incarceration on January 26, 2018 and he had attempted to find employment after his release. He tried working as a cook for a few employers but was not able to tolerate his job demands due to his injury-related symptoms. Mr. Zwicker indicates that a few months ago, he began working as a Cook for a restaurant named Via Allegro. Although he continues to work at this time, he struggles to perform his job demands due to headaches and general fatigue. He states that at work “I can’t get my shit together”. He remarks that he is a skilled chef and does fine dining and now he cannot “bring it all together anymore”. He has difficulty with delegating. He has difficulty “calling board” and ensuring that all of the cooks are doing their job. He admits that he cannot monitor activities in the kitchen with the same level of proficiency as in the past. This, combined with his “anger issues”, has become an issue that he reports threatens his employment. He adds that he also has word finding difficulty that can interfere with his function at work.

Substance Use:

With respect to substances, Mr. Zwicker reports that he smokes 10 cigarettes per day. He denies drinking alcohol.

Mr. Zwicker reports that he smokes marijuana, “four joints per day”. He denies any other recreational or illicit drug use.

Activities of Daily Living and Recreational Activities, Pre-and-Post Injury”

Mr. Zwicker informs me that he currently lives in a sublet apartment with a roommate.

Mr. Zwicker reports that prior to the subject incident, he was independent with all of his activities of daily living and instrumental activities of daily living including banking, shopping, and cooking. He acknowledged that he is physically able to perform most tasks at present, but feels “scatter-brained” and lightheaded while carrying out most of these tasks.

Mr. Zwicker confirms that he is independent with his personal care functions.

In terms of leisure activities, Mr. Zwicker reports that prior to the injury, he enjoyed spending time with his children on weekends and performing recreational activities with them. He comments that he can no longer engage in any physical activity such as running, as “it inflates my head and I get a throbbing headache with exertion”.

*(Exhibit “1”, volume 1, pp. 6-7)*



[277] Dr. Mitchell indicates that, among other things, she was told by Mr. Zwicker that he was “drug-free at the time of the subject accident”, and that he had denied any previous head injury or concussion. She then noted:

Review of the medical documentation revealed an emergency/trauma report dated June 26, 2011. It was noted that Mr. Zwicker was assaulted and struck multiple times in the head with a hammer. He underwent a CT scan on the head which was normal. He was found to have atrial fibrillation at the time. Mr. Zwicker left the hospital against medical advice. He returned to hospital for a cardiology consult. The cardiologist opined that Mr. Zwicker presented with atrial fibrillation, likely precipitated by substance abuse and trauma.

[278] Mr. Zwicker described to Dr. Mitchell his ongoing medical issues since the injury as per the following:

Despite the passage of time since the subject incident (over three years), Mr. Zwicker continues to describe the following persistent symptoms:

- Headaches: Mr. Zwicker denies any history of headaches prior to the injury. He confirms that the headaches began immediately after his injury. He states he currently experiences headaches daily through the right temple and suboccipital regions. The headaches are variable in terms of duration but generally last between two hours to the full day.

Mr. Zwicker reports experiencing a “migraine” approximately 1-2 days per week. He describes a sharp and stabbing sensation with associated sensitivity to light (photophobia) and sound (phonophobia). He does not take any medication in his regard. He rates his headache as generally a 6/10 (on an analog scale on which “0” represents no pain and “10” represents the most excruciating pain possible). Aggravating factors include bending forward or physical exertion. He did not identify any relieving factors.

- Energy level and sleep: Mr. Zwicker states that overall, he has much more fatigue since the subject injury. He describes his sleep as very poor. He states he goes to sleep at approximately 3:00 a.m. and then wakes up at 7:00 – 8:00 a.m. He reports that he wakes up 3 – 4 times per month. He denies snoring or any apneic episodes. He notes that he does not feel refreshed in the morning. He does not nap. He affirms that he does not have energy to take on the day.
- Cognitive Dysfunction: Mr. Zwicker states that following the subject injury, he developed changes in various aspects of cognition.
  - a. Focus and concentration: Mr. Zwicker reports that he struggles with conversations, especially with multiple participants. He struggles to concentrate with cooking at the restaurant.

- b. Short term memory loss: Mr. Zwicker states that he forgets names and appointments and loses items, and that he has to now make lists. His memories of recipes have significantly decreased, which impacts his ability to work as a cook.
  - c. Word finding difficulty: Mr. Zwicker notes problems with poor vocabulary and difficulty with word finding.
  - d. Visuospatial: Mr. Zwicker reports that he gets lost and relies more on GPS. He adds that he once got lost at a mall.
- Mood: Mr. Zwicker describes his mood as “snappy and angry”. He reports that he feels sadness due to an inability to do things or play with his children. He indicates that he stays home more now and does not enjoy the day-to-day activities as much as he did prior to the injury. His energy levels have reportedly decreased since this injury. He denies any suicidal thoughts. He reports that he gets panic attacks at work when he gets confused. He denies any symptoms of mania or hypomania.
  - Other: Mr. Zwicker denies any ongoing dizziness or tinnitus. He denies any dysarthria or dysphagia. The remainder of the neurological and psychiatric review was negative.

*(Exhibit “1”, volume 1, p. 9)*

[279] Dr. Mitchell administered a cognitive examination in the form of the "Montréal Cognitive Assessment" (MoCA) – version B. She described it as a tool which assesses cognitive domains such as visuospatial skills, executive function, attention, memory, language, calculations, abstract thinking, and orientation. Scores can range from 0 to 30, a score of 26 – 30 is considered normal, whereas a score of 18 – 25 is suggestive of mild cognitive impairment. Mr. Zwicker score was 18. As she put it:

He obtained a score of 18/30 which is below the cut off of normal. He lost two points for the visuospatial/executive section (one for copying a rectangle and one for completing a pattern). He lost an additional five points for delayed recall at five minutes, three points for attention, one point for language and one point for abstraction.

*(Report, August 21, 2019, Exhibit “1”, volume 1, p. 10)*

[280] Mr. Zwicker was also subjected to the Beck Anxiety Inventory and scored a 40, which indicates extreme depression, according to Dr. Mitchell. Some other aspects of her of her "Summary and Conclusions" are excerpted and/or paraphrased below:

Summary and Conclusions:

In summary, Mr. Zwicker is a 37-year-old, right-handed, previously healthy male who was involved in a slip and fall incident on February 25, 2016 while he was an inmate at Springhill Institution correctional facility. Mr. Zwicker reportedly slipped on a puddle of water outside of his cell and struck the back of his head, lost consciousness and had non-continuous memories for the time period immediately preceding and following his fall. Mr. Zwicker subsequently developed a constellation of symptoms including persistent headaches, cognitive dysfunction and neuropsychiatric symptoms that are classic for post-concussion syndrome. These symptoms continue to persist approximately three years and four months following the initial insult, impacting his independent functioning, vocational abilities and recreational pursuits.

#### Neurological Diagnosis

1. Mild traumatic brain injury (mTBI)
2. Persistent post-concussion syndrome
3. Post-traumatic tension type headaches
4. Post-traumatic migraine type headaches

Based on my extensive file review, assessment and examination of Mr. Zwicker, it is my opinion that he sustained a mild traumatic brain injury (mTBI) and cerebral concussion as a result of the subject slip and fall incident. While there is no standardized and internationally accepted definition for mTBI, the International Collaboration on Mild Traumatic Brain Injury Prognosis (2014) recommends using the American Congress of Rehabilitation Medicine (ACRM) definition (1993) which has been revised by the World Health Organization Centre Task Force on mTBI (2004). It is defined as follows:

“Traumatically induced physiological disruption of brain function resulting from the head being struck or striking an object of the brain undergoing an acceleration and deceleration movement, as manifested by at least one of the following:

- Any period of loss of consciousness up to 30 minutes
- Post-traumatic amnesia (PTA) not exceeding 24 hours
- Any period of confusion or disorientation
- Transient neurological abnormalities, including focal signs, seizures and intracranial lesions not requiring surgery
- A Glasgow Coma Scale (GCS) score of 13-15 within 30 minutes after presentation”

*(Exhibit “1”, volume 1, pp. 11-12)*

[281] Dr. Mitchell also goes on to provide some insight into the nature of concussion, and discusses those features exhibited by the Plaintiff:

Concussion is defined according to the American Academy of Neurology practice parameters as a “trauma induced alteration in level of consciousness”. Mr. Zwicker endorses losing consciousness immediately following the fall and experiencing a period of confusion and disorientation following the injury. There is also mention of him having a generalized seizure after the fall, which is an indicator of a transient neurological abnormality related to neuronal dysfunction due to the injury. Mr. Zwicker also reports non-continuous memories in the period directly prior to and following the fall. These are all neurotrauma indicators supporting a diagnosis of concussion.

In terms of the mechanism of injury, Mr. Zwicker was witnessed by his fellow inmates to have struck the back of his head against the concrete. This is, on balance of medical probabilities, a force sufficient to cause a mild traumatic brain injury through axonal disruption. In addition, it has been demonstrated that the sheer force with which the brain moves within the skull during an acceleration-deceleration injury can cause axonal dysfunction and resultant concussive symptoms in the absence of direct contact injury.

Immediately following the injury, Mr. Zwicker began to experience a constellation of symptoms classic for post-concussion syndrome (PCS). This is documented in the correctional facility medical records. On numerous occasions, Mr. Zwicker had made requests to be seen by medical professionals for symptoms including vision change, lightheadedness, headaches, memory change, language dysfunction, irritability and distractibility. This constellation of symptoms is well known to be indicative of a post-traumatic syndrome.

Mr. Zwicker continues to suffer from symptoms consistent with a persistent post-concussive syndrome approximately three years and four months following the injury. These symptoms are significantly impacting his daily function. While it is noted within the literature that most cases of PCS can resolve within weeks to months following the initial injury, it is estimated that up to 10-15% of concussion patients may experience a persistent post-concussive syndrome for a year or longer post-event and this is certainly consistent with clinical experience.

Mr. Zwicker’s headaches are quite disabling and clearly meet the definition for post-traumatic headaches being entirely attributable to the injury. The International Headache Society diagnostic criteria for post-traumatic headaches require onset within 7 days after injury, and Mr. Zwicker’s headaches are documented to have started immediately following the injury. These headaches are consistent with a diagnosis of both chronic tension type headaches and chronic migraine type headaches that are post-traumatic in etiology. Mr. Zwicker would qualify for a trial of a preventative headache medication. A tricyclic antidepressant such as Nortriptyline or Amitriptyline would be a reasonable choice given their concurrent effects on mood and sleep as well as their reported effectiveness for non-specific post-concussive symptoms.

Mr. Zwicker additionally reports suffering from persistent cognitive inefficiencies since the subject slip and fall incident. On cognitive testing performed during the

assessment, Mr. Zwicker scored below the cut off of normal on the MoCA, obtaining a total score of 18/30. Mr. Zwicker demonstrated objective evidence of impairment in the cognitive domains of attention, executive functioning, language and working memory, which are consistent with cognitive domains that can be affected in mTBI and post-concussion. Interpretation of these results is limited, as there is no baseline cognitive testing from prior to the injury with which to compare the results. However, these symptoms were reported to be entirely absent prior to the injury aside from mild inattention due to his pre-incident diagnosis of ADD. Mr. Zwicker's disabling subjective cognitive complaints emerged only after the slip and fall and have remained stable without progression. Therefore, on balance of medical probabilities, the most likely incident cause of Mr. Zwicker's cognitive deficiencies is the subject injury.

*(Exhibit "1", volume 1, pp. 12-13)*

[282] The neurologist went on to characterize the Plaintiff's low mood, headaches, chronic pain and poor sleep quality as exacerbating the cognitive complaints being experienced by him. She observed that ongoing stress to the limbic system from mood swings and poorly controlled pain symptoms can limit "the optimal functioning of other regions of the brain including the attention and working memory functions."

[283] She went on to recommend formal neuropsychological testing to further pinpoint the nature and extent of Mr. Zwicker's cognitive difficulties. She also recommended an MRI of the brain, given the persistence of his cognitive symptoms over time to rule out any focal lesions such as contusion or micro hemorrhage from the accident or otherwise. Having linked the "significant depression" and anxiety being experienced by Mr. Zwicker to the concussion, she recommended that Mr. Zwicker also undergo a full evaluation by a psychiatrist for formal diagnosis and to consider treatment with an antidepressant medication, if indicated. She went on to observe that a serotonin norepinephrine reuptake inhibitor such as Duloxetine would be one possibility that might assist with both mood symptoms and attentional difficulties.

[284] To assist with his posttraumatic tension headaches with migraine features, Dr. Mitchell recommended a tricyclic antidepressant such as nortriptyline which she thought might help with headache prevention and insomnia and his low mood as well. Dr. Mitchell also recommended an overnight polysomnogram to assess for obstructive sleep apnea, in which case a CPAP machine may improve symptoms of low mood, headaches and attention.

[285] In an effort to treat Mr. Zwicker's cognitive complaints, Dr. Mitchell recommended a regimen of screening blood work, including a CBC, electrolytes and extended electrolytes testing which included calcium phosphate and magnesium and liver function tests. As she put it:

These basic screening tests can help to better delineate if there could be an alternative systemic etiology that could it be contributing to his current cognitive complaints that may potentially be reversible.

(Report, Exhibit 1, volume 1,tab1, page 14)

[286] In addition to recommending engagement in general brain health promoting measures, Dr. Mitchell also recommended adherence with a heart and brain healthy diet along with engaging in daily cognitively challenging and stimulating tasks as well as social activities.

*(ix) Mr. Zwicker (Part 4)*

[287] Mr. Zwicker was asked on cross-examination whether he had complied with any of Dr. Mitchell's recommendations. He had earlier allowed, by the time this question was asked, that there had been some improvement (referred to in Dr. King's record of August 4, 2017 and in Dr. Mitchell's report) following the injections administered to him but, because it took a week for the improvement to occur, he did not like needles, and had experienced pain when they were administered, he did not feel that the level of improvement was worth the treatment.

[288] He testified that he did not follow up on Dr. Mitchell's recommended blood work after their meeting, saying, "I don't like needles, things would have to be pretty serious for me to get blood work done". Similarly, he did not follow her recommendation for a tricyclic antidepressant, saying "I don't want to be taking any more pills", adding that he did not think it would help him anyway, even though he does have Blue Cross coverage. Likewise, he did not obtain the basic screening tests which Dr. Mitchell had indicated "can help to better delineate if there could be an alternative systemic etiology" which might both be potentially reversible and contributing to his cognitive complaints. He also stated that she [Dr. Mitchell] "didn't give me anything that I wanted to pursue besides hot yoga."

[289] Mr. Zwicker currently occupies a basement apartment under a general store in Toronto. Presently, when not working at Via Allegro, he likes to collect objects out of the garbage and /or purchase items for resale at outlets such as "Value Village". He refurbishes them as needed, and sells them on the Internet through

“Amazon”, “eBay”, and some others. He referred to another interest of his centered around “intellectual property”, indicating that he knows how to search and where to search for patented ideas and creations. He testified that he has designed a Covid face- mask, and, has registered a product name such that he has “first dibs” on the word "vaccinated".

[290] He also indicates that, as part of his "Cut the Prep" business, he uses a calculator online to calculate the fat, carbs, and caloric intake with which he labels the meals that he creates, but admitted that often, he just approximates them. He said he pays approximately \$1,000 a year in advertising on Facebook. He also prepared a menu for use by “DoorDash” and “Uber Eats”, so they can sell his food products. He pointed out that he needs money to advertise and to get his product better known, and money is in short supply.

[291] He also talked about other aspects of his “Cut the Prep” business. For example, once the product is cooked, in order to prepare it for delivery, it must be properly cooled. Mr. Zwicker described the process as very important and complicated. He has developed a process of cooling which in part involves the use of the refrigerator in the summer. He can take advantage of the colder weather in winter by placing products outside as a part of the process.

[292] After it has been properly cooled, Mr. Zwicker packages the meal, and can deliver it. He testified that he sometimes delivers items himself, even though he does not drive. He has used Uber before, as well as other forms of transportation, including bus and trains. The process involves setting the food down, bending to pick it up, and to drop it off. The meal is essentially "on ice" when he delivers it. If the customer happens to be out or not at home, he sets it down in a secure place proximate to their residence.

[293] Mr. Zwicker’s attention was directed to online advertising claims made in November – December 2018, which were to the effect that he was “now shipping meals to Nova Scotia”, “sold out in Halifax”, and that he was working 13 hours a day to keep up with the demand for his meals. He said that these claims were not accurate. He said that he was simply “testing the waters” and that “I never really wanted too many orders at once. I was trying to gauge the market and find a way.”

[294] The Plaintiff testified that he has watched thousands of hours of YouTube over the course of two years to educate himself about what to look for in the course of his buy/sell business. He keeps track of what is trending, and described vintage electronics, musical instruments, and some other items as the most profitable ones,

but added "you can't put "reseller" on a bank loan application". He went on to elaborate that "I've bought everything, video games, books, weird electronics, intellectual properties". He added that he sometimes makes as much as \$80.00 in profit on an individual item over and above the cost of acquisition and shipping. When asked if he was doing much research/education now, he responded "not so much now, as I've found my niche."

[295] The Plaintiff said that he also goes to Value Village approximately twice a day, walking there and back, "it's addictive", and that he almost always find something each time he goes. He brings the items home, organizes them, and sells them for as much as he can get. He added that he does not take pictures of the items that he sells on Amazon or Poshmark, but does do so when selling on Kijiji. He often receives comments or questions about the items that he selling and answers the ones that he feels are serious inquiries. He said the purchasers often complete the transaction by e-transfer, and if he uses a site like Kijiji, they will take a percentage.

[296] Although there are different ways to utilize Amazon's services as a seller, his preferred method is to allow Amazon to buy inventory from him, which they subsequently warehouse and see to customer service. When they sell a warehouse item they receive a percentage, as does he. Currently, he says he has approximately \$60,000.00 in inventory at his apartment, which is as yet unlisted. This figure represents what he feels he could get for it if sold, rather than what he paid to acquire the items.

[297] I will now refer more fulsomely to Mr. Zwicker's earnings, both before and after incarceration.

[298] The Plaintiff's social assistance records reveal that, prior to his incarceration in 2016, he qualified for payment of social assistance benefits for periods of time in 2008, 2011, and his application dated August 25, 2012 was supported by a medical assessment signed by Dr. Howard Conter which described him as suffering primarily from severe depression, and secondarily from anxiety, the prognosis as to the durations of these maladies is said to be "indefinite" (*Exhibit "15"*). His "client personal and financial statement" signed in the support of his application for financial assistance with Community Services on April 15, 2012 declares that he has no income of any kind and that he is living with his parents (*Exhibit "1", volume 2 pp. 469 – 470 – all subsequent references to page numbers refer to this volume until the contrary is indicated*).



[299] The same form signed just over a year earlier, on February 11, 2011, had indicated that he had no income from any source at that time (*p. 473*). His bank account statement from Canada Trust for the month of January 2011, shows a deposit for employment insurance on January 11, 2011, in the amount of \$305.00 and a closing balance by the end of the month of -\$45.48 (*p. 487*). Similar statements for the months of November and December 2010 (*pp. 488 – 489*) show that he was drawing employment insurance benefits throughout these periods of time, as well.

[300] Returning to the medical assessments filled out by Dr. Conter in support of Mr. Zwicker's applications for social assistance, on August 15, 2011, Dr. Conter diagnosed him as suffering primarily from chronic anxiety, and secondarily from ADHD, again indicated that his period of being unable to enter the workforce would be of indefinite duration, and specifically would depend on the Plaintiff's "response to therapy", and that he would be unable to work until November of that year. He also described his patient as in need of a vocational assessment (*p. 501*).

[301] Mr. Zwicker's assistance file is also replete with "income statements" signed at various times indicating that he had absolutely no income. For example, we see some of these forms signed on September 19, 2011, September 5, 2012, April 16, 2012, December 20, 2011, October 16, 2011, November 20, 2011, May 16, 2011, June 16, 2011, August 15, 2011, February 21, 2011, July 19, 2012, June 16, 2012, April 18, 2011, August 16, 2011, March 15, 2012, February 16, 2012, July 20, 2008, June 19, 2012, and the like. During these intervals, Mr. Zwicker apparently claims to be living with his parents at their address (*pp. 538 – 551*).

[302] Income tax returns filed by the Plaintiff between the years 2008 to 2020 (*pp. 217 – 254*) show the following:

- 2008 – total earnings from employment \$1,166.00, EI benefits \$13,737.00, net income before adjustments – \$14,903.00
- 2009 – total earnings from employment \$9,334.00, EI benefits – \$20,916.00, net income before adjustments – \$30,250.00
- 2010 – total earnings from employment – \$14,835.00, EI benefits \$18,234.00, net income before adjustments – \$33,069.00
- 2011 – EI benefits \$1,542.00 social assistance payments \$4,912.00 net income - \$6,454.00
- 2012 – total earnings from employment \$10,445.00, social assistance payments \$5,487.00 net income - \$15,932 (taxable income \$10,445.00)

- 2013 – total earnings from employment \$14,175.00, social assistance payments \$4,695.00 total income - \$18,870.00 (taxable income \$14,175.00)
- 2014 – total earnings from employment \$15,970.00
- 2015 – total earnings from employment \$25,292.00
- 2016 – total earnings from employment \$5,194.00
- 2017 total earnings from employment \$357.00
- 2018 total income \$14,144.00
- 2019 – total income \$38,186.00
- 2020 – total income \$70,242.00

[303] Mr. Zwicker was vague when asked about his current sources of income. For example, his tax notice for the year 2020 was addressed to:

Ryan Zwicker  
C/O Cut the Prep  
B B 497B Silverthorne Avenue  
York, ON M6M 3H8

[304] As has earlier been observed, his reported earnings were \$70,242.00 for that year, with net income of \$69,466.00.

[305] When it was put to Mr. Zwicker that that this was his actual income for 2020, he responded with the expression, "I wish". He went on to say that he was not sure how he arrived at that number, but that he had used an H&R Block "app" on his laptop to calculate it.

[306] Mr. Zwicker said that he was quite certain that the figure (his 2020 earnings) did not include any money from "Cut the Prep" or "Brick and Order" (the buy-sell business), but that there would be some income from Via Allegro in there. He went on to add that the program that he used incorporated the T4 information that he had received from his employers, and that the only additional employer which he had not, up to that point, mentioned was "Miller Tavern, where I worked for about a month."

[307] The Plaintiff testified that he does not have a GST number for the Brick and Order business, but does have one for Cut the Prep. As he put it, "they don't like to give out GST numbers unless you're making \$30,000.00 per year for from it".

[308] Mr. Zwicker acknowledged that ADHD has been a lifelong problem which still afflicts him, and that he currently can focus on what he enjoys doing, but not on what he does not enjoy doing. The Plaintiff referenced his anxiety, and acknowledged that he has probably had it since his early 20s. He was referred to annotations in Dr. Conter's file and his MSI history, whereby there were multiple references to his "anxiety state", to which he responded to the effect that he does not recall those years very well and "to be honest, they clearly were not good years". He also made note of a car accident in which he was involved in 2012, when he drove his mother's car into a pole at 40 km an hour.

[309] When questioned about his medical history in 2018, he also referred to the fact that Dr. Conter was involved in attempting to assist him in obtaining a medical marijuana license. He was also receiving prescriptions for Diazepam for "nerves", and to counterbalance the effects of ADHD meds.

[310] Despite copious references in Dr. Conter's reports to psychiatric disorders, the Plaintiff denied that he has ever suffered from serious depression until recently.

(x) *Ashley Andrews*

[311] The last witness to whom I will make specific reference in these reasons is Ashley Andrews, Mr. Zwicker's former girlfriend. She is the mother of his two sons. She testified that she still lives with the youngest of her two children, who is 13, whereas the oldest now lives in Bathurst, New Brunswick, playing hockey at a high level. She is an RN who attained her nursing degree from Dalhousie University in 2010. She works mainly 12-hour shifts at present.

[312] She testified that she first met Mr. Zwicker in 2002, and it was an on and off relationship for the most part. The parties did live together for roughly six months while she attended St. Mary's University before subsequently taking her nursing training. She said that after they separated for good, they tried to remain friends and co-parent effectively.

[313] Prior to his incarceration, she described the Plaintiff as kind with the children, frequently present, and always caring. She described her sons as the only people with whom she ever saw him have a caring relationship. His practice was to visit with them approximately three to four times per month.

[314] She said that the Plaintiff did not really talk much about his employment, but seemed to have had a good relationship with all of the people with whom he worked.

She described a couple of occasions when, in around 2005 – 2006, she and the children had visited him at Café Chianti. Ms. Andrews said and that he always seemed positive and passionate about cooking. His goal was to have his own business preparing meals for people. Another goal was to become a "red seal" chef.

[315] She testified that, in the aftermath of a marriage that had ended, she had purchased a house in 2018 and she allowed Mr. Zwicker to live in the basement. The idea was that he could look after the house and provide childcare while she worked her 12-hour shifts. It also would provide him with an opportunity to re-establish a relationship with his children. Unfortunately, it did not go as planned.

[316] Her evidence was that when she came home from working a night shift, often he was in bed with no cleaning done, the children were not up and ready for school, and lunches had not been prepared. The Plaintiff's temper was seemingly bad, and he always seemed to cook the same meals for them, generally shepherd's pie or meatloaf. On some occasions he broke doors and drawers, and on one occasion he left a plastic cutting board on the stove and it melted.

[317] Ms. Andrews said that if she became irritated with him, or her tone of voice rose beyond a certain level, he would just snap. He had lost his patience with the children. This was one thing that she had never seen him do since the two of them had separated. Their "arrangement" lasted for about a month, and, sometime in early July 2018, it ended when the Plaintiff himself realized that things were not working out, and made the decision to leave.

[318] As to his current relationship with the children, she said they talk over the phone, mostly. She said the Plaintiff sends packages to the boys, and also sometimes provides vitamin supplements.

[319] On cross-examination, Ms. Andrews was asked why the two of them broke up when she became pregnant for their eldest. She responded to the effect that "once I was pregnant, my perspective and opinion of how I want my life to be changed". She added that once she was pregnant, "...he [Mr. Zwicker] didn't fit into my life - I was creating a future for myself and my kids, and he didn't fit in. I didn't want to be involved in the life he lived". She did go on to say however, that that when they briefly reconciled in 2008, and she became pregnant for their second child, Mr. Zwicker did seem more focused on his career and making a future for himself. She knew him to be working as a dishwasher that year, and then off and on from then on. She eventually became aware of substance abuse "after the surgery he had" but could not recall exactly when she first became aware of it adding, "I wasn't around

him very much". The drug involvement is the reason that she stayed away from him, as she did not want the children exposed to it.

[320] Ms. Andrews was only ever aware of his shoulder injury, not about the head injury that required staples. She said that she never asked him for financial support for the children, and he did not pay any, even when he was working, because she was able to support herself and the children on her own. By contrast, she did not feel that he was ever even able to provide adequately for himself.

## Analysis

### (i) Credibility

[321] The process of assessing credibility is generally more of an art than a science. The myriad of intersecting components involved in such an assessment has been described (always in a non-exhaustive manner) by many courts, in many different ways. Often, the case of *Faryna v. Chorny*, [1952] 2 DLR 354 (BCCA) is referenced, wherein we are cautioned that the process can never be based solely upon the demeanour of the witness, and that it often involves subjecting:

10 .... [the witness'] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with a preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that time and in those locations.

[322] The process was also well canvassed in *Baker-Warren v. Denault*, 2009 NSSC 59, where Forgeron, J. observed:

18. ... It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. v. Gagnon*, 2006 SCC 17, para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. R.E.M.*, 2008 SCC 51, para. 49.

19. With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:

- a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary

evidence, and the testimony of other witnesses: *Re: Novak Estate*, 2008 NSSC 283 (S.C.);

- b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
- c) Did the witness have a motive to deceive;
- d) Did the witness have the ability to observe the factual matters about which he/she testified;
- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorney* [1952] 2 D.L.R. 354;
- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

20. I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: *R. v. Norman*, (1993) 16 O.R. (3d) 295 (C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in *Re: Novak Estate, supra*, at para 37:

There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.*, [1996] 2 S.C.R. 291 at 93 and *R. v. J.H.*, [2005] O.J. No. 39, *supra*).

21. Ultimately, I have considered the totality of the evidence in making credibility determinations. I have thoroughly reviewed the *viva voce* and documentary evidence in conjunction with the submissions of counsel, and the applicable legislation and case law.

[323] Ultimately, there is no substitute for the patient examination of the testimony offered by the witness, and the comparison of what that person had to say with the body of the remainder of the evidence. The ultimate objective, in a civil case, is to see whether that testimony fits within the reasonable preponderance of probabilities in the given set of circumstances under consideration.

[324] I found Mr. Zwicker's credibility to be lacking on many important points. His explanation, for example, with respect to his documented earnings in 2020, was

virtually nonexistent. As we have seen, he vaguely referred to an online tool into which he had plugged some data which resulted in an attributed income of \$70,242.00 (net \$69,466.00). When it was pointed out to him that this was far in excess of any yearly earnings that he had ever achieved pre-accident, his response was to the effect that "well, it's definitely wrong, I'll get around to changing that someday".

[325] Moreover, as evidenced in earlier cited examples, he had no qualms about misleading Community Services on many occasions (pre-accident), with the apparent complicity of his mother, about his living arrangements, with the effect that he was provided with money to offset the cost of rent that he falsely claimed that he was incurring by living with his parents. He also had no difficulty misleading the continuing education program that he attended at NSCC with respect to small engine repair. He pretended that he was doing an apprenticeship in that line of work by providing falsified records to cover up the fact that he had not, in fact, done so. He also lied to his parole officer in 2018 about his living arrangements.

[326] In June 2019, the Plaintiff reported to Dr. Mitchell that he was experiencing headaches once or twice per week, fatigue and poor sleep, reduced focus and concentration, short-term memory loss difficulty with word finding, and changes in mood that were ongoing and persistent. Mr. Zwicker had apparently reported, in June 2018, to Dr. King, that he was sleeping well at that time and feeling better.

[327] Reference has earlier been made of his reports to Community Services prior to 2016, which were documented in medical reports provided by his long-time physician, Dr. Conter, which related to depression, anxiety, and ADHD. These maladies persisted throughout the years 2008 – 2014, and beyond.

[328] These examples are not exhaustive, but suffice to make the point. In the end result, I was cautious with my reception of Mr. Zwicker's evidence. Some of it, I was unable to accept. He carries the burden of proof, on a balance of probabilities, with respect to all aspects of his claim. I will return to this below.

(ii) *Causation*

[329] It will be recalled that Dr. Mitchell had concluded, in part (*Exhibit "1", vol. 1, p. 13*):

It is my contention that a clear temporal correlation exists between the onset of Mr. Zwicker's above outlined symptoms in the subject injury. There exists a plausible

mechanism for the development of Mr. Zwicker symptoms as a direct and indirect result of the head injury sustained from the slip and fall. Based on my assessment, but for the injury Mr. Zwicker would not be symptomatic with his current complex symptoms and would have been able to continue working full-time and engaging in his regular social and recreational life after his incarceration.

[Emphasis added]

[330] This is a direct reference to the test for causation often referenced in the leading cases. Where the cause of action involves negligence, it does not suffice for the Plaintiff merely to establish that the Defendant has breached the standard of care which was owed to him. Proof is also required that the breach led to the Plaintiff's having sustained damages. In other words, it is necessary to establish that the damages were caused by the Defendant's negligent conduct, and that they are not too remote.

[331] In *Clements v. Clements*, 2012 SCC 32, the Court articulated what has sometimes been referred to as the "default" test in the following terms:

8. The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement the defendant's negligence was necessary to bring about the injury – in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all of the evidence, her action against the defendant fails.

[Emphasis added]

[332] This in no way supplants what has been said in earlier cases (see, for example, *Athey v. Leonati*, [1996] 3 SCR 458, *Blackwater v. Plint*, [2005] 3 SCR 3, and others decided in their wake). However, it does limit the applicability of some of these early authorities.

[333] As we learn from *Athey*:

17. ... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

[Emphasis added]

[334] Earlier (in *Athey*) the Court had recognized that in some situations causation may be demonstrated when the Plaintiff is only able to prove that the Defendant's



negligent actions “materially contributed” to the injury (see para. 15). This appears to be a lower standard than the “but for” test. However, this received further consideration in *Resurface Corp. v. Hanke*, 2007 SCC 7.

[335] In *Resurface*, at paras. 24 – 25, the Court explained the limited circumstances in which the “material contribution” test may be utilized:

24. ...Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.

25. First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.

[Emphasis added]

[336] In this case, the Plaintiff has proven negligence on the part of the Defendant. His injuries are said to be of the type commonly sustained in the wake of negligence of this type. However, he has not shown that it is impossible to prove that the Defendant's actions caused his injuries using the “but for” test. As a consequence, this latter test is the applicable one.

[337] There was evidence before the Court that the Plaintiff had sustained a head injury in 2011, which was well prior to his incarceration. This occurred within the context of his fight with the "man with the knife". The resulting head trauma which he sustained required a number of staples to close. There is also evidence of other injuries, as well as activities on Mr. Zwicker's part which involved the ingestion of narcotics such as cocaine and opiates, over a period of at least five years (possibly longer), which would inevitably have impacted negatively upon some aspects of his mental processes.

[338] With that having been said, Mr. Zwicker was able to work in the food preparation industry, to some extent, prior to his being arrested in late 2015. I say "to some extent" because Mr. Culjak, who testified for the Plaintiff, and commended

the excellence of his work, had not seen him in that milieu, since 2004, which was before Mr. Zwicker's documented problems with cocaine and opiates had surfaced.

[339] Moreover, Mr. Zwicker's earnings history does not support the contention that he was able to stick at a job for other than relatively short intervals, even prior to his incarceration. Whether his restlessness was precipitated by his pre-existing ADHD, his ingestion of narcotics, a lack of fortitude, or some other reason is not apparent. The Plaintiff provided only Dr. Mitchell's opinion evidence, augmented by the records of Dr. King and Dr. Conter. The Defendant called no medical evidence whatsoever.

[340] Mr. Zwicker had the ability, prior to the subject accident, to capably work in the restaurant or food preparation industry, for comparatively short intervals at a time. As is attested by the lack of quality of his current work at Via Allegro (as per Mr. Zandona), he is currently bereft of some of that. He still has the ability to work at that establishment, at a reduced level, which has negatively impacted what he can earn in this industry.

[341] However, this income is augmented by his new passion, the "Brick and Order" business, which involves buying and/or recovering items, refurbishing them, and reselling them online. Indeed, his mother described that passion as the Plaintiff's "new addiction".

[342] His current situation is accompanied by some of the other sequelae noted by Dr. Mitchell in her report which I will proceed to discuss shortly.

*(iii) Damages*

[343] It has long been recognized that the calculation of damages to be awarded to an injured Plaintiff is not an easy task. Mr. Zwicker is to receive a sum of money with the object of compensating him for what he has lost, as a result of the Defendant's negligence, insofar as it is possible for money to do so. But, he is required to prove each and every component of his losses on a balance of probabilities. This is one reason why it was necessary to examine Mr. Zwicker's pre-accident situation closely.

[344] Only "special" damages may be quantified with any degree of precision. They include out-of-pocket payments incurred by the Plaintiff and occasioned by the injuries sustained as a result of the Defendant's negligence. On the other hand, "general" damages are not amenable to such precise calculation. They comprise all

other damage claims that are not "special". Because of this, their determination is often significantly more challenging.

### General Damages

[345] As I consider Mr. Zwicker's current circumstances, I must note some concerns with Dr. Mitchell's opinion. Although she attempted to present a fair picture of the deficits being currently faced by Mr. Zwicker, she seemed to be unaware of much of Mr. Zwicker's pre-accident medical history. In particular, although the "Appendix A: Documentation List" appended to her report does refer to "records from Dr. Howard Conter", (*Exhibit "1", volume 1, p. 18*), it is not clear how extensive these records actually were. She did not quote from any of Dr. Conter's earlier reports, for example, those provided to Social Assistance between 2008 – 2014. I was unable to note any specific reference to any medical records with respect to Mr. Zwicker that date prior to the slip and fall in February 2016, with the exception of "an emergency/trauma report dated June 26, 2011 (which noted that Mr. Zwicker had been assaulted and struck multiple times in the head with a hammer) and the reference to a note prepared by Dr. Aquino dated January 25, 2016.

[346] This was the summary appearing in Dr. Mitchell's report entitled "Past Medical History":

Past Medical History:

- Surgery to his right knee due to a ligament tear.
- Left shoulder rotator cuff tear.
- History of substance abuse, mainly cocaine. He reports that he completed an addiction program just prior to his incarceration. He adds that he was drug-free at the time of the subject incident.
- Asthma.
- Attention Deficit Disorder.
- Anxiety.

(*Exhibit "1", volume 1, p. 7*)

[Emphasis added]

[347] Clearly, Mr. Zwicker had not "completed an addiction program just prior to his incarceration". Nor was he "drug-free at the time of the subject incident". According to his own testimony, he entered the Institution high, and would still have been an addict when he suffered the subject incident approximately one week later.

Moreover, he did not complete "...high school and a postsecondary college-level mechanics program."

[348] It appears that Mr. Zwicker did disclose that he had been diagnosed with a history of anxiety since the age of 21 (*Exhibit "1", volume 1, p. 8*), however Dr. Mitchell does not evidence any realization as to how debilitating Dr. Conter's records, particularly those noted in correspondence with Nova Scotia Department of Community Services, indicate that malady had been pre-accident, several of which indicated that he was unable to work for lengthy intervals, at least in part, due to the illness.

[349] As I said earlier, I do accept that Mr. Zwicker experiences post-accident sequelae. I find that Dr. Mitchell was unaware of the extent of some of his pre-accident afflictions, however.

[350] It is clear that Mr. Zwicker cannot earn much from employment in restaurant work. As noted earlier, however, he is able to discharge other activities of daily living, and live independently. He has also found a new vocation and new hobbies. He may never get to realize his dream of employment as a chef in a high-end restaurant.

[351] With that said, it is genuinely difficult to get a handle on what Mr. Zwicker's life and employment trajectory would have been had he not been injured. Prior to incarceration for trafficking in cocaine, he was an addict. He had other health deficits which, according to Dr. Conter, rendered him incapable of working for extensive periods of time. His employment record was spotty in the extreme.

[352] I am asked to make an award of damages for pain and suffering and loss of amenities experienced by Mr. Zwicker, based upon the (pre-February 25, 2016) Plaintiff, a person suffering from dependence on cocaine and other narcotics. This Plaintiff contends that he is now substance free (except for his regular, daily consumption of marijuana), although he cannot now work in a restaurant except in his current limited capacity. He described debilitating headaches and other current symptoms to Dr. Mitchell, yet claims not to have consulted a physician since 2018, when he went to Toronto. Either he is being disingenuous on the point, and the Court has not been provided with all of his available medical records, or the symptoms have not been significant enough to require any medical assistance since late 2018. As has been discussed, he has not even been motivated enough to follow Dr. Mitchell's recommendations for ongoing treatment.

[353] I have been satisfied on a preponderance of probabilities that Mr. Zwicker currently exhibits impairment in some cognitive areas, mainly in the area of short term memory. Even though he had been consuming narcotics including cocaine for many years prior to his incarceration, and he admits that he currently uses marijuana on a daily basis, he seems to have been able to do certain things, pre-accident, that he is now either unable to do, or, if able, that he is only able to do with the expenditure of more effort and, in some cases, supervision. This has its most prominent effect on his ability to work in the food preparation and/or restaurant industries. It has been accompanied by headaches once or twice a week, but I am not satisfied that they are as debilitating as what Dr. Mitchell described in her report.

[354] I am also satisfied that a causal nexus has been established, between the impairment of Mr. Zwicker's short term memory and the headaches, which links these conditions to the head trauma that he sustained on February 25, 2016.

[355] I am less inclined to accept that there is a causal connection between the accident and the outbursts of anger, mood change, depression, difficulty sleeping, concentration problems, and some of the other current deficits that have been posited. For example, the Plaintiff's pre-existing history of ADHD, which has often been accompanied by difficulties in focus and concentration, is well-documented. As to the low mood, I have already adverted to the numerous references to his (often very significant) depression chronicled in Dr. Contor's reports, including some of those which were forwarded to social assistance on Mr. Zwicker's behalf during the years 2008 – 2014.

[356] As to anger, Mr. Zwicker was convicted of assault with a weapon causing bodily harm in May 2005, and he was involved in an altercation in 2011 and received staples in his head in the aftermath thereof.

[357] And then, the following appears in his pretrial brief:

Additionally, the Plaintiff has lost a sense of smell ... This loss, in addition to his inability to concentrate and to remember, compounds and seriously affects his work. (*Brief, para. 87*)

[358] Not a shred of evidence was led to support this contention. In fact, during closing argument, counsel for the Plaintiff conceded that the Plaintiff has not, in fact, lost his sense of smell.

[359] Plaintiff's counsel has submitted that *Smith v. Stubbert*, (1992), 117 NSR (2d) 118 (NSCA), sets the benchmark for damages for "persistently troubling but not totally disabling" injuries in Nova Scotia. This has recently been interpreted by Justice Lynch in *Pratt v. Cameron*, 2021 NSSC 129, where she concluded:

75. I find that Mr. Pratt's injuries were "persistently troubling but not totally disabling" (*Smith v. Stubbert, supra*) prior to his January 2019 accident. Mr. Pratt still suffers the effects of this accident in his post-concussion syndrome. This has had a significant impact on his life, both professional and personal. While *Smith v. Stubbert* related to soft tissue injuries the range has been used for other types of injuries (for example: *Mawdsley v. McCarthy's Towing & Recovery Ltd.*, 2010 NSSC 168 and *Tibbetts v. Murphy*, 2017 NSCA 35). I find that Mr. Pratt's injuries are at the high end of the *Smith v. Stubbert, supra*, range and award him \$55,000 in general damages.

[360] An earlier case is also instructive. In *Vogler v. Szendroi*, 2010 NSSC 390, Justice Moir made note of the specific challenges being faced by the Plaintiff in the aftermath of that particular accident:

136. Mr. Vogler struggles daily with memory. When he wakes, he has to spend much time and effort just to recall what he did the day before. During the day, he must focus on important events as they happen and make a concerted effort to commit them to memory. Otherwise, he can quickly forget an experience that he enjoyed, a person he was pleased to meet, or other important events.

137. Some specific examples show the limitations on Mr. Vogler's powers of memory. Although he is very bright, he cannot work as a cashier at Rainbow Grocery. He cannot remember the product codes. He reads one book at a time, and he cannot stop mid-chapter because he is likely to forget what he read unless he ends at a memorable stop.

138. Mr. Vogler does much to cope with his memory problems. As I said, he makes a concerted effort to commit experiences to memory and to recall them when he wakes the next day. He also keeps a daily planner and uses his art sketch book to make notes of things.

139. The changes in Mr. Vogler's reading habits also show the impediments reflected in the Processing Speed Index, as well as the Working Memory Index.

140. Mr. Vogler can no longer read three or four books at a time. He still reads a lot, but he sticks to one at a time and does not read as many in a year. He explains that his concentration is not as good.

141. Mr. Vogler says he is often at a loss for words, that he does a lot of searching for the right words. The right words came easily to him before. He knows what he wants to say, but has to search before he can communicate.

142. In that connection, Mr. Vogler says that frustration now hits him out of the blue. He dwells too much on it, and will express his general frustration without working out of it. Contrast that with Mr. Stookey's description of a fast-witted boy who encouraged others through drudgery or adversity.

143. The impairments described by Dr. Krane cause two kinds of serious loss for Mr. Vogler, who was and remains exceptionally bright. Firstly, there are numerous practical tasks that would have been easy for him before and that are now either impossible (e.g. product codes) or difficult (e.g. reading for pleasure).

144. The second kind of loss, is more social. I am not surprised that some people who had been close to Mr. Vogler for many years wonder about possible changes in executive function or personality.

145. Mr. Vogler has the same bright mind, and good nature, that made him a well liked young man, a good conversationalist, and an excellent leader among young people at the Sea School. The problem is that the brightness and good nature are under a shade now. Quick-wittedness has given way to word searching, slowed processing, difficulty remembering, and the frustrations that naturally result in a person who has known better.

[361] He concluded, at para 159:

I assess fair compensation for the intellectual impairments, the loss of sight in one eye, the continuing problem with the right forearm, the healed fractures and other injuries, and the pain endured because of these at \$150,000.

[362] In *Hayward v. Young*, 2011 NSSC 294, the late Justice Heather Robertson also summarized some cases dealing with injuries involving mild traumatic brain injury, prior to concluding that most of the Plaintiff's current deficits in that case were not caused by the subject accident. In so doing she noted:

20. The cases cited by the plaintiff were more instructive, in the area of brain injury: *Jodrey Estate v. Crowder Estate*, [1990] N.S.J. No. 183, 98 N.S.R. (2d) 116 (NSSC); *Mawdsley v. McCarthy's Towing and Recovery Ltd.*, 2010 NSSC 168; *Goguen v. British Columbis*, 2002 BCSC 1598; *Polovnikoff v. Banks*, 2009 BCSC 750; *Nagle v. Thomas*, 2009 NBQB 66, 342 N.B.R. (2d) 259; and *Vogler v. Szendroi*, 2010 NSSC 390.

21. In *Jodrey*, the plaintiff was severely injured in a motor vehicle accident where a drunk driver drove head on into the plaintiff's vehicle, killing two and leaving the plaintiff with significant facial fractures, and a closed head injury with concussion. The plaintiff had no recollection of the accident following which the evidence showed that she suffered a mild to moderate loss of intellectual function and was employable although at a lower level.

22. In *Mawdsley*, the plaintiff had his head and upper body crushed between two garbage trucks. The Court found that he suffered a mild cognitive deficit. His physical injuries were determined to be "troubling and persistent but not totally disabling." The Court had difficulty assessing his brain impairments, in part because of conflicting evidence from the plaintiff at various times as to any loss of consciousness he suffered at the accident and in light of the "modesty of medical evidence".

...

24. However, the Court finally accepted there were sufficient records indicating concentration and memory loss since the accident to conclude that the plaintiff suffered a "mild but permanent brain trauma".

25. Mr. Mawdsley was rewarded \$100,000 in general damages and \$57,000 in diminished earning capacity.

26. In *Goguen*, the plaintiff sustained serious facial and wrist injuries when thrown from a bicycle. After spitting out blood and teeth the plaintiff was in and out of consciousness and suffered retrograde and post-traumatic amnesia. The Court accepted that he had a mild traumatic brain injury and including memory deficits and personality changes, the plaintiff was awarded \$125,000 in non-pecuniary damages and loss of earning capacity of \$200,000.

27. In *Polovnikoff*, the Court accepted that the plaintiff suffered a mild traumatic brain injury and suffered from cognitive impairment, despite a history of psychotic disorders. The Court awarded \$118,000 for non-pecuniary loss and loss of earning capacity of \$168,000.

28. In *Nagle*, the plaintiff was involved in a serious car crash, in which the jaws of life were used to remove him from the vehicle. He was unconscious for up to ten minutes. He suffered hip and iliac fractures, broken ribs and pulmonary emboli. The Court accepted that the plaintiff had a mild traumatic brain injury that led to "a severe decline in his ability to perform the essential duties of his occupation." He was awarded \$125,000 in non-pecuniary damages and \$585,000 for loss earning capacity. The plaintiff had run Nagle's Fashions, a clothing store and had previously been considered "bright, articulate, capable and shrewd businessman" who through personality changes argued with and offended customers and engaged in such peculiar activity as contradicting customers on their own known shoe size. He was deemed a liability to the business and unlikely to ever succeed again in the retail sector.

29. In *Vogler*, a 21-year old student ejected from a moving vehicle suffered a fractured skull, eye damage, fractured ribs and pelvis and was diagnosed with a severe traumatic brain injury with scans showing bleeding inside the frontal lobe. He suffered memory and attention problems, had lost his wit and had diminished social skills. The Court awarded Mr. Vogler \$150,000 in non-pecuniary damages and \$180,000 for loss of earning capacity.



...

[363] In *Caron v. Omers Realty Corp.*, 2019 ONSC 1374, the Plaintiff slipped and fell at her place of employment. She was diagnosed with a mild traumatic brain injury. At trial, the Plaintiff alleged her ongoing issues of fatigue, depression, and confusion, and distractibility (among others) were attributable to that injury. The Court rejected that claim, finding instead the Plaintiff's significant pre-existing anxiety disorders were the cause of her ongoing complaints. General damages were provisionally assessed at \$80,000.00.

[364] In *Casterton v. MacIsaac*, 2020 ONSC 190, a 29-year-old Plaintiff was injured during a hockey game when he was body checked in a dangerous manner. He suffered a concussion/TBI and missed four months of work. At trial, he continued to suffer from chronic migraines, in addition to soft tissue injuries, and had withdrawn socially. He also showed signs of depression and apathy. He had not yet experienced serious depression before his concussion. He was awarded \$100,000.00 in general damages.

[365] In *Chisholm v. Lindsay*, 2012 ABQB 81, a 37-year-old Plaintiff was injured in a motor vehicle accident when she was 31. She complained of various soft tissue injuries, chronic weekly headaches, TMJ issues, and severe fatigue in addition to diminished organizational skills, ability to focus, and a lack of concentration. The Court accepted that the Plaintiff was struggling with cognitive difficulties relating to the accident, and rejected that any pre-existing conditions were affecting those symptoms of her overall dysfunction. The Court awarded \$90,000.00 in general damages.

[366] Mr. Zwicker is still affected by the injuries that he sustained in the fall. However, I find that the impact upon him is nowhere near as severe as the impression that he conveyed to Dr. Mitchell. He falls well below the range of awards canvassed above.

[367] Under the circumstances, and balancing the evidence presented as best I can, on a balance of probabilities, I assess fair compensation for the aforementioned impairment resulting from mild traumatic brain injury, as well as the post traumatic headaches, and the exacerbation of some of his cognitive issues (mainly short term memory), to which Dr. Mitchell has adverted, in the amount of \$30,000.00.

[368] This respects the "functional approach" first articulated in *Andrews v. Grand & Toy Alberta Limited*, (1978), 83 DL R (3d) 452 (SCC), whereby "money is

awarded because it will serve a useful function making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way" (p. 476).

[369] These and the other damages which will be awarded will be subject to reduction by the Plaintiff's failure to mitigate his losses, which will also be discussed subsequently.

### **Loss of income/diminished earning capacity**

#### *(i) Case law*

[370] I have not been satisfied that the Plaintiff has sustained any lost income as a result of the injury sustained. He was imprisoned at the Institution at the time of his fall, approximately one week into his term of incarceration.

[371] As to his loss of, or diminished, earning capacity, some of the approaches to such an assessment were canvassed in *Vogler*:

168. Cases on lost income earning capacity are decided on a mathematical approach or a global approach. In one, the work of an actuary is accepted but negative and positive contingencies are applied, without actuarial precision, to the actuary's opinion. *Kern* was a case on the borderline, in which I applied the mathematical approach although my findings differed a great deal from the actuary's assumptions. One of the grounds of appeal was that I should have followed the global approach. The Court of Appeal rejected that ground, but the discussion by Justice Oland at para. 68 to para. 80 makes it clear that I could have resorted to the global approach.

169. The global approach is resorted to in cases in which actuarial evidence is not helpful because the uncertainties are too great. A well known example is *Gaudet (Guardian of) v. Doucet*, [1991] N.S.J. No. 138 (Davison, J.). The recent cases about boys abused by a probation officer are further examples: *B.M.G. v. Nova Scotia* and *L.M.M. v. Nova Scotia*.

170. In my opinion, an award that is justified mathematically is more likely to be fair and adequate than one that emerges from the "crystal ball" of real and substantial possibilities without actuarial assistance. (The crystal ball metaphor comes from cases of young men with promising attributes who lost earning capacity: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] S.C.J. No. 6 at para. 58 and *Chow v. Hiscock*, 2005 BCSC 1933 at para. 29.)

[372] The case law establishes that all that must be established as a precondition to such an award is that Mr. Zwicker's earning capacity is diminished so that there is a

chance that at some time in the future he will actually suffer some pecuniary loss. The Court must then assess the value of that lost chance.

[373] The case of *Couse v. Goodyear Canada Inc.*, 2005 NSCA 46, is also instructive. Therein:

31. ...following the accident, Ms. Couse changed career paths and began to develop an interior decorating business in which she has encountered some difficulty in carrying and lifting heavy samples and in measuring for curtains and window treatments. This business is just getting under way, and to date Ms. Couse maintains that she has just barely broken even on it. No financial statements or tax returns were produced by her.

32. Ms. Couse had previously done some decorating work for acquaintances and for her husband and considered that she was good at it. As I have said, she decided to go into this business following the accident. She took courses. The name of her business was Emerald Business Interiors. She produced a business card. It indicates telephone, cell and fax numbers and an email address. She styled herself as Eileen Crawley Couse, Interior Decorator "creating harmonious interiors for your work place." In addition to taking courses she at times worked long hours on her computer in connection with this business. She carries a ladder, samples and other paraphernalia of her profession. She stated that her work in this business was essentially that of a general contractor. She detailed a variety of jobs she had done for businesses, including the offices of the Federal Court in Halifax. She advertised in trade magazines, had a brochure, and her business was advertised in the Yellow Pages. She took two trips to Toronto for trade shows.

33. The trial judge was called upon to balance the chances of what would have happened had there been no accident and what, in fact, has happened. In the first scenario, Ms. Couse had plans to upgrade herself to return to office administration from which she had been absent full time for nearly 20 years and part time for two years. A previous employer had been cutting back. She had not, prior to the accident, taken any concrete steps to start the upgrading process. She had an interest in interior decorating work and according to the evidence at trial had given some thought to the decorating business.

34. On the second scenario she has now established herself in this business to the point of barely breaking even, and to the extent I have outlined above. She has chances of substantial gain if she is as good as she appears to be. She has also done some extensive travelling since the accident which would not be as easy if she were in an employed position as opposed to being in private business.

35. The trial judge obviously concluded that the negative and positive contingencies balanced evenly. He said:

I am not satisfied on the evidence that she has lost her ability to earn an income in general.

36. Underlying this finding is the finding that Ms. Couse had a moderate to severe soft tissue injury and that she will continue to improve with flare-ups but have residual symptoms indefinitely. The flare-ups would not interfere with every aspect of her life but with some functions. They can be mild to severe. Also underlying this finding is the trial judge's conclusion, in light of Ms. Couse having embarked upon a new career after the accident, that it was not shown that she had lost the chance to make more money but for the accident. This is a conclusion that is not, I consider, to be tainted by palpable and overriding error or by wrong principle. I am not persuaded that Coughlan, J. erred in declining to award damages under this heading. I would dismiss this ground of appeal.

[Emphasis added]

[374] One of the cases referenced by the Plaintiff is *L.M.M. v. Nova Scotia (Attorney General)*, 2010 NSSC 44. Therein, the Court discusses the criteria to be considered in assessing such an award:

Damages for loss of future earning capacity are intended to compensate a plaintiff whose earning capacity has been affected by defendants wrongdoing. The loss is of a capital asset. Some of the considerations to take into account were set out in *Brown v. Golaiy*, [1985] BC J No31 (BC SC):

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

The court must assess the chance that such a loss will occur. As noted above future hypothetical events need not be proven on a balance of probability; they are simply given weight according to the relative likelihood: *Athey, supra*.

[375] In *Earnshaw v. Despins*, [1990] BC J No 944 (BCCA), the Court put it thus:

In my opinion, the true questions the [trier of fact] must address in a claim such as this are:

1. Has the plaintiff's earning capacity been impaired to any degree by his injuries?
2. If so, what amount in the light of all of the evidence should be awarded for that impairment?

(ii) *Application to Mr. Zwicker's circumstances*

[376] The Plaintiff argues (*pretrial brief, p. 29*):

105. If the Court accepts the Plaintiff's evidence that his symptoms have not allowed him to successfully compete in his chosen field, the Plaintiff asserts that a claim for diminished earning capacity is made out:

- The hypothetical is that the Plaintiff, after his release, would have been successful in his plans to work as a chef at a high-end restaurant or under highly acclaimed chefs; and
- Lay witness evidence will establish the possibility of higher earnings in the industry compared to his current position.

106. The Plaintiff submits that the evidence, therefore, will demonstrate that there is a "real and substantial possibility" that the Plaintiff would have earned more income but for the incident.

[Emphasis added]

[377] The challenge in this case is compounded by the aforementioned pre-accident employment history of the Plaintiff, tempered as it was by his health issues, including regular and prolonged use of narcotics such as cocaine. How does one juxtapose this, or extrapolate from it, when dealing with a Plaintiff who claims to have beaten his addiction (while incarcerated), and who now says that the Court's frame of reference (as it assesses what his future would have looked like had he not been injured) should be based upon he would have earned as a sober individual?

[378] The "elephant in the room", of course, is the issue of sobriety. One can certainly express the hope that the Plaintiff has overcome his addictions, while at the same time observing that we only have his word for that fact. As noted earlier, he claims that he has not been under a physician's care since moving to Ontario in 2018, so there are no records available after that date, except Dr. Mitchell's report. At the very least, however, we know that is still consuming marijuana on a daily basis. Marijuana is not an illegal drug, and it can be accepted that medical benefits are obtained by some individuals through its use. It is also an intoxicant.

[379] I couple that observation with another. Neither counsel asked him, nor did the Plaintiff mention, how he is presently getting prescriptions refilled to deal with his ADHD and/or asthma, if he is not seeing a doctor, and has not done so since the 2018 move to Toronto. In Dr. Mitchell's report, she mentions at p. 8:

Medication:

- Dexedrine 60 mg once daily (to treat attention deficit hyperactivity disorder)
- Ventolin as needed (to open up the medium and large airways of the lungs)
- Diazepam 10 mg once daily (taken before the subject incident for anxiety)

*(Exhibit "1", volume 1, p. 8)*

[380] In closing argument, Plaintiff's counsel told the Court what his client "would have said, if he had been asked" on cross. This, of course, is not "evidence", nor does it assist his case to point out that the question could have been put to him on cross, and was not. Mr. Zwicker carries the burden of proof with respect to all aspects of his case. As I have mentioned earlier, his credibility is crucial to my assessment of the extent to which he has done so.

[381] While considering the broad body of the evidence provided by the Plaintiff and his witnesses, I approach the issue of determining an award for loss of income earning capacity with some circumspection. Among other things, I once again turn to the Plaintiff's tax returns which reveal the following pre-incarceration T4 earnings (albeit, while struggling with addiction issues), and the previously discussed sources of these earnings:

2012 – \$10,445.00

2013 – \$14,175.00

2014 – \$15,970.00

2015 – \$25,292.00

2016 – \$5,194.00 (incarcerated in February, parole October – December 2016)

[382] Following his release in 2017, and the years beyond, we have the following:

2017 – \$357.00

2018 – \$14,144.00

2019 – \$38,186.00

2020 - \$70,242.00

2021 – no evidence called

2022 – no evidence called

[383] Would Mr. Zwicker have ever attained his dream of becoming a head chef, or an executive chef at a high-end restaurant? Mr. Culjak testified (although he was not presented as an expert qualified to offer opinion evidence) that in his experience such a position, in the Toronto area, could pay upwards of \$70,000.00 per year.

[384] I accept that Mr. Zwicker certainly had an intellectual interest in, and some talent for, the culinary arts. With that said, however, and as I noted earlier, I find it to be unlikely that he was on such a career path before he was injured.

[385] I say this not only because of his pre-accident drug addiction, but also because of his temperament at the time. Whether because of ADHD, anger, or concentration issues, his approach to employment seems to have been a rather casual, short-term and migratory one. The odds of him finding the resolve or discipline necessary to attain such a skilled and demanding position seem to me to be rather remote, even if he had not been injured, and even if he is indeed now addiction free, as he claims. This tempers the value that I assign to his loss of a portion of his ability to compete in the job market. His loss is not so great, for example, as someone whose pre-accident work history has demonstrated his resolve to work in the field, in a more committed and tangible way.

[386] I also observe that Mr. Zwicker is not bereft of his ability to earn a living. He has ability to generate an income by obtaining, refurbishing, and selling items online, as he is currently doing. He has spent a great deal of time educating himself as to how to go about determining the potential value of items after refurbishing them. Indeed, it will be recalled that when he testified, he said that he currently has accumulated an inventory of goods in his home for which he could receive about \$60,000.00, when sold.

[387] He appears to be very active in the Brick and Order business. He goes to Value Village on average twice per day, to obtain inventory, and engages in other foraging activities as well. However, I found him to be (deliberately) vague in terms of the income that he is deriving from this business, as well as from "Cut the Prep". He may not be reporting all of it, in any event, unless it is to his advantage do so (i.e., the income reported in 2020 *vis-à-vis* the availability of CERB benefits). He has not presented any evidence of what he has earned in 2021 and 2022.

[388] In an ideal world, Mr. Zwicker could expect to have approximately 20 years of working life ahead of him. Obviously, I have no actuarial evidence in front of me with which to assess contingencies over that period such as health issues, addiction

relapse, future economic downturns affecting the restaurant or buy/sell industry and the like.

[389] He has been deprived of an asset, because he is left with some residual difficulties in the aftermath of the mild traumatic brain injury that he sustained in the subject accident. But for that, he would have had some capacity to work in the restaurant industry in a more meaningful way than his current position at Via Allegro. Instead, he has chosen a different career path. The Court has not been presented with much evidence as to his interests in other possible employment areas, but it is realistic to expect that he has lost the ability, overall, to enter certain employment sectors (primarily in the restaurant industry) given his deficits.

[390] However, I am not satisfied that there is much appreciable difference in his earning capacity now (albeit, in other lines of work) than what existed pre-accident. I assess the potential loss of the capital asset (i.e. the loss of his ability to work in some aspects of the restaurant industry) on a go forward basis, as somewhat minimal.

[391] In my assessment, and on the balance of probabilities, \$20,000.00 is a fair and adequate award for the Plaintiff's lost or diminished income earning capacity.

### **Loss of housekeeping**

[392] Ever since *Carter v. Anderson*, 1998 NSCA 76, it has been accepted that compensation for this type of loss is available in certain circumstances. As noted in that case:

In my opinion, the modern advancement of this area of the law of damages, which is premised on the concept of direct economic loss of the plaintiff whose ability or capacity to perform homemaking or housekeeping tasks has been impaired, should be acknowledged and accepted in Nova Scotia. Future loss of capacity, where proved, should be compensated separately whether or not replacement help has been paid in the past. The award for lost capacity should not simply be part of the non-pecuniary damages as "an element of loss of amenities". Housekeeping capacity is ordinarily not an amenity. Its loss is not an intangible loss comparable to the appellant's loss of ability to dance, to skate, or to ride horses. ... Managing one's home and keeping it clean and organized is important and necessary for the health and safety of the family. The partial or total loss of that ability has economic value which should be recognized...

[Emphasis in added]

[393] In *Pratt*, Lynch J. provided a helpful review of the law in this area:



107. In *Awalt v. Blanchard*, 2013 NSCA 11, the court found at para. 47:

Loss of Valuable Services:

47. Loss of valuable services can only be recovered if direct economic loss can be proved:

50. The question becomes to what extent, if at all, have the injuries impaired the claimant's ability to fulfill homemaking duties in the future? Thus, in order to sustain a claim for lost housekeeping services one must offer evidence capable of persuading the trier of fact that the claimant has suffered a direct economic loss, in that his or her ability or capacity to perform pre-accident duties and functions around the home has been impaired. Only upon proper proof that this capital asset, that is the person's physical capacity to perform such functions, has been diminished will damages be awarded to compensate for such impairment. For an excellent and comprehensive analysis of this subject see the paper presented by W. Augustus Richardson to the Nova Scotia CLE Society in January, 2001. [Leddicote, 50]

48. It is not necessary that expenditure be incurred, provided there is an impairment of one's physical capacity to perform pre-accident services and functions.

49. Ms. Awalt sought \$30,000.00 for loss of valuable services. Such a sum warrants a sound evidentiary foundation. The trial judge was unpersuaded. Certainly the evidence was very modest.

...

108. An actual financial loss need not be established to make out a claim (*Awalt, supra*, para 48). As Justice Brothers said in *Gale v. Purcell*, 2018 NSSC 319, "loss of valuable services is often dealt with in a global way as a loss or an impairment of an asset" (para. 202). In that case, the Plaintiff was found to have some impairment, for a period of time and \$10,000 was awarded. Justice Warner in *Blenus, supra*, awarded \$25,000 for loss of housekeeping capacity and valuable services where the Plaintiff required assistance to do chores he had been able to do prior to the accident. Justice Warner reviewed cases where losses for valuable services were between \$5,715 and \$12,015 but awarded \$25,000 placing emphasis on the loss of ability to perform the heavier outdoor chores. In *Leslie v. S&B Apartment Holding Ltd.*, 2011 NSSC 48, Justice Scaravelli awarded \$35,000 based on the ability to perform duties being impaired and the continued need for assistance in the future. In *Warnell v. Cumby*, 2017 NSSC 88, Justice Robertson awarded the Plaintiff \$15,000 although she was able to resume most of her housekeeping duties and injuries in that case fell under the minor injury cap.

[394] The Plaintiff lives independently. He does his own housework. There is no evidence that he has had or will have the need to pay someone else to do it. He

asserts that after his fall he has struggled to perform most tasks because he feels "scatterbrained" and lightheaded. As a consequence, he does his housework at a slower pace. This argument culminates with the assertion that:

Should the Plaintiff move into a house in the future, he will have significant difficulty with outdoor chores, such as lawnmowing and snow clearing. The plaintiff claims \$20,000 for his loss of housekeeping capacity. (*Plaintiff's brief, para. 116*)

[395] The premise underlying this claim is entirely speculative. I make no award under this head of damages.

### **Cost of care**

[396] The Plaintiff claims the cost of further medication and/or treatment modalities, into the future, as a result of the headaches, increased fatigue, sleep disturbance, and cognitive dysfunction which he experiences. It is further argued that he should be compensated for the cost on an ongoing basis, and references Dr. Mitchell's recommendations that he requires "tricyclic antidepressants for headache prevention and to simultaneously target insomnia on low mood, overnight polysomnogram, neurophysiological testing and a low impact exercise plan/activity (see tai chi, yoga etc.)" (*brief, para. 118*). He claims the sum of \$20,000.00 to compensate him globally for these costs.

[397] This (somewhat ironically) overlooks the fact that he has followed none of Dr. Mitchell's recommendations, and has testified that he has no interest in exploring any of them (with the possible exception of "hot yoga"). He does have a Blue Cross plan. It would cover medication and medically prescribed testing. There is no evidence before me as to his co-pay under the plan, or how much he is paying in order to have access to it.

[398] I consider that it is likely that he will (someday) pursue some medically prescribed or recommended treatment to alleviate or assuage his symptoms to some degree. I award \$5,000.00 for this head of damage.

### **Mitigation of losses**

[399] The authors of *Fridman's Law of Torts in Canada* (4<sup>th</sup> edition, copyright 2020 Thomson Reuters Canada Limited), at p. 645 discuss this concept:

... the issue of mitigation is not irrelevant in personal injury cases. For example, a plaintiff could mitigate the extent of physical injury by losing weight, engaging in regular exercise, stopping smoking or doing physiotherapy. In *Talon v. Whalley*, Lacourciere J.A. held that underlying the principle of mitigation is the notion that an injured party may not increase his or her damages by unreasonable conduct. The plaintiff is bound to act with the defendant's interest in mind as well as his or her own. In taking steps to mitigate, the plaintiff is entitled to recover from the defendant the reasonable expenses incurred to reduce the extent of the loss.

[400] Further, in *Schrump v. Koot et al.*, [1977] O.J. No. 2502, at para. 13 the issue receives additional attention:

... Speculative and fanciful possibilities unsupported by expert or other cogent evidence can be removed from the consideration of the trier of fact and should be ignored, whereas substantial possibilities based on such expert or cogent evidence must be considered in the assessment of damages for personal injuries in civil litigation. This principle applies regardless of the percentage of possibility, as long as it is a substantial one, and regardless of whether the possibility is favourable or unfavourable. Thus, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be substantial and not speculative: they may tend to increase or reduce the award in a proper case.

[401] The Plaintiff argues that the Defendant has not met its evidentiary burden to show that he has not mitigated his losses. He says, in essence, that he sustained head trauma and had been told by both Drs. King and Conter that there is no "therapy" available for such injuries that would result in improvement.

[402] With respect, and to the contrary, there is evidence that Mr. Zwicker did derive some benefit from the injections administered by Dr. King (as per note of August 4, 2017), but he felt that the improvement did not justify the pain of the administration of the needles. More importantly, his direct evidence was that he had not followed the recommendations of Dr. Mitchell, which might have had a beneficent or (at least) measurable impact on his symptoms. It will be recalled that she had recommended a tricyclic antidepressant such as Nortriptyline, which was expected to help with headache prevention and also target insomnia and low mood, and an overnight polysomnogram to assess for obstructive sleep apnea. She also recommended screening blood work to check for an alternative systemic etiology "that could be contributing to his current cognitive complaints [and] that may potentially be reversible" (*Report, p. 14*), as well as water exercise, tai chi, yoga or other low impact exercise.

[403] This is more than just a speculative or "fanciful possibility". I find it to be probable that this was a course of treatment, recommended by the Plaintiff's own expert, which, had he pursued any of it, would at least have vitiated or alleviated the effects of the symptomology (perhaps eliminating some of them) that he has experienced and will experience as a result of the accident, into the future. Not only has he not followed this advice, but (to repeat yet again) he asserts that he has not seen a doctor at all since 2018, when he moved to Toronto.

[404] Mr. Zwicker's damage award shall be reduced by 30% as a result of his failure to mitigate his losses.

### **Conclusion**

[405] The Plaintiff shall receive the following amounts as summarized below:

General Damages	\$30,000.00
Diminished Earning Capacity	\$20,000.00
Cost of Future Care	<u>\$5,000.00</u>
Total	\$55,000.00

They shall be reduced by 30% as noted above.

[406] In the event that they are unable to agree, I will accept written submissions from the parties on the issues of prejudgment interest, costs and disbursements within 30 calendar days.

Gabriel, J.