SUPREME COURT OF NOVA SCOTIA
Citation: Roscoe v. Halifax (Regional Municipality), 2011 NSSC 485

Date: (20111229)
Docket: Hfx 307889
Registry: Halifax

Between:

Elizabeth Roscoe

Plaintiff

v.

Halifax Regional Municipality

Defendant

Judge:	The Honourable Justice Pierre L. Muise
Heard:	April 26 and 27 2011, in Halifax, Nova Scotia
Final Written Submissions:	May 4, 2011
Counsel:	Jean McKenna, for Elizabeth Roscoe Karen E. MacDonald, for Halifax Regional Municipality

A. INTRODUCTION

[1] The evening of Wednesday, March 26, 2008, Elizabeth Roscoe, was playing badminton in the Bob Douglas Gym. As she was moving backwards to return a high shot, her right foot was suddenly stopped. She felt immediate pain in her right knee. She noticed that there was a piece of duct tape where her foot had been stopped. She was unable to continue playing. Medical examination later determined that she had a torn meniscus. She underwent a variety of therapy and treatment for the injury, including arthroscopic surgery. Within 14 months, she returned to most of her pre-incident activities, with some residual effect.

[2] The Bob Douglas Gym is part of the Citadel Community Centre, owned by Halifax Regional Municipality ("HRM"). It is attached to Citadel High School, which is owned by the Halifax Regional School Board ("HRSB"). The Community Centre is used by HRM in partnership with HRSB, in accordance with a shared use agreement. HRSB uses the facility weekdays, except Tuesdays. HRM uses the gym evenings and weekends.

[3] At time of the incident, HRM had responsibility for and control of the gym.

[4] HRM had no system in place for the cleaning, nor for the inspection, of the gym when it was turned over to it for evening use. There was no evidence that, on March 28, 2008, any such cleaning or inspection was carried out.

[5] Ms. Roscoe alleges that HRM failed to take reasonable care to see that she was reasonably safe while playing badminton in the gym, and, thus, is liable to her as the occupier of the gym at the time she suffered her injury.

[6] Both liability and damages are in issue.

B. LAW AND ANALYSIS

1. EVIDENCE

(a) Credibility and Reliability of Lay Witnesses

[7] The credibility of the lay witnesses in the case at hand is not in issue. All the witnesses gave their evidence in a straightforward, un-evasive fashion. There was no indication that they were not doing their best to give truthful evidence.

[8] Marilyn Nolan testified on behalf of HRM. She gave evidence regarding which gym she had seen an HRSB group use tape in. It was inconsistent with her discovery evidence. However, on cross-examination, she explained that she had made an error. She apologized for the error and corrected it. She confirmed that she had seen them use tape in the Bob Douglas Gym. In my view, the inconsistency was adequately and reasonably explained. Therefore, I did not find that it called into question her credibility.

[9] There is a note in the Joint Exhibit Book, Tab 8, at page 9, in the Family Practice Associates' entry for April 16, 2008, and, another, at page 47, in a letter from Dr. R.H. Yabsley to Dr. Diane D'Arcy, regarding a visit by Ms. Roscoe on April 24, 2008, indicating that Ms. Roscoe continued to play after her foot was caught on a tape causing her to stop suddenly. Ms. Roscoe indicated that the notes were not accurate. She testified that she was not able to continue playing that night, and had to stop after two or three minutes the following Monday. She added that she has not played badminton since. The evidence of Mr. Lynch confirmed those points. I find that each note is an erroneous record of the history. More likely than not, it is a misinterpretation of Ms. Roscoe's explanation that she tried

to continue to play the following Monday. I do not find that the notes diminish Ms. Roscoe's, nor Mr. Lynch's, credibility, nor reliability. After Ms. Roscoe had played badminton for approximately 40 years, the event which caused her to be unable to continue to play, would, more likely than not, be a significant event which would be fixed in her mind and, to a lesser extent, in Mr. Lynch's mind. The notes are an interpretation of the history provided to the health care providers in question. They are not a record of the outcome of some medical test conducted by those health care providers. As such, they are more prone to misunderstanding and/or error.

[10] Leaving aside the expert evidence of Doctor Stuart Smith, which I will discuss later, no circumstances or reasons were presented to cause me to question the reliability of the evidence that the witnesses indicated they remembered. The lay witnesses gave evidence that they could reasonably be expected to have known and remembered. They acknowledged things that they could not remember. Their evidence of what they did not remember, but probably happened, is subject to that expressed limitation in reliability.

[11] I accept the evidence the lay witness gave in relation to the points they remembered and were qualified to give evidence on.

(b) Expert Evidence of Dr. Stuart Smith

[12] Dr. Stuart Smith was qualified as an engineer capable of giving expert evidence on the subject of shoe and floor friction and the friction co-efficient between various materials and its measurement.

[13] He was engaged by HRM to conduct tests on the floor of the Bob Douglas Gym, in the area of the alleged incident, to determine the co-efficient of friction of court shoes dragged over the floor and over duct tape on the floor.

[14] He purchased two pairs of used women's white, gum-soled, court shoes. One was of "Pony" brand, and the other was of "Disney" brand. He also purchased "Duck" brand duct tape.

[15] He attended at the Bob Douglas Gym. To find the approximate location of the alleged incident, he used a photograph on which that location was highlighted

by marking it with a circle. A copy of the photograph is labelled Photograph Number 1, and is found in Appendix 2 to the Accident Investigation Report of Doctor Stuart, located at Tab 20 of the Joint Exhibit Book. He used ten lead weights. They all weighed about the same amount. He showed one to the Court. It was marked as weighing 300.9 grams. He put all ten weights in each shoe as he conducted his tests. He used a spring scale to weigh the shoe and lead weights. He also used the same spring scale to measure the force used to drag each shoe, with the lead weights, across the gym floor and across duct tape that he placed on the floor.

[16] The towing force required to tow the shoe and weights across the floor, divided by the weight of the shoe and weights, gave him the co-efficient of friction for each pulling scenario. He conducted the same series of tests for each of the two brands of shoes.

[17] The first test involved simply dragging the shoe across the gym floor. In the second test, he cut a piece of duct tape, “roughly 2 ½ to 3 inches long, stuck half of it to the floor, folded the other half back and stamped on it several times”. He dragged the shoe across the folded duct tape, measuring the force required to do so.

For the third test, he “cut another piece of duct tape roughly 2 ½ to 3 inches long, stuck half of it to the floor, rolled the other half back in a coil and stamped on it several times”. Once again, he dragged the shoes across this coiled duct tape, measuring the force required to do so.

[18] There are many factors negatively affecting the weight of Dr. Stuart Smith’s opinion.

[19] In my view, he used a substandard scale. It was graduated in one kilogram and two pound intervals, making it impossible to read the precise weight measurement. The scale itself was inconsistent and inaccurate. While he was at the gym he measured the weight of the Pony shoe, with the ten lead weights inside of it, at 3.5 kilograms. During his in-court demonstration, he weighed the same shoe, with the same weights, at 3.8 kilograms. This 0.3 kilogram discrepancy demonstrates the inconsistency and inaccuracy of the scale. Also, with no weight or resistance attached to the scale, it reads at the one kilogram mark. Although the one kilogram can be subtracted from the ultimate measurement, this flaw calls into question the accuracy of the scale as well. Dr. Smith noted no difference in the scale reading during the transition from starting the movement of the shoe (i.e.

overcoming the force of inertia) to continuing the movement of the shoe (the dynamic co-efficient of friction). Therefore, the scale was not sufficiently sensitive to detect the change. The type of scale used is one that can be purchased cheaply for the purpose of weighing fish. It is not legal for trade. In my view, it is a rudimentary and inconsistent scale, that is not sufficiently accurate to conduct a proper co-efficient of friction test. It is a type of scale that might be acceptable for an elementary school student to use in a science fair project. However, in my view, it is not acceptable for use by a professional engineer, hired as an expert to conduct a co-efficient of friction test and prepare a report for the court, in an occupier's liability suit.

[20] The test method Dr. Smith used was adapted from Test Method D 2047-04 - Standard Test Method for Static Co-efficient of Friction of Polish-Coated Flooring Surfaces as Measured by the James Machine. Paragraph 5.2 of the instructions for that test method states:

> "If a standard rubber shoe material is required, the test rubber should be in accordance with Test Method D 1630."

[21] There is no evidence of that test method. This recommendation for an alternate test method for rubber shoes calls into question whether Dr. Smith's adaptation of Test Method D 2047-04 was appropriate for rubber shoe material.

[22] Dr. Smith agreed that the test method he adapted his test from had very precise requirements which he was unable to reproduce. For example, he was unable to maintain a consistent rate of speed as the shoe was dragged across each surface.

[23] The test method required testing in four directions on the surface being tested. He did not do that. He also did not pull the shoe itself from different directions. He agreed that the tread on the shoe may create a difference, depending on the direction from which it is pulled, as the shoe engages the edge of the duct tape.

[24] In the second and third tests, involving folded and coiled duct tape, he "stamped" on the exposed adhesive part several times before conducting the tests. He said he did that because, in his "experience", the badminton court would have been covered. He "guesstimated" someone stepped on the tape without it being

removed. His experience with badminton was minimal. He had occasionally watched what most likely was school badminton. In the case at hand, there was no evidence that the shoe of anyone, but that of Ms. Roscoe, had contacted the exposed adhesive part of the duct tape. The tape was located close to the badminton court boundary lines. Ms. Roscoe's husband, Michael Lynch, testified that badminton players watch for the boundary lines to avoid foot faults. I infer that means they try to keep their foot away from the area of the boundary lines. As can be seen in the video of high level competitive badminton that was entered as Exhibit Number 4, badminton rackets have fairly long handles. I take judicial notice that badminton players can reach some distance away from where they are stepping because of the racket handle and the length of their arm. Therefore, they can return shuttlecocks that would land within the court boundaries without stepping in the area of the boundary lines. Consequently, in my view, it is not an area that would be likely to be stepped on frequently.

[25] Dr. Smith agreed that stamping on the tape would probably change its adhesive quality. He indicated he did not wash his own shoes before stamping on the tape. There was no evidence of whether or not he kept wearing the same shoes he had been wearing outside before entering the gym. However, in my view, if he

had taken that step, more likely than not, he would have said so. The stamping of the tape taints the results. At the very least, he ought to have conducted some tests without the stamping.

[26] Dr. Smith did not conduct any tests to determine the co-efficient of friction when the sole of the shoe catches a partially lifted edge of duct tape that is almost completely stuck to the floor and rolls it back into a coil over itself. That scenario is at least as likely to have occurred as the tape already having been folded or coiled before Ms. Roscoe's shoe contacted it. In my view, it would have been a reasonable test to conduct in the circumstances.

[27] Dr. Smith's report focussed on whether both the floor and the tape provided sufficient friction so that Ms. Roscoe's foot would not have slipped. It did not focus on what, in my view, is the real issue raised by the case at hand. That issue is whether the friction created by the tape was sufficient so that, while Ms. Roscoe was sliding her foot back as part of her backwards shuffling or gliding motion, her foot was stopped or rapidly decelerated as a result of contact with the tape.

[28] Dr. Smith discounted the backwards shuffling or gliding motion as not being a realistic possibility. In that regard, he stated, in section 4.2 of his report:

> "The only circumstance in which Ms. Roscoe's shoe would have been sliding on the floor and might have stopped on encountering the tape would have been if she was moving backward with a shuffling or 'moon-walking' gate. This slower type of gate would not be consistent with her intention to move back quickly, in time to return the badminton bird."

[29] In my view, a backwards shuffling or gliding motion, is precisely the type of movement one would expect from all but the most novice of badminton players. Ms. Roscoe had been playing for approximately 40 years, and was a fairly advanced recreational player. She testified that her movement was a combination of gliding, shuffling and side-stepping. That is also the type of movement observed in the video of high level competitive badminton that was entered as Exhibit Number 4. Dr. Stuart agreed that there were many types of movement on the video, including dragging, sliding and sideways movements.

[30] The evidence of Mr. Lynch was that Ms. Roscoe used a gliding type of step, not a step where she would lift her foot up. He indicated badminton requires quick movements, in all directions and a lot of sudden stopping. The evidence of Ms. Roscoe was that she used a gliding step going backwards. The front foot comes to

the back, the back foot slides back and that process repeats itself. It is done in more of a side-step movement; and, there is an intentional sliding motion where the foot with little weight on it is kind of sliding on the floor. In my view, the diagram in Appendix A to Dr. Smith's report (Tab 20, page 12), is not a fair representation of how a badminton player would generally move backwards. It is also not a fair representation of how Ms. Roscoe was moving at the time of the incident in question.

[31] Dr. Smith based his assessment of what he would expect Ms. Roscoe's backwards running gait to be on Weyand, et al, "The biological limits to running speed as imposed from the ground up", J Appl Physiol 108: 950-961, 2010.

[32] He admitted that he was not an expert in kinesiology. He is not qualified to give expert evidence on backwards running gaits. That portion of his report is inadmissible.

[33] Dr. Smith agreed that there probably were many different types of duct tape, with different adhesive capacities. However, he only tested using one type.

[34] Neither of the test shoes used were of the type worn by Ms. Roscoe during the incident in question. Ms. Roscoe wore Nike shoes. She found that they had the best traction. The test results, reported at page 6 of Dr. Smith's report, show a marked difference in the co-efficient of friction range between the two test shoes when encountering the coiled tape. The range for the Disney shoe was 1.3 to 1.5; and, the range for the Pony shoe was 1.6 to 2.0. Dr. Smith agreed that: different types of shoes could produce different results; and, co-efficient of friction depends on, among other things, the type of shoe worn. Consequently, the fact that he did not use the same type of shoe worn by Ms. Roscoe makes the test results less helpful in the case at hand.

[35] In relation to the bare floor test, Dr. Smith " believed" he pulled approximately three times and got a consistent result which he recorded as one figure in his notes. In relation to the tests over the tape, he recalls taking several measurements which were in the range noted in his report; but, he only recorded the range in his notes, not the individual measurements. This recording method is less than scientific. It increases the chance of error and the likelihood of estimating the tenths, on the scale graduated in one kilogram intervals, in a way which artificially produces a consistent result.

[36] Dr. Smith acknowledged that differences in walking gait and foot movement would affect the co-efficient of friction and would likely produce results which were different from merely dragging a shoe across a surface.

[37] Considering these factors, I find that the report is of almost no value. I attach it negligible weight.

[38] The testing was rudimentary, imprecise, incomplete and flawed. Therefore, the results cannot be relied upon as being accurate. The most that can be safely taken from Dr. Smith's evidence is that a badminton shoe requires more force to make it slide over the adhesive side of duct tape, even if it has been repeatedly trampled on, than over a bare gym floor. Thus, on Ms. Roscoe's foot contacting the duct tape, the force against the foot would have increased.

2. LIABILITY

(a) Duty of Care

[39] The ***Occupiers' Liability Act*** , S.N.S. 1996, c. 27, subsection 2(a), defines "occupier" as follows:

> "'[O]ccupier' 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."

[40] Marilyn Nolan is an administrative assistant with HRM. She testified that the Bob Douglas Gym, also known as Citadel Gyms A and B, is part of the Citadel Community Centre, which is owned by HRM. The gym is attached to the Citadel High School, which is owned by HRSB. The Community Centre is used by HRM, in partnership with HRSB, in accordance with a shared use agreement.

[41] In 2008, HRSB used the gym from 8:30 a.m. to 5:30 p.m. each weekday, except Tuesdays . HRM used the gym from 5:30 p.m. to 10:00 p.m. each evening, except Wednesdays, when the use continued to 11:00 p.m. HRM also used the gym on weekends.

[42] HRM was responsible for the cleaning of the Community Centre, including the gym, at all times. They paid a school custodian to work in the Community Centre, each weekday, six hours out of his day.

[43] A group, which Ms. Nolan referred to as the Carl Hickman Group, contracted with HRM to rent one-half of the Bob Douglas Gym (i.e. Citadel Gym A) each Wednesday from 7:00 p.m. to 9:00 p.m. to play badminton. The rental agreement was created by her. Ms. Roscoe was part of the Carl Hickman Group. That was also confirmed by Ms. Roscoe and her husband, Michael Lynch.

[44] HRM had employees working the reception desk of the gym who monitored and controlled the entry of the Carl Hickman Group and of other groups who rented the gym in the evenings.

[45] There is no dispute that HRM had responsibility for, and control over, the gym during the period of time it was rented by the Carl Hickman Group. As such, HRM was an occupier of that gym.

[46] The duty of care which HRM owed to the Carl Hickman Group, and to Ms. Roscoe in particular, is outlined in section 4(1) of the ***Occupiers' Liability Act*** which states:

> "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."

[47] Subsection 4(2) specifies that this duty of care "applies in respect of the condition of the premises; activities on the premises; and the conduct of third parties on the premises".

(b) Standard of Care

[48] As noted in subsection 4(1) of the ***Occupiers' Liability Act***, HRM was required to "take such care as in all the circumstances of the case" was "reasonable to see that" Ms. Roscoe was "reasonably safe while on the premises".

[49] The court in ***Burrough v. Kapuskasing (Town)***, 1987 CarswellOnt. 876 (D.C.), in the context of a tennis court, at paragraph 28, articulated the standard of care under the ***Ontario Occupiers' Liability Act*** as follows:

> "The Municipality in providing facilities for the playing of tennis must insure that such facilities can be used in safety for that purpose. Tennis is an activity which requires physical exersion on the part of the participants. In the instant case, the plaintiff sustained his injuries not as a result of his play but as a result of the deteriorated condition of the court. The courts were in my view dangerous premises, keeping in mind the purpose for which they were constructed; i.e. the active use of the premises."

(c) Whether Standard of Care Met

(i) Factors to Consider in Determining Whether Duty of Care Discharged

[50] "[T]he factors which are relevant to what constitutes reasonable care will necessarily be very specific to each fact situation ... ." [***Waldick v. Malcolm***, [1991] 2 S.C.R. 456, para 33]

[51] Section 4(3) of the ***Occupiers' Liability Act*** lists specific factors to be considered in determining whether the occupier has discharged its duty of care. The following factors, specified in section 4(3), are relevant to the case at hand:

> "(a) The knowledge that the occupier has or ought to have of the likelihood of persons ... being on the premises;
>
> (b) the circumstances of the entry into 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 ... ; 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."

[52] Other relevant factors emanating from the case law include the following.

[53] The harm must be foreseeable. [***Corbin v Halifax (Regional Municipality)***, 2003 NSSC 121, para 32]

[54] If it is relatively easy to prevent a danger, persons entering the premises are entitled to expect that those relatively easy steps, or equally effective ones, will be taken. [***Campbell v Royal Bank***, 1963 CarswellMan 88 (S.C.C.), para 46]

[55] In my view, the nature of the premises, the nature of the activity, and the level of risk involved in it, are also relevant factors.

[56] Marilyn Nolan testified that, in addition to preparing the rental contract for the Carl Hickman Group, she also signed it. She, and thus HRM, knew the Group was using Citadel Gym A Wednesday evenings, from 7:00 p.m. to 9:00 p.m., for badminton.

[57] Ms. Roscoe, along with the rest of the Carl Hickman Group, entered by contract to play badminton. Badminton is an activity requiring movement in a variety of directions and using a variety of foot movements. It was not an entry, such as an entry to watch a concert, where the entrant would only be walking, and might expect to find tape on the floor holding down cables. In addition, as noted in the evidence of Ms. Roscoe, Mr. Lynch and Charles McGinnis, an evening desk person, when the Carl Hickman Group entered, the badminton nets were already

set up. They had been set up by the youth badminton group who had been using the facility from 5:30 p.m. to 7:00 p.m.

[58] The youth badminton group used shuttlecocks with real feathers. These feathers would sometimes dislodge and land on the floor. Consequently, the Carl Hickman Group would have to clear and pick them up at times. According to Ms. Roscoe and Mr. Lynch, when they did that, they would have their eyes towards the floor. However, the feathers were easily visible because they were white and contrasted with the brown floor. In addition they were light weight, so they floated up off the floor. Otherwise, while playing badminton, the players only took quick looks at the floor to keep an eye out for the court boundary lines in order to avoid foot faults. During these brief glances at the floor, they would not be looking for foreign objects. They would be looking eye level at the players on the court or up in the air, where the shuttlecock usually is. The tape in question, in the case at hand, was located in the area of various court boundary lines. The lines were multicoloured. The duct tape in question was a greyish colour. It would not stand out markedly amongst the multiple boundary lines. Therefore, it was unlikely that the members of the Carl Hickman Group would have noted it during a brief clearing of shuttlecock feathers and subsequent play.

[59] There was no evidence of any attempt by HRM to warn of the possible presence of tape on the gymnasium floor. Mr. McGinnis was working the reception desk at the time of the alleged incident on March 26, 2008. He testified that there was no sign asking renters to clean, nor warning them that the use of the facility was at their own risk.

[60] People renting a gymnasium to play badminton reasonably expect the floor to be uniform and clear of foreign substances and objects. Badminton involves rapid and multidirectional foot movement. In my view, it is reasonable to expect that the occupiers of a gymnasium being used to play badminton will offer some protection against foreign substances and objects on the floor.

[61] HRM argues that the gym had been in use every weekday evening, and every weekend, since October of 2007, with an average of 100 users each evening, and Ms. Roscoe was the only person that complained of being injured because of duct tape on the floor. Therefore, HRM submits, it was not a risk that they could reasonably anticipate.

[62] HRM points to ***Corbin***, where Justice Wright, at paragraph 44: noted that there had been no other reported slip and fall incidents in well over a million users; combined that track record with the "limitations of the expert opinion evidence"; and, found he was unable to conclude the floor tiles were unsafe. HRM suggests that, since Ms. Roscoe was the only person to complain of injury resulting from contact with tape in the Bob Douglas Gym, there should also be no finding of liability against it. However, there are important differences between the ***Corbin*** case and the case at hand. Ms. Nolan provided evidence that there were 100 plus users per night and unknown amounts on weekends. The facility opened on October 9, 2007. The alleged incident occurred on March 26, 2008. Assuming 120 users per day, seven days per week, that is still less than 21,000 users. That is a significantly lower amount than well over a million users. At paragraph 46, Justice Wright found that the presence of water on the floor was a "usual occurrence". If those "well over a million users" were usually exposed to the presence of water on the floor and there had never been a complaint of a slip and fall, then that would be a factor tending to make it difficult for Justice Wright to accept the floor tiles were unsafe. In the case at hand, the presence of tape on the floor, on everyone's evidence, was not a common occurrence. Therefore, the lack of a prior complaint is not a factor that has any significant impact on determining

whether the presence of tape on the gymnasium floor was unsafe, such that the harm was foreseeable.

[63] HRM had been fortunate that there were no prior injuries, or at least no prior injuries serious enough to lead to a report. However, that does not make the harm unforeseeable, just like the fact that an injury occurs does not make the harm foreseeable. I must consider whether a reasonable person, having responsibility for and control of the premises, prior to the event, would reasonably have foreseen the risk of harm.

[64] Part of the foot movement of a badminton player includes gliding or shuffling in a backwards motion to return the shuttlecock. During such movement, the feet would glide or skim along the floor. The HRM employees working the reception desk of the gymnasium ought to have been familiar with the fact that badminton players engage in such foot movement. It ought to have been foreseeable to HRM that the foot of a badminton player could easily catch the edge of tape that was at least partially adhered to the floor, or contact an exposed adhesive surface of tape, resulting in an arrest or rapid deceleration of the movement of the foot. The whole body being in motion, it is reasonably

foreseeable that a sudden arrest or deceleration of the foot, could result in a stumble, or fall, and corresponding injury. HRM did not need an expert to provide them advice that such an event was foreseeable. However, the expert it presented at trial, Dr. Smith, did confirm that the adhesive side of duct tape had significantly greater friction than the gym floor, and that the transition from the floor to the tape would result in greater resistance against the sliding foot. He also confirmed that the momentum of the body would tend to keep the rest of the body moving. That creates the risk of injury from the arrest or rapid deceleration of the foot.

[65] Further, the duct tape used by Dr. Smith also had a smooth side. Most types of tape do. In my view, it is also foreseeable that a badminton player trying to stop with his or her foot on the smooth side of tape, with no adhesive surface exposed, would risk a slip and resulting injury.

[66] HRM argues there is no reason to think the school had not removed the tape, as there was no indication of any complaints of tape on the floor, nor of injuries arising as a result. The evidence of lack of complaints came from Ms. Nolan and Mr. McGinnis. However they did not cover the entire period the Community Centre was staffed. Mr. McGinnis added that he never personally saw tape on the

floor. Ms. Nolan said she expected the HRSB would turn over the gym in a reasonable condition for HRM's renters, most of which are involved in activities requiring a lot of movement.

[67] It is important to note that Ms. Roscoe did not complain at the time the incident occurred. She only complained at a later date, when she realized the injury would not resolve itself. Ms. Roscoe testified that, on the night in question, she simply threw away the tape, thinking the injury was minor and transient. Therefore, the lack of complaint does not confirm the lack of a tape problem.

[68] Further, the Court in ***Burrough v Kapuskasing***, at para 29, stated:

> "It is my view that the municipality failed to discharge its duty by having some of their employees perform a thirty minute inspection the spring of each year. Nor was it discharged by relying upon student instructors to inform them of potential dangers. These students were hired by the municipality to supervise children between the ages of 7 and 13 who would use the courts between the hours of 9:00 a.m. and 4:00 p.m during the months of July and August. Children would not make the same use of the courts as would older, more experienced players. <u>The municipality cannot discharge its duty by simply saying no complaints had been received from these student instructors, the children or the parents.</u>" (Emphasis added)

[69] HRM, through Ms. Nolan, was aware that tape had been used on the floor of the gym, both by the school itself, and by the RCMP group that sometimes used

the gym on Tuesdays. Both of these groups were daytime, weekday users. Knowing of the potential for tape being on the floor, HRM could not simply wait for a complaint before taking measures to protect the persons using the gym, evenings and weekends, from the hazards of tape being on the floor.

[70] HRM argues that, if Ms. Roscoe and her group did not notice the tape on the floor and remove it, it is unlikely to expect that HRM would have discovered it, given that it was only a 2 ½ to 3 inch piece of duct tape. However, during a sweep of the gymnasium floor, the sweeper is looking for foreign objects. He or she is also looking for substances, like spills or sticky spots, to spot mop. I draw that inference from the custodian schedule located at Tab 4 of the Joint Exhibit Book, which provides for the gym to be swept and spot mopped between 7:30 a.m. and 7:45 a.m. If the edge of the duct tape was lifted or the sticky part exposed, the broom would be likely to catch, stick, or at least slow, signalling there was something there warranting closer examination. Mr. McGinnis testified that if he did sweep the whole floor, he kept his eyes on the floor the whole time and would notice any mess. He also indicated that, if he saw tape on the floor, he would pick it up. Therefore, in my view, an HRM employee sweeping or inspecting the floor

would, more likely than not, discover a 2 ½ by 3 inch piece of duct tape stuck to the floor.

[71] The evidence of Ms. Nolan was that HRM took over the gym from HRSB at 5:30 p.m., at which time HRM renters immediately started using it. HRM did not delay the start of rentals for any period of time to conduct a sweep and/or inspection of the gym. The custodian schedule, at Tab 4 of the Joint Exhibit Book, suggests that 15 minutes may have been sufficient for that purpose. Even a ½ hour buffer would not be unduly onerous on HRM, it would bring the start time of the first group to 6:00 p.m. There was no indication that would be an unreasonable or an unworkable start time. Such a delayed start time, to accommodate a proper sweep and inspection, would, in my view, have been a relatively easy step for HRM to take.

[72] The premises in question were a gym. One expects a gym floor to have a uniform and consistent floor surface. Foreign objects, such as duct tape, stuck to the floor are not something badminton players using the gym expect to be there.

[73] Badminton is a high speed sporting activity. It is different from the situation where someone shopping for groceries may be exposed to the risk of produce on the floor. Movement in badminton is often quick and in a backwards direction. There is, more likely than not, a lower probability of finding foreign objects or substances on the floor of a gymnasium, than of finding produce on the floor of the grocery section of a supermarket. However, because of the rapid, multi-directional movement, the gymnasium scenario involves a greater risk of more serious injury. The produce section scenario involves a higher probability of risk situations, but a lesser risk of serious injury.

[74] Section 7(1) of the ***Occupiers' Liability Act*** provides that:

> "An occupier may, by express agreement, express stipulation or notice, ... restrict, modify or deny the duty created by section 4(1) ... ."

[75] In the case at hand, there was no evidence of any agreement, stipulation or notice so restricting, modifying or denying HRM's duty of care. The rental contract, at Tab 2 of the Joint Exhibit Book, according to Ms. Nolan, was the full document and contained all the terms and conditions of the contract. It did not say anything about the Carl Hickman Group being responsible for cleaning, nor

inspecting, the gym before using it. It did not have any limitation of liability clause.

(ii) Reasonableness of System in Place

[76] A reasonable system for maintenance must be in place. The defendant must ensure the persons responsible for carrying it out comply with its requirements. The system must have been followed during the period in which the incident occurred. [***Teigland v Killarney Gardens Cooperative***, 2001 BCSC 811; ***Rees v BC Place***, [1987] BCWLD 756]

[77] HRM points to ***Miller v Royal Bank of Canada***, 2008 NSSC 32, at paragraph 118, where it was noted that there was no system or policy in place dealing with floor cleanup. The floors were monitored and mopped on an *ad hoc* basis. Some moisture was observed on the floor of the ATM foyer the morning of the incident; but, it was not determined to be enough to warrant mopping. The Court found the defendant bank was not liable because, requiring it to monitor an ATM foyer for wet footprints, would be requiring it to observe a standard of

perfection and to act as an insurer. HRM argues that, similarly, requiring it to inspect for tape never reported would be holding it to a standard of perfection.

[78] In my view, there are important distinguishing features between the ***Miller*** case and the case at hand.

[79] Firstly, the allegedly hazardous condition in ***Miller*** was a wet footprint, not snow, nor a puddle of water. Justice LeBlanc found it would be holding the bank to a standard of perfection to require it to monitor the ATM foyer floor to ensure it was dry. In that situation, people were constantly tracking in moisture from outside, and people simply walked in, directly from outside, to use the ATM, expecting wet footprints on a frequent basis. In the case at hand, the premises in question are a gymnasium. People are not constantly tracking in moisture, or other substances, from outside, and the floor is used for activities requiring rapid movement and change of direction, rather than simply walking. Athletes expect the gym floor to be free of foreign substances and objects.

[80] Secondly, the Royal Bank of Canada had occupied the premises the entire time. It knew it had not been snowing, nor raining, the weather was simply misty.

Employees had observed moisture on the floor. They simply did not see it as significant enough to mop. In contrast, HRM had the gym turned over to it at 5:30 p.m., without knowing, nor having control over, what had been occurring in the gym since 8:00 a.m. that morning. They had not inspected the condition of the floor at all to make any assessment whether it required cleaning.

[81] Thirdly, the risk of injury from encountering moisture in the form of wet footprints in an ATM foyer, while walking in to use the ATM, is minimal compared to the risk of injury from encountering duct tape, or other foreign objects or substances, on the floor of a badminton court while playing.

[82] Consequently, in my view, ***Miller*** does not lead to a conclusion that there was no need for HRM to have a system in place in the case at hand.

[83] "If an occupier has failed to take certain actions which, if taken, would have prevented injury to a person on the premises, it is incumbent upon the occupier to demonstrate that in the circumstances it was reasonable not to have taken any preventive action." [***Sandberg v Steer Holdings Ltd.*** (1987), 45 Man. R. (2d) 264 (Q.B.), para 22]

[84] Though occupiers must make premises reasonably safe, the duty is not absolute, occupiers are not insurers, and they need not observe a standard of perfection. [***Corbin***, para 32; and, ***Miller***, para 119.]

[85] However, the goal of the ***Occupiers' Liability Act*** is to require, where the circumstances warrant it, positive action to be taken to make the premises reasonably safe. [***Waldick***, para 45] The occupier cannot simply wait for a complaint and then react.

[86] The "system" which HRM had in place, according to the custodian schedule, was to have a single custodian sweep and spot mop the gym floor for 15 minutes, starting at 7:30 a.m. each weekday. Ms. Nolan testified that the custodian did not work weekends. In addition, she indicated that HRM simply adopted a schedule that was created by a custodian outlining what he felt was the best use of his time. It was not created by HRM to ensure reasonable measures were in place to detect and remedy the presence of objects and substances on the gym floor which might endanger the safety of patrons. Further, Ms. Nolan indicated it was only posted as a guideline for custodians, not a firm directive. As such, it was not a well thought

out system, focussed on ensuring the safety of gym patrons. The only additional measure in place, which might provide such protection, was the measure described by Mr. McGinnis. He indicated that, when he was working evenings, he would do spot checks for spills and debris. However, this was only at the end of the evening. Otherwise, the HRM employees working the reception desk would only clean if a spill was reported to them. Ms. Nolan testified that it was that person's job to clean up such reported conditions. There was no custodian on after 4:30 p.m. In addition, there was no cleaning, nor inspection, scheduled for any time after HRSB turned over the gym to HRM at 5:30 p.m. and prior to the renters using the gym.

[87] Mr. McGinnis confirmed that he would clean up reported spills. Ms. Nolan confirmed that it was not the reception desk person's responsibility to dry mop, nor spot mop, the gym. That was the custodian's responsibility. Specifically, no one was expected to mop after the gym was turned over by HRSB at 5:30 p.m., and prior to HRM renters starting any activity. She agreed there was nothing preventing HRM from starting gym rentals at 5:45 p.m., to give time to inspect and clean the gym.

[88] Mr. McGinnis testified he would try to do a check between groups to ensure there were no gum or chocolate bar wrappers, or similar objects, left behind. However, he did not want to cut into the renters' times. So, he only did that if a group left early. He was asked whether he did anything between the youth badminton group and Carl Hickman's Group, on the night in question. He said that it depended on how anxious they were to start. He indicated the Carl Hickman Group, most of the time, was very anxious to start.

[89] More likely than not, on March 26, 2008, the gym went straight into use by evening groups. There was no cleaning, nor inspection, prior to the Carl Hickman Group using the gym.

[90] HRM argues that, given the use made of the facilities during the day, they could not reasonably be expected to protect against the danger in question.

[91] According to Ms. Nolan, the gym, during the day, was used for physical education, athletic team practices and "other school uses". No tape was permitted to be used in the gym because it left a sticky residue and damaged the walls and

floor. HRM argues that it would not expect liquid, garbage, food or debris from outside on the floor. Therefore, morning cleaning should be sufficient.

[92] However, Ms. Nolan indicated that she knew tape was used in the gym by the RCMP group and by the school. Thus, HRM knew that. Ms. Nolan saw, "probably" only once, the school use tape in the gym for a "BEAT" test, which involves running back and forth between marked lines. She would have had to have walked to the door of the gym, and looked in through the small window, to see that. She could not see it from her desk. She has no idea of the type of tape used. She did not focus on what the school did during their time with the gym. She took a hands-off approach to activities and acts by the school. She said that what they did was none of her business. She did not know who could direct them not to use tape.

[93] HRM submits there is no reason to think the school would not have removed the tape, prior to turning over the facility, as there were no complaints received of tape on the floor. However, as noted in ***Kapuskasing***, HRM had a duty to take positive steps to ensure the gym floor was safe, not just put in place a system after there was a complaint.

[94] HRM argues that the floor was clean, and that even Ms. Roscoe confirmed that it was “beautiful”. Therefore, it submits, there was no reason to clean. However, Mr. McGinnis did say that he would pick up gum and chocolate bar wrappers. These, more likely than not, were consumed in the gym. Pieces of gum or chocolate bar on the floor would also create a hazard. Therefore, HRM, through Mr. McGinnis, ought to have known there was a reason, in addition to the known use of tape, to clean, or at least inspect, the gym prior to it being used by the renters.

[95] HRM, through its counsel, agreed the condition of a gym floor was important, because people are running all over the floor. In my view, it is important that there not be spots on the gym floor with sticky or slippery substances. Both types of substances create a hazard. It is also important that there not be foreign objects on the floor. Yet, there was no measure in place to check whether the floor was in good condition. HRM relied on HRSB to hand the gym over in good condition, free of foreign substances, such as slippery and sticky spots, and foreign objects. Even if one were to conclude that HRM could not expect the presence of tape on the gym floor, they ought, at least, have expected

that, at times, there would be other foreign substances or objects on the floor, which would pose a risk for athletes. HRM had an obligation to look generally for those types of risks.

[96] It would have been easy for HRM to have a system requiring a 15 to 30 minute sweep and/or inspection, on turn-over from HRSB, before the evening renters started using the premises.

[97] Ms. Nolan testified that, prior to March 26, 2008, she was not aware of complaints of duct tape, or any tape, in the gym, nor of any complaints of any injury because of tape on the gym floor. HRM argues that evidence that the floor was clean shows that there was no need to do an afternoon cleaning. HRM argues that Mr. McGinnis randomly picking up gum wrappers, and spot cleaning of spills, was sufficient.

[98] In my view, failing to verify the safety of the premises, after it has been in the possession, and under the control, of another party all day, simply because there have not been any complaints of any problems, would not be taking reasonable care, unless HRM only had a duty to be reactive to complaints.

However, HRM cannot discharge its duty of care by merely reacting to complaints. It has a duty to take positive steps to ensure the safety of its patrons.

[99] In my view, it is not holding HRM to anywhere near a standard of perfection to require a system in place to check the condition of the floor of the gym, upon it being turned over by HRSB. It is simply requiring HRM to do something, instead of nothing, when it takes over the premises after they have been in HRSB's exclusive possession and use all day.

[100] Based on the foregoing, in my view, HRM did not have a reasonable system for maintenance and/or inspection in place.

(iii) Whether System Followed on Day of Event

[101] Even if I had found the system in place reasonable, the system would still would have to have been followed, by HRM, on the day in question, to relieve it of liability.

[102] HRM argues that there is no evidence to suggest that the custodian did not sweep and spot mop the gym between 7:30 a.m. and 7:45 a.m. that morning. However, the onus is on HRM to at least provide circumstantial evidence from which it can be inferred the task was completed.

[103] The Court in ***Atkins v Jim Pattison Industries Ltd.***, [1998] B.C.J. No. 3050 (C.A.), at paragraphs 3 and 6, stated:

> "Where there is evidence of a *prima facie* breach of the statute, an occupier may refute the breach by calling evidence to show that it had put into operation a reasonable scheme which was being followed at the time of the incident.
>
> ....
>
> ... The plaintiff had established a *prima facie* case of negligence. The defendant sought to refute it by showing that it had a reasonable scheme in place which was being followed. It is not enough to demonstrate that there is a plan in existence. The defendant must call some evidence to show that it was being followed. To paraphrase Cumming J.A. in *Kayser v Park Royal Shopping Centre Ltd.* (1995), 16 B.C.L.R.(3d) 330 at p. 334, there must be evidence from which it is reasonable to infer that the system in place for ensuring that hazards are minimized was followed on the day in question. In some cases the occupier may not be in a position to show that a particular person swept the floor (or did whatever the plan required) on the particular day in question. It must at least establish that there was routine compliance with the scheme from which the trial judge can infer observance on the day in question."

[104] In the case at hand, there was not a sufficient system in place to ensure that hazards were minimized. Nothing at all was done on the transfer of the gym to HRM. HRM depended on HRSB handing over the gym in a safe condition. Even if the system had been sufficient, there is no evidence from which I can infer the system was followed. There is not even any evidence that it was usually followed. The custodian schedule was only posted as a guideline for custodians, not as a firm directive. Ms. Nolan testified that the custodians changed a lot. There was no evidence about whether the schedule was given to them immediately, nor what was said to them about the requirement, or importance, of following the schedule. Ms. Nolan agreed that there was no way to determine if the cleaning schedule was followed on March 26, 2008, as no cleaning logs were kept.

(iv) Finding on Whether Standard of Care Met

[105] In my view, considering the factors outlined in Part 2(c)(i) above, to meet the standard of care required in the circumstances of the case at hand, HRM would at least have to have conducted an inspection and/or cleaning of the gym when it took over use of it, from HRSB, at 5:30 p.m. on March 26, 2008. It did not have a

system in place requiring such an inspection and/or cleaning; and, there is no evidence from which I can infer it was done on March 26, 2008. I find nothing was done to check the condition of the gym between when HRM took it over from HRSB and the time of the incident in question. Therefore, HRM has failed to meet the standard of care required of it.

(e) Causation

(i) Whether the Duct Tape is What Caused Sudden Stopping and Subsequent Injury

[106] Ms. Roscoe described that her movement, while playing badminton, does include an intentional sliding motion. The foot with little weight on it sort of slides on the floor when you want it to; but, when you want to stop, you can.

[107] She indicated that, at the time of the incident in question, she was moving back quickly, "probably", using a side gait with some shuffling. She had been mid-court. She was running back looking up, and her racket was up, to return a high clear shot going way to the back of the court. She recalls thinking it may be

out of bounds. She was moving backwards for the shot using a combination gliding, shuffling and a side-stepping motion. Her right foot was stopped suddenly. She stumbled and lost her balance. She did not recall whether she moved a few steps. She indicated that she probably leaned back. She did not really know where her left leg was. She indicated it probably came off the ground. She moved back, and forward again, as she regained her balance. She did not intend to stop at that point. At first, she did not know why she was stopped. However, she looked to the spot where she felt her foot had been stopped. She recalls looking down and seeing the duct tape right next to her right foot. It was in front of where she had been when she finished her stumble. It was sticky side up on the floor. She, at that point, recognized that her right foot had been stopped suddenly because of the tape. She did not know what part of her foot contacted the tape. It could have been the heel or the side. She had not seen the tape on the floor before then. It had been stuck to the floor and had rolled over itself. There was still some of the sticky part on the floor. It was located right where her foot was stopped. She is sure that is what stopped her foot, not the sole of her shoe against the bare gym floor. She had never been stopped unintentionally before. There was nothing else there to stop her foot.

[108] I find Ms. Roscoe's evidence establishes that she was moving backwards to return a shot, using some combination of foot movements in which her right foot was moving along the surface of the gym floor, when her rear foot contacted duct tape, that was at least partially stuck to the floor, and was stopped suddenly, resulting in her stumbling and regaining her balance.

[109] She testified she was unable to continue playing badminton that night because of the pain in her knee area. She went home, iced her knee, and rested it over the weekend. On Monday she tried to play badminton again. However, she was only on the court two or three minutes and was unable to continue. She had realized she was injured as soon as it had happened. However, she had thought initially that it was simply a sprain and it would resolve itself within a day or two. On Monday she realized that it was worse than she had thought. She was unable to run. Her knee got worse and it became very painful.

[110] Prior to the incident, she already had arthritis in her hands, back and knees. She had been taking Celebrex for that. She generally had to ice her knee and elbow after badminton and golf. Her arthritic pain manifested itself as a general

overall ache. The pain she experienced, starting on the night in question, was a sharp pain inside the knee.

[111] Prior to the incident, although her hips were sore after walking, it did not prevent her from walking. After the incident, she was generally only able to walk for two or three minutes, before the pain prevented her from continuing. However, occasionally, for some reason, it would not hurt, and she could walk for longer periods.

[112] There is a note in the Joint Exhibit Book, Tab 8, at page 9, in the Family Practice Associates' entry for April 16, 2008, and, again, at page 47, in a letter from Dr. R.H. Yabsley to Dr. Diane D'Arcy, regarding a visit by Ms. Roscoe on April 24, 2008, indicating that Ms. Roscoe continued to play after her foot was caught on a tape causing her to stop suddenly. For the reasons noted at paragraph [9] herein, I find that those notes are erroneous, and I accept the evidence Ms. Roscoe and Mr. Lynch that Ms. Roscoe: was not able to continue playing that night; had to stop after two or three minutes the following Monday; and, has not played badminton since.

[113] At Tab 16 of the Joint Exhibit Book, there is a letter from Dr. Glen Richardson to Ritch Durnford. Dr. Richardson is the surgeon who conducted arthroscopic surgery in which a meniscal tear in Ms. Rocsoe's right knee was repaired. The tear had been detected through magnetic resonance imaging ("MRI"). In this letter, Dr. Richardson stated:

> "I am stating in my note that it is a possibility that her meniscus was torn secondarily to her traumatic injury. Unfortunately with osteoarthritis, meniscus pathology can be associated with degenerative changes within the knee. I have difficulty being definitive that the badminton injury actually caused the tear of her meniscus. It would be in keeping with her description of events where she had minimal symptoms in her knee prior to the badminton injury and then subsequently had more pain and discomfort in her knee. Furthermore, the arthroscopic debridement of the torn meniscus and articular surface resulted in an improvement in her symptoms and based on my last assessment she had returned to her baseline osteoarthritic symptoms that she had in her knee prior to the badminton injury. Based on that history and response to treatment it is highly likely that the meniscus pathology resulted from her badminton injury.
>
> Without having a definitive test prior to her injury, it is difficult to attribute one specific damage to her knee resulting from the accident. Nevertheless, clearly there was injury from her badminton accident that was helped by the arthroscopic procedure. Whether that it the meniscetomy or the debridement of the articular surface damage." (Emphasis added)

[114] HRM has essentially admitted that the meniscus injury was caused by the stumble during the incident in question.

[115] Based on: the sudden onset of pain; the inability to return to badminton following the incident; the continuing problems with the knee up until the arthroscopic surgery and the rehabilitation following it; and, the opinion of Dr. Glen Richardson, I find that, more likely than not, the stumble, during the incident in question, caused the meniscus injury.

[116] I accept that Ms. Roscoe's foot was stopped where the duct tape was located by her and that there was nothing else there to stop her foot. I accept that her foot was not simply stopped by her badminton shoe rubbing against the bare floor of the gymnasium. It had never happened to Ms. Roscoe before. However, I am of the view, that she would have been able to distinguish that type of feeling from the feeling of her foot coming into contact with an object on the floor of the gym. There was no evidence of anything else that might have caused the sudden stopping of her right foot as it was moving backwards. I find that, more likely than not, the duct tape in question is what caused the sudden stopping of her foot.

[117] I find the injury would not have occurred but for the presence of the duct tape.

(ii) Whether Incident Would Not Have Occurred But For Breach of Standard of Care

[118] HRM argues that there is no evidence to suggest the tape was not brought in on the footwear of a player in the youth group, which played from 5:30 p.m. to 7:00 p.m., using the entire gym, or the other adult group that was playing in the other part of the gym that night, at the same time as the Carl Hickman Group. HRM points out that the only evidence of badminton players not wearing footwear outside is in relation to the Carl Hickman Group itself. That evidence came from Ms. Roscoe.

[119] It is, of course, a possibility that the tape was brought in on the footwear of a player that played after 5:30 p.m. on March 26, 2008. However, there is no evidence from which I can conclude that that is the most reasonable inference. It is merely speculation. The only evidence of the presence of tape, prior to the incident, is in relation to tape that was deliberately placed by groups using the gym. There is no evidence that tape was ever brought in on footwear. On the evidence before me, the most reasonable inference is that the tape was put there by a group who used the gym before it was turned over to HRM.

[120] It was not likely to have been from the RCMP group. According to Ms. Nolan, the last time they had been there was on March 18, 2008. Thus, more likely than not, it was there because it had been used by the school.

[121] HRM argues that the fact that the youth group used the court, in which the incident occurred, from 5:30 p.m. to 7:00 p.m., and the Carl Hickman Group used it for about one hour before Ms. Roscoe's injury, without encountering tape or sustaining injury, suggests that the tape was not there the entire time, or was not generally a risk to players.

[122] Mr. Lynch testified that the injury occurred between 8:15 and 8:30 p.m. The Carl Hickman Group started at 7:00 p.m. There is no direct evidence that others encountered or noticed tape that night. There is also no direct evidence they did not. However, the most reasonable inference is that, if they had, they would have disposed of it, as Ms. Roscoe testified she did. However, the tape was located at, or near, the area of the court boundary lines. That is an area that would not be treaded upon as frequently as the part of the court that is more within the boundary lines. It is more likely that others were more fortunate, such that their foot did not

catch the tape, either because they did not contact it at all, or because: they did not have the same weight on their foot at the particular spot required to catch the edge of the tape; they were using a different gait; or, were not at the same point in their stride. Even though the tape may not generally cause injury, that does not mean that it is not generally a risk. Dangerous premises and circumstances can exist for a long time without injury being caused. Not all grapes, on a produce section floor, even if stepped on, cause a fall, but they all pose a risk of causing a fall. It is not necessary to prove that injury is certain to occur before positive steps are required to protect people entering premises. However, in my view, the closer the injury is to being certain, the closer the protective steps must be to being perfect.

[123] If the gym had been swept and spot mopped at 5:30 p.m., would the duct tape have been discovered and removed?

[124] According to Ms. Roscoe, the duct tape was about 2 ½ to 3 inches in length, and, it was rolled over itself. That is a relatively small piece of duct tape on an 8400 square foot gym floor. However, it was noted by Mr. McGinnis that, while sweeping, the sweeper keeps his or her eyes focussed on the floor. That person is looking for foreign objects, spills, stains and sticky substances. A piece of duct

tape with the edge lifted or a portion of the adhesive side exposed would, more likely than not, be noticed. The broom would be likely to catch, or stick, or slow, signalling something warranting a closer examination. Mr. McGinnis testified that, if he did sweep the whole floor, he kept his eyes on the floor the whole time and would notice any mess. He said that if he had seen tape he would have picked it up. Further, the floor would have been completely open. The badminton nets were not installed until the youth group started their session. No other persons would have been using the gym yet for the evening activities. The totally open gym, without the nets installed, would have been free of the distraction, view blocking and shadows created by the nets and poles. It would have made it easier to spot a piece of tape from a distance when the gym was clear of equipment and people. In my view, a person sweeping, spot mopping, and simultaneously inspecting, the gym floor, would, more likely than not, have discovered the piece of duct tape, despite its small size. It would not stand out readily for someone entering the court, anxious to get playing badminton, and only alerted to the importance of looking for feathers. However, the duct tape was grey, thus it was a slightly different colour than the court boundary lines. As such, it ought to have been relatively easily detectible by someone covering the entire area of the gym floor, sweeping, and looking for foreign objects and substances.

[125] HRM argues that the tape would have been removed because it causes damage to the floor, not because it is a hazard, thus, the failure to remove it should not render HRM liable. In my view, there are three reasons that this argument does not materially advance HRM's case. Firstly, tape causes damage to a floor when it is removed. Removal is what can either pull up the floor coating or leave sticky residue. So, if the tape is not considered a hazard, one would expect that it would not be removed right away by an HRM desk person who might be sweeping the floor. One would expect that it would be left to a later time so that a specialized and careful removal method can be used to minimize the damage. Therefore, when Mr. McGinnis indicated that he would remove the tape, more likely than not, he would have done so because he thought it a hazard, irrespective of the reasons given by HRM for prohibiting the use of the tape. Secondly, and more germane to the case at hand, even if HRM did not recognize the hazard created by the presence of tape, in my view, it is a hazard. Depending on the portions of the tape that are exposed, and on the way it is contacted by the badminton player's foot, it can be a catch hazard, or a slip hazard. In my view, HRM ought to have recognized that. Thirdly, irrespective of the reason for removal, upon discovery of the tape, even while looking for other hazards, it would have been removed in any event.

(f) Contributory Negligence

[126] HRM argues that Ms. Roscoe: failed to keep a proper lookout; did not inspect or check the floor before she started playing badminton; had a common-law duty to take reasonable care for her own safety; did remove some feathers from the shuttlecocks used by the youth group because they could cause her to slip; similarly, ought to have conducted a careful inspection of the court floor for other foreign objects or substances; and, in failing to do so, was contributorily negligent.

[127] However, unlike HRM, Ms. Roscoe had no knowledge of prior use of tape in the gym. Ms. Roscoe testified that she had never seen tape on a badminton court before. Mr. Lynch also testified he had never encountered tape at any of the facilities he played badminton at before and there was never any mention of duct tape, or tape of any kind. It is not something that he was looking for. In his view tape on a gym floor is “unbelievable”. Consequently, in my view, tape is not a hazard that Ms. Roscoe would have expected or thought to look for. She was aware of the use of feathered shuttlecocks. She did look for that hazard. The feathers are white and light weight. That makes them easy to detect because they

contrast with most of the floor, which is a multi-shaded brown colour. In addition, the feathers floated up easily, also making them easy to detect. Ms. Roscoe testified that there were very few feathers and that she could just see them as she walked by and they floated up because of their light weight. In contrast, grey duct tape stuck to the floor, in the area of multiple and multicoloured court boundary lines, is more difficult to detect. It does not show up as well against the floor.

[128] In addition, there is no evidence that Ms. Roscoe was aware of any other foreign objects or substances having been on the gym floor which would cause her to inspect for their presence before starting to play badminton.

[129] Further, I find that a badminton player's focus would be on the game itself, the other players and the shuttlecock. They would be looking up in the air a lot. They would only be making brief and occasional checks of the floor markings to avoid foot faults. In my view, Ms. Roscoe could not be expected to conduct an inspection of the court for duct tape, nor to have noticed it without conducting such an inspection. As such, I cannot find that she was contributorily negligent.

[130] Similarly, I cannot find that she was contributorily negligent by not sweeping the court herself prior to starting. Mr. Lynch testified it was never their practice to sweep or mop at the Citadel Community Centre because it was a brand new floor. They had done so at the St. Andrews' School, because the floor there was generally dirty. However, both Mr. Lynch and Ms. Roscoe testified that they did not even know where they could access brooms and mops at the Citadel Community Centre.

3. DAMAGES

(a) Effect of Injury

[131] Ms. Roscoe provided evidence of: the effect of the incident on her; and, the comparison between her pre and post-incident conditions.

[132] She was unable to continue playing on the night of the incident because of the pain. She realized as soon as it occurred that she was injured. However, she thought it was simply a sprain and that she would be fine. She iced her knee and rested over the weekend. On the Monday, she tried to play badminton. However,

after two or three minutes she realized she could not continue. As she tried to run, the pain in her knee became worse.

[133] Her knee continued to be very painful, especially when she tried to walk down steps. The pain was in her right knee, on the side that was suddenly stopped. Mr. Lynch confirmed that walking stairs, especially going down, became very difficult for Ms. Roscoe.

[134] Prior to the incident, she already had arthritis in her hands, back and knees. She took Celebrex for that. In addition, she generally iced her knees and elbow after badminton and golf. However, she managed to continue playing. The pain from the injury suffered during the incident in question was different. It was not a general ache. Rather, it was a sharp pain.

[135] Following the incident she was unable to walk for more than two or three minutes. Mr. Lynch confirmed that, following the incident, Ms. Roscoe could not walk for very long. His estimate was a maximum of five minutes. He added that, prior to the incident, they used to walk 40 to 45 minutes each morning.

[136] Ms. Roscoe's visit to the doctor, on March 31, 2008, was a previously scheduled appointment. The appointment she had, on April 16 2008, with Dr. R.H. Yabsley, was an appointment she made for her knee. It is on that date that she first reported her knee injury. Prior to that, she had thought the problem would resolve itself quickly.

[137] From April 9, 2008, to May 22, 2008, she saw Shaun Sangster, at Halifax Physiotherapy, 15 times. She found that the physiotherapy was helping a little. There was a note, in a letter from Dr. Yabsley to Dr. Diane D'Arcy, arising from an April 24, 2008 visit, indicating that, on the day before (i.e. April 23, 2008), Ms. Roscoe walked for ½ hour and that it did not appear to have "stirred things up". Ms. Roscoe's view is that this would have been a rare event. By that time, she thought she might have improved about 75%. She recalled any walking being painful. She specifically recalled an incident where she got off of the plane in Halifax and was hardly able to walk to her car.

[138] Ms. Roscoe had an MRI conducted in a private clinic because she wanted to fix the problem with her knee as soon as possible. She had found out it would be the end of July if she did not have it done in a private clinic. An MRI report, dated

May 5 2008, indicated a long history of anterolateral knee pain and recent hyperextension strain, and revealed a “tear of the posterior horn of the medial meniscus”. That is when she found out that her meniscus had been torn.

[139] In May of 2008, Dr. Yabsley referred Ms. Roscoe to Dr. Gerry Reardon for a consultation for arthroscopic surgery. Dr. Reardon had a long wait list for arthroscopic surgery. Therefore, Ms. Roscoe arranged for surgery in a private clinic in Montreal so that she could get it done quickly and get back to playing golf.

[140] From June 6, 2008, to October 1, 2008, she saw Dr. Mattias Jaepel 12 times for medical exercise therapy. That was helping. She thought it would work. Dr. Jaepel recommended against arthroscopic surgery. Therefore, she cancelled her appointment in Montreal.

[141] Dr. Jaepel got her to the point of being able to play golf from a cart. During the 2008 golf season, which runs from May to November, she did play golf, from a cart, 46 times. However, she did not play well and did not play as often as she wanted. She missed tournaments because her golf game had become so bad. She

was not able to swing the golf clubs properly because it hurt her to do so. While she was swinging, it would put weight on her right knee. She had to wear a knee brace when she played golf. Mr. Lynch confirmed that Ms. Roscoe: took therapy; could swing her clubs; had difficulty getting from the golf cart to the point of her shot; and, wore a knee brace, which appeared to cause her discomfort.

[142] Hazel McDonald, who plays golf with Ms. Roscoe, testified that, prior to the incident, Ms. Roscoe was a very competitive golfer. She had made it to the playoffs to be on the Nova Scotia Team for a national tournament. They would walk when they played golf together. Ms. Roscoe preferred walking. She would only take the cart on a very hot day. However, after the incident, Ms. Roscoe used a cart. She would go by herself in the cart. She appeared to have trouble getting in and out of the cart. She also wore a brace on her leg. Ms. McDonald could tell that Ms. Roscoe was struggling to play. Her handicap went up. She had difficulty negotiating steep terrain.

[143] The fact that Ms. Roscoe would no longer walk the course, as she had liked to do, and had done, before the incident, was also confirmed by Mr. Lynch.

[144] Ms. McDonald pointed out that, while on the course, Ms. Roscoe was limping, and, in pain. Further, she was grumpier than she had been before.

[145] Ms. Roscoe had a preplanned trip to Scotland, during which she had planned to play golf. Some of the courses did not permit golf carts. Therefore, she had to walk them. She found it difficult. Her group would allow her to putt out first. Then she would go to the next tee-off and sit on the bench waiting for them. She had a caddie to carry her clubs. Still, she became really tired. Further, despite her condition, she climbed the Glen Cove Tower, because her ancestral history made it important for her to do so. Mr. Lynch confirmed the experience in Scotland and he indicated Ms. Roscoe hobbled her way over the courses where no carts were permitted. She had a hard time coming down the spiral staircase in the tower. He added that she was unable to hike around the beautiful countryside.

[146] Ms. Roscoe ended up seeing Dr. Glen Richardson, an orthopaedic surgeon with a shorter wait list than Dr. Reardon. Dr. Richardson performed arthroscopic surgery on her on January 27, 2009. His report dated June 16, 2009, to Ritch Durnford, located under Tab 15 of the Joint Exhibit Book, at page 2, indicates that he saw Ms. Roscoe in a follow-up visit on February 10, 2009. It states:

> "At that time she was doing reasonably well and her wounds were healthy. Her range of motion was improving. I made arrangements for her to have physiotherapy and a prescription was given to her. Subsequently follow-up was then arranged for May 14, 2009.
>
> On that visit she felt that she was doing better. She felt her swelling and pain were improved that she was able to be active and in fact golfed 18 holes without the use of a cart. So, she was pleased with the result of her surgery although I think the long term concern is the underlying degenerative osteoarthritis of her knee and the likely progression over the ensuing years.
>
> ....
>
> With regards to the question about the prognosis for her recovery; I would submit her prognosis is good in the sense that the meniscus pathology has been dealt with. However, long term her knee will probably give her more problems as osteoarthritis generally is a progressive condition that will get worse in time. I don't feel the meniscus injury is likely going to be the pathology that will cause her the most difficulty over the years, it is more likely going to be related to her underlying osteoarthritis."

[147] Dr. Richardson had advised Ms. Roscoe that she could not golf for six weeks after her surgery. The end of the six weeks fell at the end of the second week of a three week golf vacation she had booked in Florida. Mr. Lynch confirmed that Ms. Roscoe was only able to play golf the third week of their March 2009 Florida vacation.

[148] From November 4, 2008, to June 8, 2009, Ms. Roscoe attended chiropractic treatment at Active Approach Health and Wellness Centre, 19 times. Part of the treatment she received was laser treatment for the bursitis in her left hip. The records indicate that Ms. Roscoe has had bursitis in both hips for 25 years. However, she indicated the knee injury she suffered while playing badminton caused her to walk with a limp, and that aggravated her left hip. That is also reflected in the Active Approach notes at Tab 9, page 8.

[149] From March 24 to May 25, 2009, she received acupuncture in her left hip, from Dr. Lu, 9 times. That fixed her hip problem.

[150] From February 17 to June 2, 2009, she received post-arthroscopic surgery physiotherapy on her right knee from Alison Buckley, at Young Kempt Phsyiotherapy and Massage Centre, 11 times. She gradually improved through the therapy. By April 29, 2009, she had started golfing about half of the course on foot, according to the handwritten notes attached to Ms. Buckley's March 5, 2009 report, located at Tab 10 of the Joint Exhibit Book. Ms. Roscoe built up to 18 holes by the end of her treatment.

[151] Ms. McDonald indicated that, after her operation, Ms. Roscoe was still cautious going down steep slopes. She progressed over the summer and did not appear to be in the same pain she had been in prior. Ms. McDonald was of the view that Ms. Roscoe seemed to be doing okay.

[152] Ms. Roscoe indicated her golf game improved. That was important to her. She plans to return to competitive golf this summer. Her pre-incident handicap was 16. Her handicap is now 17. She indicated that she walks regularly and a fair amount. She gave, as an example, that she had walked an hour and a half on the Sunday before trial. In her view, she's fine. She was able to do all of the walking she needed to during her Baltic Trip to Russia following surgery in 2009.

[153] Ms. McDonald confirmed that Ms. Roscoe now walks the golf courses, without her brace, and that her game has improved, bringing her back to where she was.

[154] Mr. Lynch was of the view that Ms. Roscoe had made a good recovery; but, was not pain free yet. He confirmed she now walks the golf courses. However, he

indicated that, even though they walk occasionally, they never got back to their morning walking routine. He indicated that Ms. Roscoe does Tai Chi now.

[155] Ms. Roscoe acknowledged that she did not suffer any loss of housekeeping capacity because Mr. Lynch had taken care of those tasks in any event. That was confirmed by Mr. Lynch.

[156] Ms. Roscoe indicated that her injury had little impact on her work as a judge.

[157] However, she indicated she gained a lot of weight because of the lack of exercise which resulted.

[158] Ms. Roscoe gave evidence of her current residual symptoms.

[159] Prior to the incident, she would squat to do her gardening work. Following the incident, she was not able to squat; therefore, she did her gardening with a stool. She also was not able to squat to clean her home when preparing to move. She indicated that she is still unable to squat down.

[160] Mr. Lynch confirmed her inability to squat, not only to do gardening work, but also to read a putt. He indicated that she has to go down on one knee now to read a putt. He acknowledged that she did have prior problems with sore knees from time to time; but, that did not prevent her from squatting.

[161] Ms. Roscoe indicated she still has trouble walking down steep hills, which she did not have before the incident.

[162] Ms. Roscoe stated that she is not able to play badminton now because she only has half a meniscus in her right knee. However, she acknowledged Dr. Richardson advised her that he did not recommend her playing badminton because she had arthritis and badminton was hard on her knees. Nevertheless, she also thinks that her meniscus damage creates an impediment to her playing badminton. There was no medical evidence that the meniscus damage she suffered prevents her from playing badminton. Therefore, I cannot find that her current inability to play badminton is a result of the incident in question.

[163] Otherwise, Ms. Roscoe testified that she was back to her normal activities by June or mid-June of 2009.

[164] Ms. Roscoe further gave evidence related to her pre-existing conditions, for the most part confirming the existence of the conditions noted in her medical file.

[165] In a letter from Nancy Egan, physiotherapist, dated October 27, 1993, to Dr. D'Arcy, located at page 40, of Tab 13, of the Joint Exhibit Book, it is stated:

> "Mrs. Roscoe was first seen in this Clinic on August 19, 1993 for treatment of right posterior thigh pain which had been occurring intermittently since early July 1993. Mrs. Roscoe reported a history of intermittent back pain for several years. She reported that the pain was present in the right posterior thigh when playing golf and when walking; especially up hill."

[166] In the handwritten notes from the August 19, 1993 visit, attached to the letter, at page 43, of Tab 13, it is noted that the pain was "severe" and "sharp".

[167] In a "Final Progress Report", from Sharon Mailman, physiotherapist, dated June 29, 1995, located at page 33, of Tab 13, under the heading "Initial Status - Chief Complaints", it is stated:

> "Bilateral pain over the greater trochanters described as a pulling sensation with a soreness and pinching. Her pain was aggravated by walking, going up and down hills and stairs, and getting up and down from a chair repeatedly."

"Trochanter" is defined in Mosby's Medical Dictionary, 6th edition (Toronto: 2002, Mosby Inc.) as "one of the two bony projections on the proximal end of the femur that serve as the point of attachment of various muscles". Thus the report is assessing pain in the hips.

[168] A letter dated December 10, 2009, from Dr. G. Robert Tharp, to Dr. Diane D'Arcy, located at page 134 of Tab 8, notes that Ms. Roscoe was "having pain in her lower thoracic spine, primarily at night". Ms. Roscoe indicates that Tai Chi has helped with that problem. In addition, the fact that she sits less also helps. She indicates that her spine is now fine.

[169] A report, dated September 14, 1998, from Sharon Mailman, physiotherapist, to Dr. Stalker, located at page 21, of Tab 13, describes pain in the right greater trochanter or hip region, which "was aggravated by going up and down hills, prolonged walking, and playing golf" but, "eased by application of ice". Ms Roscoe indicated that that problem did not interfere with her continuing her regular activities.

[170] In a report dated May 7, 2002, from Rhonda Reardon, physiotherapist, to Dr. D'Arcy, located at page 17 of Tab 13, it is noted that Ms. Roscoe reported:

> "[A] 3-4 year history of right knee pain. She reports that, as of late, the pain has worsened to the point where she is experiencing medial knee pain in the rest position. She can attribute no cause for the increase in symptoms, except for she remembers increased use of stairs at work over approximately a one week period. At the present time, she reports particular difficulty going up and down stairs and going from a standing to a sitting position."

[171] A diagnostic imaging report ordered December 21, 2004, and located at page 133, of Tab 8, noted:

> "There is also mild uptake around the right knee, likely related to degenerative changes."

[172] Ms. Roscoe indicated that she simply iced her knee after badminton and that her knee did not cause her problems otherwise. I took that as a general comment on the condition of her right knee prior to March 26, 2008. I did not take it as a denial that, in 2002, she was "experiencing medial knee pain in the rest position" and having "particular difficulty going up and down stairs and going from standing to sitting position".

[173] A letter dated September 8, 2006, from Dr. Robert Stalker to Dr. Diane D'Arcy, located at page 131, of Tab 8, indicates that Ms. Roscoe saw him for a problem with the achilles tendon of her left heel.

[174] Ms. Roscoe confirmed that she had pre-existing pain in both hips for a long time from bursitis. It interfered only with her sleep. In 2007 she was treated for that problem with massage therapy. A letter from Jillian Scott, massage therapist, to Dr. D'Arcy, dated April 26, 2007, located at page 130, of Tab 8, confirmed the treatment and indicated that the left hip was more symptomatic than the right hip.

[175] Ms. Roscoe added that, since her retirement, she has been more active and her hips are better.

[176] Ms. Roscoe indicated that she was taking Celebrex for her arthritis prior to the incident and that she still does.

(b) General Damages

(i) Comparison Cases

[177] Both parties provided the following cases in which the plaintiff suffered knee injury, so that this Court could compare the circumstances of the case at hand, with those in the cases provided, to determine an appropriate quantum of general damages.

[178] The plaintiff in ***Mathews v North Road Baptist Church, Inc.***, [1999] N.B.J. No. 390 (Q.B.) suffered what was described as a "possible torn lateral meniscus" in her right knee. It was noted that "the main problem seemed to be the torn anterior horn of the lateral meniscus". She underwent arthroscopic surgery approximately one month after the incident. That same day, she was able to walk out of the hospital without crutches or a cane. Less than one month after the surgery, her surgeon noted that she was "much better". Ms. Matthews continued to work at a reduced level, in a nursing home. A note from her physiotherapist, dated less than three months after the incident, noted that she was "pain free" and "okay to return to work" if her doctor agreed. She returned to full-time employment within five months of the incident. She received a total of nine sessions of physiotherapy, over a three week period. She walked with a limp for about five years following

the incident. For about one year after the incident she had to descend the stairs in her home on her buttocks. Her residual symptoms included being no longer able to: bend her knee; drive a car for more than one hour; wear high heel shoes; and, walk and jog. As a result, she gained approximately 30 pounds. She was awarded general damages amounting to $10,170.00, in 2011 dollars.

[179] The 33 year old plaintiff in ***Maher v. Beaton***, [1999] N.B.J. No. 33 (Q.B.) suffered a left knee injury which caused her severe pain the night of the incident. She went to the hospital the next morning and, six months later, had arthroscopic surgery on her knee, in which her patella was shaved and there was a "lateral retinacular release" It was described as a "rather minor total 3-4 hour operative procedure". Ms. Maher was on crutches for a short period of time. She was told to avoid squatting and climbing stairs for three to six months. She attended physiotherapy. She was on pain medication until trial, which was less than two years following the event. She would be able to return to normal daily activity. However, it was noted that when she stood for long periods of time, walked stairs, squatted or lifted any significant amount of weight, she would experience pain and would have to rest and take medication. These were residual effects that were expected to continue indefinitely. She would also have difficulty using a clutch.

"The plaintiff was described as a person who dresses well, wears high heels on occasion and has been seen dancing , shopping and generally living a rather unrestricted life". The general damages assessed in that case would amount to $25,425.00 in 2011 dollars.

[180] The 30 year old plaintiff in ***Rennehan v Heffernan***, 2008 NSSC 39, suffered significant injury to the medial collateral ligament and a partial tear of the anterior cruciate ligament of her right knee. She was taken by ambulance to the hospital immediately following the incident; but, allowed to go home that night. She was able to get around on crutches for five days before being able to see her family physician. She was able to return to work in "offices" five days after the incident. Five days after the incident she started physiotherapy. That continued twice per week for one year. She also treated her conditions with massage therapy. The therapy she received was also for problems with her back and neck. An MRI report noted no abnormality. Approximately 3 ½ months after the incident, an orthopaedic surgeon noted that she was "markedly improved" but "still not reaching full flexion and extension". In another letter, he indicated that the plaintiff "was getting back to normal activity but still 'having problems with deep squat and does not feel her knee is quite back to normal'". At trial, which was five

years after the incident, the plaintiff indicated she did not have constant pain but that there was a difference between her knees, and the right knee was not like it had been before the incident in question. She was able to ski or snowboard on the "bunny hill". She had also been able to drive her car relatively long distances. The general damage award amounted to $22,770.00 in 2011 dollars.

[181] The 34 year old plaintiff in ***Dahlia v Toronto (City)***, [2005] O.J. No. 6382 (S.C.J.), suffered a tear of the meniscus. She spent two weeks at home in bed. Then she was able to walk with crutches. In five weeks she returned to work. She had worked as a secretary/receptionist/hairstylist, a teaching instructor and lifeguard and a funeral home receptionist. It was possible she might have to undergo surgery at a future date. She was a single mother who had temporarily lost the ability to play with, and provide guidance to, her daughter, and suffered loss of enjoyment as a result. She loved scuba diving and dancing. The Court had regard to that in awarding general damages. Thus, the incident must have impacted her ability to continue those activities. Provisional general damages were assessed at $37,000.00, in 2011 dollars.

[182] The 60 year old plaintiff in ***Nuttall v Thunder Bay (City)***, 2001 CarswellOnt 465 (S.C.J.), suffered a fractured left knee cap, which initially healed, but later developed into a post-traumatic condition resulting in “a weakening or a softening of the cartilage in the knee”. She had to wear a cast for about six weeks. She was ambulatory thereafter using crutches, then a cane. She took physiotherapy on and off, up to the time of trial, which was approximately eight years after the incident. She did home exercises and tried to remain active. She often had to use ice packs and Aspirin to help control the pain and swelling. She could not stand, nor sit comfortably, for long periods of times. She had to keep changing positions. Eight years after the incident, she was still taking Cortisone shots, which controlled the “shooting pains”, but not the other symptoms. She had not undergone arthroscopic surgery. She was “leery” of such surgery, which carried no guarantees. At the time of the accident, she had no health problems, and she had three jobs, all of which were physically demanding. They included: cleaning tables and custodian work in a cafeteria, requiring her to be on her feet for seven hour shifts; a job at a dry cleaner; and cleaning a house. She was unable to continue working.

[183] At paragraph 50, the Court stated:

> "As far as non-pecuniary general damages are concerned, I have determined the range of damages is in the area of $12,000.00 for more minor situations where ongoing pain and discomfort continue but where surgery is not anticipated up to the area of $75,000.00 where a complete knee replacement is called for and the person's whole way of life is permanently disrupted."

[184] The Court assessed general damages for Ms. Nuttall at $47,000.00 in 2011 dollars.

[185] The range, in 2011 dollars, would be $14,200.00 to $88,900.00.

[186] The 41 year old plaintiff in ***Lesniak v Mississauga (City)***, [2002] O.J. No. 5125 (S.C.J.), suffered a medial collateral injury. She had suffered a prior injury approximately six years earlier which culminated in surgery to reconstruct her anterior cruciate ligament ("ACL"). Following the second knee injury she attended physiotherapy and had arthroscopic surgery. During that surgery, the surgeon "found changes to the cartilage in Ms. Lesniak's knee in several areas." "He found that the reconstruction of the ligament was present but stretched." He also found "instability related to the ACL". The arthroscopic surgery took place within five months of the second injurious event. A year and a half after the second event, Ms. Lesniak was experiencing "pain on the inner aspect of the right knee which would occur five days out of the week". "She was having difficulty kneeling, squatting,

using stairs, she could not play tennis, she was having difficulty at trade shows, she was having to use medication and had swelling in her knee." She had not had those same problems between the first arthroscopic surgery and the second incident. She was injected with Cortisone to help with the pain and swelling, at least five times. Three and a half years after the second incident, she was still experiencing knee symptoms, which were treated with anti-inflammatory medication. However, the motion in her knee was good at that point. There was a good chance that Ms. Lesniak would ultimately require a knee replacement. That surgery would require hospitalization and a recovery period, having a major impact on her life. The Court accepted that, although Ms. Lesniak had a prior problem with her knee including some arthritis, it was not causing her any symptoms until the second incident. The Court, however, found that the "pre-existing condition would have resulted in some treatment and subsequent loss". It assessed general damages at what would amount to $62,500.00, in 2011 dollars. However, it reduced the award to account for the pre-existing injury.

[187] Ms. Roscoe's temporary post-incident symptoms were more serious, and lasted longer, than those of Ms. Matthews, even though Ms. Roscoe underwent significantly more treatment and therapy than Ms. Matthews. However, Ms.

Matthews' residual symptoms appeared more significant that those of Ms. Roscoe. In my view, the general damage award in ***Matthews*** was somewhat low.

[188] Ms. Maher's temporary post-incident symptoms were resolved in less time than it took to resolve those of Ms. Roscoe. Unlike Ms. Roscoe, Ms. Maher was left being able to squat. However, that, and other actions, would cause her pain, requiring rest and medication. Otherwise, like Ms. Roscoe, she was able to live a relatively unrestricted life. Ms. Roscoe underwent a greater variety of treatment and therapy. It is noteworthy that, Ms. Maher, being only 33 years old, would be more likely to suffer the residual effects for a longer period of time than Ms. Roscoe, who was 60 years of age. Ms. Maher had pre-existing depression. Her continued treatment for that condition was noted as being only "peripherally" related to the accident. Ms. Roscoe had significant pre-existing conditions in her hips and knees. The bursitis in her left hip was aggravated by the limping resulting from the injury to her right knee.

[189] In 2002, Ms. Roscoe experienced problems in her right knee which caused her difficulty going up and down stairs. However, that problem had been resolved. The remaining knee and hip problems were controlled using ice and celebrex. The

symptoms resulting from the meniscus injury were different, and separate from, those resulting from the pre-existing conditions.

[190] Ms. Roscoe's temporary post-incident symptoms lasted significantly longer, than those of Ms. Rennehan, even though Ms. Roscoe underwent a wider variety of treatment and therapy to expedite the rehabilitation process. Their residual symptoms were comparable. Ms. Renenhan, being one half Ms. Roscoe's age, would likely continue to suffer them considerably longer. Unlike Ms. Roscoe, there was no indication Ms. Rennehan had any pre-existing condition that was aggravated by the injury suffered.

[191] Ms. Dahlia's temporary post-incident symptoms were significantly more serious, but shorter lived, than those of Ms. Roscoe. Ms. Dahlia's residual symptoms are unclear. It appears that her ability to scuba dive and dance continued to be impacted. Thus they were likely somewhat more serious than those of Ms.Roscoe. Further, Ms. Dahlia, being only 34 years of age, would likely suffer them much longer.

[192] Ms. Nuttall's temporary post-incident symptoms, as well as her residual symptoms, were significantly more serious than those of Ms. Roscoe. She was the same age as Ms. Roscoe. Prior to the incident, she worked at three physically demanding jobs. She was unable to continue working.

[193] Ms. Lesniak's temporary post-incident symptoms were comparable to those of Ms. Roscoe; but, took longer following the arthroscopic surgery to resolve. Ms. Lesniak had comparable residual symptoms; but, unlike Ms. Roscoe, there was a good chance she would ultimately require a knee replacement.

[194] Like Ms. Roscoe, Ms. Lesniak had a pre-existing condition. The Court was of the view that it would have resulted in some treatment and subsequent loss without the second injury. In the case at hand, I accept that the pre-existing osteoarthritis in Ms. Roscoe's knee is what is likely to cause her the most difficulty over the years, not the meniscal tear. However, there was no evidence from which I could measure the risk that the pre-existing condition would have resulted in additional treatment and subsequent loss, or detrimental effect, without the incident of March 26, 2008. Thus, the pre-existing conditions, in the case at hand, do not reduce the overall general damage award. The award in the case at hand is based

solely on additional damage, and resulting symptoms, arising from the March 26, 2008, injury. It is not based on effects which Ms. Roscoe was experiencing or would have experienced in any event.

(ii) Appropriate Amount for General Damages

[195] Ms. Roscoe has already had arthroscopic surgery. Therefore, an appropriate general damage award for her falls above the lower end of the range ($14,200.00) indicated at paragraph 50 of ***Nuttall*** as being applicable to a minor situation "where ongoing pain and discomfort continue but surgery is not anticipated". However, her way of life is far from having been "permanently disrupted" and there is no indication she will require a knee replacement. Therefore, a general damage award well below the upper end of the range ($88,900.00) indicated at paragraph 50 of ***Nuttall*** is warranted.

[196] Considering the effects of Ms. Roscoe's injury, and comparing it with those in the comparison cases, in my view, it is appropriate to award Ms. Roscoe $25,000.00 in general damages.

(c) Special Damages

[197] The parties agree that Ms. Roscoe is entitled to reimbursement of the $1,290.00 she paid to rent a power cart to play golf during the summer of 2008, when she was unable to walk the course.

(d) Past Cost of Care

[198] The parties agree that Ms. Roscoe is entitled to reimbursement of the $3,593.36 she paid for treatment and therapy not covered by her medical plan.

(e) Other Head of Damages

[199] It is agreed that Ms. Roscoe did not suffer any loss of income. In addition, there is no claim for diminished housekeeping capacity, as Mr. Lynch, with the aid of a housekeeper, took full responsibility for the housekeeping duties.

(f) Pre-Judgment Interest

[200] The parties have agreed upon a pre-judgment interest rate of 2.5%.

(g) Total Damages

[201] The $25,000.00 general damage award was quantified using present day values for the awards in the comparison cases. Therefore, I will not add pre-judgment interest to the general damage award. If I were to do so, I would be granting Ms. Roscoe double recovery.

[202] Although the parties have agreed on the amounts payable for golf cart rentals and the cost of treatment and therapy, they have not agreed upon a pre-judgment interest start date, nor generated a calculation of pre-judgment interest based upon individual expenditure dates. Therefore, I have selected a start date that is approximately midway between the beginning and the end of each category of expenditures. I have chosen: for the golf cart rentals, August 1, 2008; and, for the cost of treatment and therapy, November 1, 2008.

[203] Therefore, I have calculated the pre-judgment interest: for the golf carts, at $109.65 (2.5% per year, multiplied by 3.4 years, multiplied by $1,290.00); and, for the cost of treatment and therapy, at $287.47 (2.5% per year, multiplied by 3.2 years, multiplied by $3,593.36). The total pre-judgment interest is $397.12.

[204] Consequently, the damages total $30,280.48 ($25,000.00 general damages, plus $1,290.00 for golf cart rentals, plus $3,593.36 for the cost of treatment and therapy, plus $397.12 in pre-judgment interest).

C. CONCLUSION

[205] Based on the foregoing, I find Halifax Regional Municipality liable, and grant judgment for Elizabeth Roscoe, against Halifax Regional Municipality, in the total amount of $30,280.48.

D. COSTS

[206] HRM agrees that Ms. Roscoe: is entitled to reasonable disbursements; and, as of March 9, 2010, incurred reasonable disbursements totalling $1,253.36.

[207] HRM acknowledged that, if it was found liable, Mr. Roscoe would be entitled to reasonable costs in accordance with **Civil Procedure Rule** 77 and Tariff A.

[208] Ms. Roscoe has made no submission on costs.

[209] If the parties cannot agree on costs, including disbursements, I ask that written submissions be provided on behalf of Ms. Roscoe and, that HRM provide written submissions in response, or a letter indicating that it has no further submissions to make.

Muise, J.