SUPREME COURT OF NOVA SCOTIA

Citation: *Munian v. Nova Scotia (Attorney General)*, 2025 NSSC 98

Date: 20250317
Docket: *Syd*, No. 456905
Registry: Sydney

Between:

John Roland Munian

Plaintiff

v.

The Attorney General of Nova Scotia in Care of Nova Scotia Housing and Municipal Affairs

Defendant

Judge:	The Honourable Justice D. Shane Russell
Heard:	January 30, 2025, in Sydney, Nova Scotia
Counsel:	Alan Stanwick, for the Plaintiff Jeremy P. Smith, for the Defendant

By the Court:

Introduction

[1] This decision relates to an action for liability and damages under the *Occupiers' Liability Act* , S.N.S. 1996, c. 27 (the "*Act*").

Issues

[2] Is the defendant liable under the *Act* for the plaintiff's injuries? If so, what is the measure of damages?

The Incident

[3] March 30, 2014, began as a typical Sunday afternoon for the 55-year-old plaintiff. He decided to visit his, sister-in-law, brother, and their children at 15923 Cabot Trail, Petit Etang, Inverness County ("the premises"). The premises was the family home of his sister-in-law Rachel MacKinnon. It is a single-family unit managed by the Cape Breton Regional Housing Authority.

[4] As the plaintiff entered the living room, he regrettably selected the "soft wide chair". He sat down and began to watch T.V. while his sister-in-law fixed him a cup of tea. Suddenly and without warning he "felt a big bang" on top of his head.

[5] Unbeknownst to him a large “grey” and “soggy” section of gyprock had fallen from the ceiling above. The section was approximately 5 feet by 8-feet. The gyprock broke into several pieces upon impact. Photographs were tendered at trial. It is fortunate children were not harmed.

[6] The impact forced the plaintiff’s body forward. He never went to the ground but was disorientated. As he returned to the upright position, he immediately felt pain in his head, neck, and back. The plaintiff described the gyprock as “really heavy” and “damp”. With the help of his sister-in-law, he was able to remove it and get to his feet.

[7] Shortly after the incident he drove home and relaxed. He soon, began to feel worse. He became dizzy and started to vomit. On the advice of a friend, he attended the Cheticamp Hospital Emergency Room. He was evaluated and transferred to the Cape Breton Regional Hospital for further testing.

The Hospital Visit

[8] The plaintiff was strapped into a stretcher and put in a neck brace. The following medical impressions were noted:

- Limited range of motion to his neck, upper back, and shoulders.
- Tender on examination to the mid-thoracic area.

- Reports having an electric-like feeling in the arms.
- No bruising or swelling.
- No loss off consciousness but reported “feeling dizzy at times”.
- X-Rays and CT-scans do not reveal any fractures or injuries to the skull, cervical spine, thoracic spine, or shoulder. Pre-existing degenerative changes to lower cervical spine.

[9] He was held overnight and discharged the next day. Later in this decision I will complete a more robust review of the plaintiff’s injuries and their impacts.

The Defendant’s Evidence Norman Leslie

[10] At the time of the events Mr. Leslie worked for Cape Breton Island Housing. He held the administrative position of property manager. In 2014 approximately 360 living units fell under his mandate. Most of these units were individual apartments and senior units, however some were single-family homes.

[11] Mr. Leslie had various duties. These duties included, dealing with tenant property concerns/complaints, overseeing property safety, and coordinating property maintenance and repairs. He was also chair of the joint occupational health and safety committee. Mr. Leslie held monthly committee meetings with employees who would in turn carry out required property work.

[12] In 2014 the premises fell under his mandate. His evidence was that he would not necessarily have monthly meetings with tenants of single-family homes.

However, he would do periodic site visits. His role required him to follow up with any property issues reported by a tenant. Mr. Leslie also completed what he referred to as yearly site inspections. These site inspections involved speaking with the tenant and looking for any identifiable issues or concerns with respect to the integrity of the property. If a tenant reported a concern, he would generate a work order.

[13] If maintenance workers attended on an initial work order and discovered other issues with respect to the integrity of the property, they were required to report back. In turn Mr. Leslie would generate an additional work order.

[14] Mr. Leslie's practice was to instruct maintenance workers to "keep their eyes open for any issues they see". Maintenance workers were provided with checklists to assist them in looking for various things which may require repair.

[15] Mr. Leslie and his department only learned of an issue with this premises after the incident. There is no indication that tenant Ms. Mackinnon reported any concerns prior to the incident. When the incident was reported to the Housing Authority three maintenance workers were dispatched in short order.

[16] Workers attended the premises on April 2 and April 4, 2014. The property was inspected, and repairs were done. Workers replaced a substantial portion of the

ceiling, more than the 5 X 8-foot portion which had fallen. Insulation was replaced and repairs were also done to an eave vent.

[17] Mr. Leslie testified that Mr. Paul Burt was sent to the premises to inspect and determine the cause. While the Court was eager to learn what Paul Burt's observations and conclusions might have been with respect to the cause, plaintiff counsel properly objected. Mr. Leslie's evidence with respect to Mr. Burt's observations and any opinion as to cause would have been hearsay. Mr. Burt never did testify, and the Court never did learn the exact details of what his observations were. However, it is known that a fairly large damp portion of living room ceiling fell without warning.

[18] During cross examination Mr. Leslie was asked if any work had been completed on the ceiling prior to the incident. Mr. Leslie stated he was not aware of any. He was asked if he was aware of another leak in the ceiling but at a different location. Mr. Leslie testified that he was also not aware of the same. I pause here to note that, there was no direct evidence called with respect to their being a primary source leak or secondary leak.

[19] The work order from April 2, 2014, reads, "Caller: Rachel MacKinnon" and "Problem Description: leak through living room ceiling & a part of it collapsed".

However, it is unclear who made this entry, if the entry is accurate, if it was based on a recorded observation, etc. Again, this is the very problem with hearsay evidence. Ideally, either counsel would have called evidence from witnesses on this point, however, for whatever reason neither counsel did.

Position of the Parties

[20] The plaintiff claims that the defendants are occupiers under the *Occupiers' Liability Act* , S.N.S. 1996, c. 27 (the "*Act*"). It is alleged that the defendant breached their statutory duty and were negligent by failing to ensure that the plaintiff was reasonably safe while on the premises. They seek an award of $30,000 in general damages, pre-judgment interest, and costs.

[21] The Defendant argues that the collapse of a wet ceiling does not, of itself, create a presumption of negligence. The plaintiff has not tendered evidence showing that the defendant has failed to meet the standard of care. If the plaintiff can establish liability, damages ought to be “nominal”.

Liability

The Legal Framework

[22] Liability in this case is grounded in section 4 of the *Occupiers' Liability Act*, S.N.S.,1996 c. 27. With respect to occupiers' liability Norton J. *in Tyler v. Halifax Convention Centre Corporation*, [2024] N.S.J. No. 158 stated:

> **50** A claim in negligence - whether *simpliciter* or under the *Occupier's Liability Act* - cannot succeed without evidence that the injury was caused by a breach of the defendant's duty.

Occupiers' Liability Act

[23] The *Act* defines "occupier" and speaks to the duty of care an occupier owes to persons entering on the premises. Sections 2 and 4 of the *Act* state:

> 2. In this Act,
>
> (a) "occupier" means an occupier at common law and includes
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> (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 premise
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> …
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> 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.
>
> **Duties of Occupier**
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> 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
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> (a) the condition of the premises;
>
> (b) activities on the premises; and
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> (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.

Caselaw: Interpretation of the *Occupiers' Liability Act*

[24] As stated by Boudreau J. in *Flowers v. Allterrain Contracting Inc.* [2017] I.L.R. para. G-2779; "An occupier has a duty of reasonableness, not perfection.".

[25] The Nova Scotia Court of Appeal in in *Miller v. Royal Bank of Canada*, 2008 NSCA 118, commented on the duty of care as outlined in section 4(1) of the *Act*:

> **113** … The duty of an occupier was considered in *Corbin v. Halifax (Regional Municipality)* (2003), 214 N.S.R. (2d) 345 (S.C.), where Wright J. stated, with respect to the duty set out in s. 4(1):
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> > [32] In interpreting the identical provision found in the *Occupiers' Liability Act* of Ontario in *Waldick et al. v. Malcolm et al.* (1989), 35 O.A.C. 389; 70 O.R. (2d) 717 (C.A.), Blair, J.A., described the essence of this statutory duty in the following passage (at para. 19):
> >
> > A similarly worded statement of an occupier's duty occurs in all other Occupiers' Liability Acts. All courts have agreed that the section imposes on occupiers an affirmative duty to make the premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm. The section assimilates occupiers' liability with the

> modern law of negligence. The duty is not absolute and occupiers are not insurers liable for any damages suffered by persons entering their premises. Their responsibility is only to take "such care as in all the circumstances of the case is reasonable". The trier of fact in every case must determine what standard of care is reasonable and whether it has been met. Occupiers are also not liable in cases where the risk of injury is "willingly assumed" by persons entering the premises or to the extent that such persons are negligent ...

[26] Justice Bourgeois (as she was then) outlined the following principles in *Langille v. Bernier*, 2010 NSSC 402:

> 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)

Analysis of Liability

Has the Plaintiff demonstrated a prima facie case of negligence?

[27] Neither party disputes that the collapsed ceiling caused the plaintiff some degree of injury. The plaintiff's testimony, photos, and medical evidence establish this.

[28] It is undisputed that the defendant is an occupier as defined under the *Act*. The evidence is clear that the premises was a community housing unit owned by the province. Under s.4(1) of the *Act*, an occupier of a 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 is reasonably safe while on the premises.

[29] The defendant is correct when he states that there is no presumption of negligence, and the occupier is not a guarantor or insurer of the safety of persons coming onto their premises. Simply because the plaintiff was injured while on the premises 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 in this case which resulted in his injury.

[30] The onus is on the plaintiff to prove on a balance of probabilities that the defendant failed to meet the standard of reasonable care as it relates to this premises and more specifically ensuring the structural integrity of the ceiling. As well, demonstrating the existence of an act or omission by the defendant does not automatically give rise to a finding of negligence. Whether an act or omission constitutes negligence giving rise to a statutory breach will depend on all the circumstances. In assessing whether an occupier has taken reasonable care in the circumstances to make the premises safe, the factors to be considered by the trial judge will be specific to the particular fact situation *Ricketts v. Best Buy Canada Ltd*., [2023] N.S.J. No. 279 at para. 8.

[31] I pause here to note that the plaintiff referred to the doctrine of *res ipsa loquitur* several times during closing submissions. Any such argument is misguided in that it does not reflect the current state of the law. On this point I refer to the Supreme Court of Canada's declarations in *Fontaine v. British Columbia (Official Administrator)* [1998] 1 S.C.R. 424;

> **23** As in any negligence case, the plaintiff bears the burden of proving on a balance of probabilities that negligence on the part of the defendant caused the plaintiff's injuries. The invocation of res ipsa loquitur does not shift the burden of proof to the defendant…
>
> …

> **27** It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a prima facie case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

[32] I will now examine the evidence. As stated, Mr. Leslie testified to the policy manual, various department practice standards, and policies. However, his evidence was notably absent of how any of this came into play with respect to this premises. There is nothing in the evidence to suggest that he or anyone else from his department ever inspected the premises, conducted maintenance or repairs, or did a single site visit while Ms. Mackinnon was the tenant prior to the incident.

[33] There is no evidence to suggest that he or anyone else ever spoke to the tenant at all prior to the incident. There was no evidence that he or anyone inquired about the state of this property. In fact, Mr. Leslie's evidence was that he did not know of this tenant until after the incident was reported.

[34] Most of Mr. Leslie's evidence was in the abstract in the sense that he was able to confirm there were various best practices, procedures, and protocols; however, in practice nothing was ever linked to this premises. Based on his evidence the Court

is left to conclude that there were no proactive efforts by him or his department relating to the state of this premise until after the incident.

[35] As mentioned, Mr. Leslie testified that he was not aware of this tenant until after the incident. As well, during cross examination Mr. Leslie agreed that he was not aware of any work done to the premises prior to the March 30, 2014, accident. By logical deduction, when it came to this premises Mr. Leslie, failed to engage in any of the many listed department practice and protocols which were put in place to ensure safety. For example, there was no evidence that he or anyone from his department ever completed a walk through, conducted a periodic cite visit, conducted a site inspection, or proactively reached out to the tenant about any concerns she may have had with respect to the integrity of the property. All of this was absent from his evidence.

[36] As stated by Norton J. **"**While the trier of fact may draw inferences, inferences cannot be drawn in the complete absence of evidence or based on primary facts that are the result of speculation." *Tyler v. Halifax Convention Centre Corporation* at para. 45. In this regard, on the evidence before this Court, I am unable to definitively conclude the source of any ceiling leak, or if there was any secondary leak. However, I can conclude water from some source had to have entered the living room ceiling making the ceiling wet.

[37] Furthermore, I can accept that as a matter of common-sense substantial portions of living room ceilings do not get wet on their own or typically collapse without warning on people below. I do not believe I need expert opinion on that point. Nor do I believe that by using "common-sense" in this regard am I introducing illogical considerations, or new considerations which do not arise from the evidence. The plaintiff testified that the collapsed portion of the ceiling was "grey" and "soggy".

[38] The defendant had a duty under the *Act* with respect to the condition of the premises. There was an obligation to ensure that it was safe and properly maintained. After reviewing the evidence of Mr. Leslie I am satisfied that the defendant had responsibility for, and control over, the condition of the premises. Mr. Leslie's evidence was clear on this point. In his words, maintenance workers were to "keep their eyes open for any issues they see". This very philosophy applied to him as well as his department.

[39] There were various protocols and procedures to be followed to ensure the structural integrity and safety of a given premises for which he and his department had control over. However, based on the evidence before this Court most if not all were absent when it came to this premises. There was no evidence of any form of site inspection, preventative maintenance, or effort to check in with the tenant.

[40] Collectively, this Court can conclude that on the balance of probabilities the injury was caused by a breach of the defendant's duty to ensure the safety of the ceiling and premises. The defendant failed to take reasonable care by failing to inspect and maintain the premises.

[41] I am mindful of the defendant's argument that the tenant never reached out to the defendant prior to the accident to report a pre-existing problem. In a sense this is a fair point. One is naturally inclined to ask how an occupier can know what they do not know. It was argued that there was some degree of obligation on the tenant to let the department know there was an issue with the ceiling. I have considered this in the context of this case.

[42] In the same vain the defendant argues that it is unknown how long there was an issue with the ceiling and it would have been unclear to the defendant when the danger might have vested. In closing submissions, the defendant bluntly stated, "the defendant can't be in everyone's house everyday". I agree with this statement. It is unrealistic to think Cape Breton Housing would visit each premises every day. Such a burden is unrealistic and clearly unreasonable. However, here the evidentiary record reflects an absence of any initiative taken by the defendant to educate and inform themselves of the state of this premises.

[43] Ultimately, it would be improper and unjust for this defendant to simply fall back on the absence of action by the tenant. The reality remains that the defendant still had their own obligations and failed to meet those obligations. This was independent of whatever the tenant did or did not do.

[44] There is no evidence to suggest that the tenant ever assumed responsibility or control for inspecting, repairing, or ensuring the safety of the ceiling. This was always the domain of the defendant. This is to be coupled with the defendant's failure to actively apply its own protocols towards this premises. As Mr. Leslie testified, these were in place to ensure the safety and integrity of community housing units. It was therefore the defendant's duty to make some degree of effort to proactively discover any danger and repair it. At the end of the day this failed responsibility rests at the feet of the defendant.

[45] The ultimate question is whether the defendant took reasonable care in the circumstances to make the premises reasonably safe. For the reasons outlined, I conclude that the plaintiff has on the balance of probabilities established that the defendant did not. A *prima facie* case of negligence has been established.

Adverse Inference

[46] Defendant counsel has invited this Court to draw an adverse inference against the plaintiff for failing to call evidence of the tenant. It is argued that the tenant would have had specific knowledge of facts related to the state of the ceiling and one would assume be willing to assist the plaintiff. Respectfully, this Court will decline the invitation. Simply put the argument cuts both ways. This Court could use the same logic and consider drawing an adverse inference against the defendant for not calling Mr. Paul Burt. Afterall, Mr. Burt was supposedly dispatched to inspect and determine the cause of the collapsed ceiling. This Court will stay in the lane which is the actual evidence presented within the confines of this trial.

Has the Defendant discharged its duty by having a reasonable regime of inspection and maintenance ?

[47] After examining the evidence of Mr. Leslie I conclude that the defendant has not discharged the evidential burden.

[48] Again, I am mindful that the standard is not one of perfection *Miller v. Royal Bank.*. I also accept that as a rule the defendant had a very detailed system of policies, procedures, and protocols for the inspection and repair of community housing units. As outlined, the defendant, through Mr. Leslie, called evidence about a regular regime of inspection, maintenance, and monitoring. However, the problem lies with

the reality that there was nothing to say that it was ever applied with respect to this premises. As outlined, the evidence suggests just the opposite. The system, as described in the evidence, would likely have been sufficient to meet the standard of reasonableness, however, the evidence does not support that it was ever applied to this premises.

[49] Unlike the post-accident documentation of maintenance and repair, the defendant failed to provide or speak to any such records relating to the premises prior to the accident.

[50] As outlined in *Stacey*, 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. Here, the evidence is absent of any effort by the defendant to proactively put the established practice and procedures in place when it came to this premises. The defendant’s conduct is not judged simply because the plaintiff was injured because of the falling ceiling, but rather because they have demonstrated no effort to comply with the very polices developed to ensure the safety and integrity of the premises.

Failure to Take Reasonable Care

[51] In examining whether the duty of care created by s.4(1) has been discharged, a Court must consider the six non exhaustive factors outlined in s.4(3) of the *Act:*

1. *Knowledge that the occupier has or ought to have of the likelihood of persons or property being on the premises.*

   The defendant clearly had knowledge that there was a likelihood that persons would be on the premises. This was a residential housing unit. There where known tenants and an expectation that they would have welcomed visitors from time to time.

2. *The circumstances of the entry into the premises.*

   There was nothing unusual or material about the circumstance of entry. The plaintiff was a relative of the tenant. It would be reasonable for the defendant to expect such a person would be entering upon the property.

3. *The age of the person entering the premises.*

   Nothing really turns on this factor. The adult plaintiff was authorized to be on the premises.

4. *The ability of the person entering the premises to appreciate the danger.*

   There was no ability of the plaintiff to appreciate the danger. One naturally expects a living room to be a safe space for television and a hot cup of tea.

5. *The effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk.*

   There was no effort by the occupier to give warning of the danger awaiting or to discourage persons from incurring the risk. As stated previously, it was argued that one is not responsible for what one does not know.

   Compliance with established protocols and procedures would no doubt have gone a long way in preventing this accident. Had the defendant made efforts to inform themselves of potential issues with this ceiling by following established procedures and policy they would have properly positioned themselves. Accordingly, the defendant would have been able to take preventive actions and warn others of the potential danger that was this living room ceiling.

6. *Whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.*

   It the circumstances of this case, there is an expectation that those who reside in community housing, which includes their invited guests, are reasonably offered some level of protection against falling “soggy” ceilings. Based on the

> testimony of Mr. Leslie there was no cite inspection, cite visit, maintenance, or work of any kind done to this ceiling in advance of the accident.

As a result, I am satisfied that the defendant failed to meet the standard of reasonableness.

Damages

The Plaintiff's Evidence Regarding Impact of Injury

[52] Approximately one month following the incident the plaintiff was diagnosed with neck and upper back pain. After consulting his family doctor, he was referred to physiotherapy. Within one to two weeks post-incident, he received various treatments including; hot packs, acupuncture, cervical traction, and stretching exercises. These provided only temporary relief for his neck, back, shoulder, and headache pain.

[53] The plaintiff was asked about the impact of these injuries. He testified that the pain continues to this day. He is "not even 50 percent" of what he was prior to the incident. Prior to the incident he took Percocet for what he described as "a touch of the lower back pain". Now the pain is worse, and he requires a higher dose.

[54] Prior to the incident he worked "out West" as a labourer working 12 hours a day 24 days straight. This is no longer possible due to the physical demands and his

physical limitations. He gets “calls everyday” to go back “out West” to work but is “in too much pain”.

[55] The plaintiff proudly declared that he was once a former body builder and could bench press 458 lbs. However, those triumphant days of glory are long gone. While on the stand he warmly proclaimed there was a time where he could pick up “100 lbs and throw it here to the wall”. Now he is lucky if he could do it with 25 lbs.

[56] There are times he is unable to bend over. He still struggles with moving and lifting things. He needs the assistance of his wife to put on his boots “at least twice a week”.

[57] For the first 5 to 6 months post incident, the plaintiff described having significant limitations on his mobility. He reported that it was difficult to walk and move around. In his words, he was left unable to “lift anything”. He was unable to do basic chores such as laundry, cooking, cleaning, and mowing the lawn. During those first 5 to 6 months the debilitating pain prevented him from driving.

The Medical Evidence of Dr. Edwin Hanada

[58] On August 22, 2024, ten years after the incident, the plaintiff was assessed by Dr. Edwin Hanada. Dr. Hanada is a duly qualified specialist in Physical Medicine

and Rehabilitation (PM&R) with a subspecialty designation in Pain Medicine. In preparing his report Dr. Hanada reviewed the plaintiff's current and historical medical records.

[59] Although Dr. Hanada did not testify, counsel agreed to the admissibility of, his October 25, 2024, report, expert opinion, and qualifications. The report and expert opinion were admitted into evidence for the truth of their contents. Counsel for the plaintiff agree that his report and opinion with respect to the plaintiff's injuries before, after, and a result of the March 30, 2014, incident are uncontested.

[60] I will not repeat all that is outlined in Dr. Hanada's very detailed and thorough 62-page report. However, I do wish to highlight a few areas as it relates to his opinion of the plaintiff's injuries before, after, and as a result of the incident.

Dr. Hanada's Opinion Plaintiff's Injuries Caused by the Incident

[61] It was Dr. Hanada's uncontested and accepted expert opinion that the plaintiff sustained the following injuries as a result of the March 30, 2014, incident:

- Mild head injury
- Cervical and upper thoracic spine sprain/strain with a "burner' or "stinger'
- Bilateral shoulder sprain/strain

Dr. Hanada's Opinion Plaintiff's Pre-existing Injuries

[62] Prior to the incident the plaintiff reported experiencing and being treated for "chronic back pain" for which he was prescribed Percocet and has taken continuously for almost two decades. In 2008 or 2009, the plaintiff injured his shoulder after he had fallen overboard and was pulled by a boat. Even as far back as the mid 1990s he reported experiencing and being treated for low back pain, shoulder pain, and migraines.

[63] Medical records reveal that in the early to mid 2000s the plaintiff was diagnosed with and treated for loss of range of motion and "degenerative joint disease" of the left shoulder. Around 2009 a CT scan revealed spine degeneration which includes bilateral spondylolysis and anterolisthesis. At page 13 of his report Dr. Hanada opined:

> Therefore, prior to the subject incident, Mr. Munian was experiencing significant back pain, that was treated with Percocet, an opioid medication since at least year 2000. Pre-incident tests indicate that there was a grade 1 anterolisthesis, or slippage, of vertebrae L5 on S1, with spondylolysis, some Schmorl's nodes, diffuse annular disc bulge and narrowing or the right neuroforamen at L5/S1 that may have been contacting the right exiting nerve root.
>
> Furthermore, based on the cervical spine and thoracic spine x-rays taken on the day of the incident on March 30, 2014, there was evidence of arthritic changes in the cervical and thoracic spines which, on the balance of probabilities, were present prior to the subject incident.

Dr. Hanada's Opinion The Impact of the March 30, 2014, Injuries in Aggravating Pre-Existing Conditions

[64] Dr. Hanada's opinion was that the incident did not cause a significant or lasting aggravation of pre-existing condition. The following can be found at page 19 of his report:

> Based on my review of the medical records, diagnostic imaging, and my assessment of Mr. Munian, it is my opinion that the injuries sustained on March 30, 2014, did not cause a significant or lasting aggravation of his pre-existing conditions. The objective evidence does not support the conclusion that the incident had more than a temporary effect on his preexisting degenerative conditions.
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> …
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> In conclusion, while the injuries sustained on March 30, 2014, may have temporarily worsened Mr. Munian's symptoms, there is no objective evidence to suggest that they caused a significant or lasting aggravation of his pre-existing osteoarthritis, degenerative disc disease, or spondylolisthesis. The ongoing progression of these degenerative conditions is likely the main factor contributing to any current limitations or discomfort he experiences.

Dr. Hanada's Opinion Lasting Injuries Resulting from the Incident

[65] At page 16 to 18 of the report Dr. Hanada opined:

> Based on the objective evidence alone, I cannot definitively prove that Mr. Munian sustained any lasting injuries from the 2014 incident. While I have carefully considered his subjective symptoms and account of his injuries, the diagnostic imaging, physical examination, and medical records do not provide conclusive evidence linking his current complaints to the incident on March 30, 2014.
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> …
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> In summary, while I have carefully evaluated both the subjective and objective aspects of Mr. Munian's case, the available evidence does not support a conclusion that the 2014 incident caused any lasting injuries that would explain his current symptoms approximately ten years and five months later. In my medical opinion, the symptoms he currently reports are more likely attributable to the natural progression of his pre-existing "wear and tear" conditions rather than any specific injury sustained during the ceiling incident.

…

> In addition to the injuries Mr. Munian attributes to the incident on March 30, 2014, he has multiple pre-existing conditions documented in his medical records that likely influence his current symptoms and functional limitations. These include chronic degenerative changes in his spine and left shoulder, as well as several other medical conditions that contribute to his overall health status and may exacerbate symptoms he associates with the ceiling incident.
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> …
>
> In summary, while Mr. Munian sustained mainly soft tissue injuries on March 30, 2014, these injuries likely had a temporary impact and did not cause significant lasting effects. His ongoing symptoms are more plausibly attributed to his chronic degenerative conditions in the spine and left shoulders, polycythemia vera, and a history of migraines and chronic back pain. These pre-existing conditions of "wear and tear changes" in the spine and left shoulder may have progressed over time, independently of the ceiling incident, and are likely the primary contributors to his current functional limitations and symptomatology.

1. Dr. Hanada's Opinion Impact of Incident Injuries on the Plaintiff's Day to Day Life

[66] Dr. Hanada offered a very clear opinion with respect to the impact of the incident injuries on the plaintiff's day to day life at page 18 of his report:

> In summary, while the injuries from March 30, 2014, may have temporarily affected Mr. Munian's daily life, there is no objective evidence to suggest that they caused lasting or significant impairments. Any ongoing limitations he experiences are more likely attributable to the progression of his pre-existing degenerative conditions rather than the acute injuries sustained in the incident.

Concerns with Respect to the Plaintiff's Credibility and Reliability Relating to Injury

[67] There are countless reported decisions dedicated to assessing credibility and reliability. I will not recite them here. Assessing a witnesses' credibility and reliability is at the core of what judges do. However, a trial is not reduced to a nitpicking credibility contest. Simply because one or more witnesses may be deemed somewhat uncredible or unreliable on a certain point does not automatically fuse a conclusion on the ultimate issue.

[68] When considering a witness's narrative on core aspects, the trier of fact must consider whether the person's evidence is in harmony with itself, the probabilities that surround it, and whether it is in harmony with the totality of the accepted evidence. Finally, an assessment of a witness's credibility and reliability is not completed within a silo. Assessing in a silo marginalizes that witness's evidence from all the other trial evidence. Such a process is flawed.

[69] I find that the plaintiff was often an inconsistent and unreliable historian when it came to his reported injury and impact of injury. I will provide a few examples.

[70] The plaintiff was asked how often he suffered headaches in the first 4 to 5 months after the incident. He reported almost daily and as frequent as 4 to 5 times a week. When asked about whether he suffered from headaches prior to the incident he responded, "not to my knowledge no". Later, however, he agreed that he did in

fact suffer frequent pre-incident headaches. Even then he was quick to dismiss their significance stating that he “fixed it”. He claimed that the pre-incident headaches were “fixed” by shaving his head. According to his nonmedical opinion they were caused by the lack of airflow to his scalp.

[71] I found that the plaintiff frequently minimized his pre-existing symptoms, injuries, and their impacts. I reach such a conclusion after having considered the evolving nature of his answers, and his disjointed and often inconsistent explanations which often did not accord with what was outlined in the documented medical history.

[72] Furthermore, the plaintiff displayed a resistance to directly answering questions posed to him during cross-examination. His evidence would evolve in such a way as to suggest avoidance. For example, defendant counsel put to him, “you had backpain since childhood”. His answer, “no not since childhood”. He was asked again, the answer changed, “not severe but I did have it, not like I’ve had it since the accident”. The plaintiff was asked a third time at which point he then revealed he was in a previous car accident when he was “young” but the pain only started to impact him when he was in his 20s. He was then shown various passages of his discovery transcript. These passages revealed he had reported back pain since he

was a child. It was only after continuous probing did the plaintiff finally adopt his discovery evidence.

[73] It was put to the plaintiff that he was hit by a mail truck when he was 5 years old. His answer, “oh yeah I remember this now”. It was then suggested that the pain got worse as he aged. At first, he did not fully agree with the suggestion. He was again confronted with his discovery evidence where he stated, “it seemed like it got worse as I got older”. Backed into yet another corner the plaintiff finally agreed that the pre-existing pain began when he was young and got worse as he aged.

[74] Counsel suggested to the plaintiff that he had pre-existing neck pain prior to the 2014 incident. At first the plaintiff resoundingly rejected this suggestion. In fact, he doubled down. He was yet again confronted with the discovery transcript. His discovery evidence was clear, he disclosed having both pre-existing neck and shoulder pain. When confronted with this inconsistency the plaintiff offered several wavering and evolving answers; “I must have meant as of the accident”, “I don’t know if I said that at discovery”, “well I don’t recall it”, “it must be then”. He finally settled on “I guess yes”.

[75] It was suggested that he had migraines going back to the 1990s. At first, he did not agree. His initial evidence was that the migraines stopped in the 1990s and

"started in 2004, something like that". When confronted with Dr. Hanada's report his position changed.

[76] The plaintiff was asked if he had a pre-existing shoulder injury from a fall while working on a fishing boat. When asked about the extent of that injury he stated, "I hurt it a little bit then". He was then asked about another fall he had in 2018, 4 years after the incident. He had no recollection until counsel provided him with the particulars. In the plaintiff's words, "I didn't hurt myself bad that time, I got checked but it wasn't severe". Counsel probed further and again the plaintiff couldn't recall until he was led directly to his discovery evidence. When he first reported injuring both shoulder blades, he described the pain as a ten out of ten. Confronted with this reality he promptly added that the pain was "more a 7 or 8 out of 10" and that he got "it fixed".

[77] I highlight these back-and-forth exchanges for a reason. Time and time again it appeared as though the evidence had to be pulled out of the plaintiff. His answers waivered and varied with each passing question on the same topic. Then when he did commit to acknowledging past injury, he tended to minimize it.

[78] Finally, the plaintiff agreed that he still works as a labourer in the lobster fishery. He works twelve to fourteen weeks per year. Interestingly, in 2014 he was

able to return to work on the boat within weeks after the incident. He described some of his required duties while on the boat. These duties appeared to be somewhat inconsistent with his self-reported limited mobility in the four to six months following the incident.

Conclusion with Respect to Plaintiff's Injuries and Their Impacts

[79] Dr. Hanada's expert opinion has not been challenged, contradicted or refuted in any material way. There were no arguments, suggestions, or evidence called which would cause the Court concern with respect to the credibility or reliability of the opinion. I have evaluated this evidence in conjunction with the plaintiff's evidence and the totality of the evidence presented. After having done so I accept Dr. Hanada's opinion evidence as being both credible and reliable in terms of the plaintiff's injuries and their impacts on him.

[80] As outlined earlier, I reject the evidence of the plaintiff as to the extent of the resulting injuries and their long-term lasting impacts. I conclude that the incident caused minor soft tissue short-term injuries which aggravated underlying conditions.

[81] Furthermore, I accept the uncontested expert evidence of Dr. Hanada that these minor short-term soft tissue injuries are not the source of the plaintiff's present condition. I find that the short-term injuries had only a temporary impact on the pre-

existing injuries. Within weeks the plaintiff returned to a job which required lifting, bending, etc. There is no objective evidence to suggest that the injuries attributable to the incident resulted in any long-term functional limitations. I do accept however, that there was a degree of persistent short-term discomfort and temporary restriction in mobility. I would hold that the soft tissue injuries sustained were persistent over the short-term in the range of several months at the most.

[82] I will now turn to the appropriate quantum.

General Damages

[83] The plaintiff has only advanced an argument for general damages and has cited zero authority supporting their $30,000 claim. In arguing for an unspecified "nominal" amount the defendant cited a few cases but not many.

[84] I accept the defendant's argument that the plaintiff's injuries fall within the range established by *Smith v. Stubbert*, [1992] N.S.J. No. 532. As stated by the Nova Scotia Court of Appeal in *Cameron v. Pratt*, [2023] N.S.J. No. 509, "*Smith v. Stubbert* was intended to be confined to cases involving soft tissue injuries, which can include chronic pain and psychological injuries.". I would note that this case lacks several key features which would put it in the upper *Smith v. Stubbert* range.

This case lacks features such as chronic pain, psychological injuries, and persistence of symptoms over a protracted period.

[85] The range established by *Smith v. Stubbert* has been the law in Nova Scotia relating to general damages in cases of this nature for over 30 years. Despite the quantum having been updated to account for several factors like inflation the range "has been consistently upheld as providing a fair and reasonable measure of compensation." *Hayward v. Young*, [2013] N.S.J. No. 252 para. 49. Our Court of Appeal in *Hayward v. Young* also stated that "adhering to the range established by this Court promotes consistency, predictability and certainty when arriving at a fair and reasonable award for general damages on account of pain, suffering and loss of amenities".

[86] Bryson J. (as he then was) in *Mawdsley v. McCarthy's Towing and Recovery Ltd.*, 2010 NSSC 168 added the following at para. 66:

> **66** The seminal decision in Nova Scotia dealing with injuries which are "persistently troubling but not totally disabling" is *Smith v. Stubbert*, [1992] N.S.J. No. 532. In *Stubbert,* the Court of Appeal established a "range" of general damages in such cases of $18-$40,000. This court considered the *Stubbert* range of damages in *Merrick v. Guilbeault*, 2009 NSSC 60. LeBlanc, J. "updated" the *Stubbert* range for inflation to $27,000.00 to $54,000.00. …

[87] I will not recite an exhaustive list of cases to establish parity. Inevitably each case often differs significantly on their facts. However, I would review two cases

which will serve as helpful guideposts in arriving at a fair and proportionate quantum of general damages in this case.

[88] In *Hayward v. Young*, 2013 NSCA 64, the plaintiff was injured after he was broadsided in a motor vehicle accident. He immediately returned to work after the accident but soon developed disorientation and nausea. There was no loss of consciousness. At the time he reported stiffness and soreness in the neck, back, and shoulders. He was subsequently diagnosed with soft tissue injuries, with associated headaches. The pain became chronic, and he was later treated for depression, associated with his injuries and pain. The chronic pain was found to still be impacting him eight years after the accident. Despite this he remained employed and continued to work. On appeal the injuries were classified as being within the *Smith v. Stubbert* range and general damages were set at $57,500.

[89] In *Marsh v. Paquette*, 2010 NSSC 43, the plaintiff was a front-seat passenger in a stopped car. The defendant car reversed into the plaintiff vehicle. The plaintiff reported injuries to her neck and lower back. This was coupled with reported psychological injuries. The Court held that the plaintiff's injuries fell within the *Smith v. Stubbert* range stating:

> **273** I have concluded the accident caused only minor short-term injuries and was not the cause of her present condition. I have concluded the minor accident did in fact cause injuries but not to the extent claimed by Carolyn Marsh.
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> **274** It is clear that Carolyn Marsh did suffer: 1) a temporary aggravation of the previous Tim Horton's neck injury; 2) a sore back for a brief period; 3) anxiety arising only in part from the motor vehicle accident, a situational stress which had ended by March 1997.
>
> …
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> **276** In *MacDonnell v. Campbell*, 2001 NSSC 4, the plaintiff was awarded $10,000.00. He suffered mild neck and back injuries resolving within three to four months. In *O'Brien v. Nova Scotia (Attorney General)*, [2000] N.S.J. No. 457, 2000 CanLII 3105 (N.S.S.C.), the court provisionally awarded $7,500.00 for soft tissue injuries to the low back which caused "minimal" pain for about seven months.
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> **277** In *Kelly v. Loblaws*, [1999] N.S.J. No. 178, 1999 CanLII 6887 (N.S.S.C.), the court provisionally awarded $9,000.00 for a mild lumbar sprain which resolved within eighteen months. In *St. Peter v. Atlantic Shopping Centres Ltd.*, [1999] N.S.J. No. 373, 1999 CanLII 3678 (N.S.S.C.), the court provisionally awarded damages of $7,500.00 for a mild soft tissue injury to the lower back which resolved within five months.
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> **278** Another 1999 decision was *W.E.D. v. Rice*, [1999] N.S.J. No. 255, 1999 CanLII 5238 (N.S.S.C.), where the plaintiff suffered a mild whiplash injury and was awarded $15,000.00.
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> **279** Carolyn Marsh suffered an aggravation of a previous neck injury which very quickly resolved, a sore back which also quickly resolved, and anxiety caused only in part by the motor vehicle accident.
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> **280** However, using the cases cited as guidance and allowing for an updating from the dates on which the awards were made, I conclude that an appropriate general damage award in this case is $10,000.00, taking into consideration both the physical injuries and the anxiety caused...

[90] Clearly there are some factual differences between these cases and the one before this Court. No two cases can ever be the same. However, I conclude that the quantum of general damages to be awarded in this case falls somewhat lower than *Hayward v. Young* but higher than *Marsh v. Paquette*.

[91] Factually, this plaintiff is very similar to *Marsh v. Paquette*. In both cases the accident caused minor short-term injuries which were aggravations of underlying conditions. These injuries were not the cause of the present condition. The accident injuries were only a temporary aggravation of the previous injuries. The accident injuries resolved within relatively short order and within several months. Both plaintiffs returned to work very soon after suffering the injuries.

[92] The most notable difference between this plaintiff and *Hayward v. Young* is the lack of chronic pain and depression which were still active and attributable to accident almost 8 years later. As stated, I have determined that the plaintiff does not suffer from any level of persistent troubling or chronic injuries relating to the accident.

[93] Considering the circumstances of this case, the guiding case law, and accounting for the fact that *Marsh v. Paquette* was decided 15 years ago I would award the sum of $15,000 in general damages.

Prejudgment Interest

[94] I will award prejudgment interest at a rate of 2.5%.

[95] The plaintiff is seeking prejudgment interest from the filing date of the action and the date of the Court's Order. The action was filed on October 25, 2016.

[96] There is nothing to suggest that the plaintiff unduly delayed filing this action. However, a history of the proceedings does reveal some plaintiff delay in having this matter brought to trial. Discoveries were completed on December 13, 2019. The defendant had to apply for and did receive two separate orders compelling compliance with discovery undertakings (September 27, 2021, and May 2, 2022). On both occasions costs were awarded against the plaintiff.

[97] Therefore, there will be an exclusion of 26 months (the approximate time between completion of the discoveries and the last order directing compliance with undertakings less the 60-day period under the rules).

Conclusion

[98] I conclude that the defendant is liable to the plaintiff under the *Occupiers' Liability Act* and order the following:

- The Defendants shall pay the Plaintiff $15,000 in general damages, plus prejudgment interest at 2.5%, per annum calculated simply from

October 25, 2016 to the date of this order less 26 months (Total months 74).

- General Damages $15,000
- Prejudgment Interest (2.5% for 74 months)

[99] Plaintiff counsel will prepare a draft order reflecting this decision. I request that counsel make best efforts to reach agreement on costs. Should no agreement be reached, the Court will accept written submissions from counsel within 30 calendar days of this decision.

Russell, J.