CITATION: Onley v. Town of Whitby, 2020 ONSC 20
COURT FILE NO.: CV-14-047
DATE: 20200102

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Zoe Onley, Sallie Onley and Richard Onley	)	
	)	David A. Morin and Peter Reinitzer for the plaintiffs
Plaintiffs	)	
– and –	)	
	)	
Corporation of the Town of Whitby, Whitby Iroquois Soccer Club Inc, Whitby Hydro Electric Corporation and Electrical Safety Authority	)	Charles M.K. Loopstra and Paul Martin, for the defendant Corporation of the Town of Whitby
Defendants	)	
	)	
	)	**HEARD:** July 29, 2019 – August 5, 2019; September 23, 24, 2019

REASONS FOR JUDGMENT

E.J. KOKE

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Introduction

[1] In the summer of 2012, eighteen-year-old Zoe Onley played for the local Bracebridge Under 18 girls soccer team, "The Storm".

[2] The Storm played a night game against the Town of Whitby Girls soccer team on the evening of August 15, 2012. The game was played under the lights at the Iroquois Park Sports Centre ("Sports Centre"). The Sports Centre is owned and managed by the Town of Whitby ("Whitby" or "the Town").

[3] Zoe arrived at the Sports Centre about an hour to an hour and a half before the game which was scheduled to start at 9 pm. The grass was wet from an earlier rainstorm. The players spent time warming up before the game.

[4] Coach Wilcox of the opposing team turned on the lights around 8:10 pm because it takes about half an hour before they are at full intensity.

[5] The first half of the game lasted 45 minutes. Zoe testified that she left the field after playing the full half and sat down on the grass behind the bench, in proximity to a light pole. When the whistle blew to restart the game, she rolled over onto her hands and knees to get up and felt a shock ("the shock incident" or "the August 15, 2012 incident"). She was wearing leather track shoes. She got up and said, "Holy crap! I think I've got shocked".

[6] Zoe testified that she informed her coach, Graham Good, the team trainer, Preethi Nichol and two of her teammates, Tamika Wickett and Sholaine Pager. All four, subsequently, touched the ground near the light pole and reported feeling a tingling or a shock. None reported any injury.

[7] Coach Good testified that after the second half started and had proceeded for about 5 minutes, Zoe waved to get his attention. Once she had his attention, she asked to leave the game. Coach Good then waited for a pause in play so he could substitute her. However, before the pause occurred, Zoe collapsed. An ambulance was called and Zoe was transported for emergency medical assistance.

[8] Zoe alleges that she sustained serious and permanent injuries as a result of the electric shock she received that night. She claims pecuniary and nonpecuniary damages against the Town of Whitby. She alleges that the Town did not take reasonable steps to inspect and maintain the lights on the field, and that the Town failed to comply with the provisions of the *Occupiers Liability Act*, R.S.O. 1990 c. O.2 ("*OLA*"). Zoe's parents, Sallie and Richard Onley, claim damages for loss of care, guidance and companionship pursuant to s. 61 of the *Family Law Act*, R.S.O. 1990 c. F.3, as amended.

[9] The Plaintiffs' action has been discontinued against the other three co-defendants.

[10] The parties agree that the shock Zoe received was caused by a leakage of current from the light pole beside where she sat and onto the ground.

Issues

[11] This action raises two main issues:

a) Liability: Did the Town of Whitby fail to take reasonable care in the circumstances of the case to ensure that Zoe was safe while on the premises, and, thereby, breach its duty under the *Occupiers Liability Act*, R.S.O. 1990, c.O.2?

b) Damages: If the Town of Whitby breached its duty of care, did this breach cause damages to Zoe and her parents, Sallie and Richard Onley, and how should such damages be assessed?

I. First Issue: Liability

A. Origin and cause of the August 15, 2015 electrical shock

1. The Iroquois Park Sports Centre: layout and description of facilities

[12] The Sports Centre is a multi-use recreational facility that is used by local sporting clubs and other groups. It is located on 50 acres of parkland. The inside venues include six arenas, two pools, a fully licensed restaurant and food court area, banquet facilities, a pro shop and elite athletic training facilities. Outside, there are 6 illuminated tennis courts, 3 illuminated baseball diamonds, two unlit baseball diamonds and a fully lit tournament quality soccer pitch.

[13] There are 63 high-mast hollow concrete poles (the "light poles" or the "poles") which supply light to the outside venues, with five or six luminaires installed on a frame atop each pole. The poles rise approximately 61 feet above ground and house the wires which provide the current to power the luminaires.

[14] Power is distributed throughout the Sports Centre facilities via an underground cable distribution network to interior electrical rooms and exterior concrete bunkers that house electrical equipment. One of these bunkers houses the supply equipment for the underground wires which supply the high-mast lighting for the sports fields–soccer pitch and baseball diamonds.

[15] The soccer pitch is located at the north end of the Sports Centre. The goal posts are located at the north and south ends of the field and the players' benches are located on the west side

of the field, on either side of midfield. There are 8 poles which provide lighting for the soccer pitch, four on each side of the field.

[16] Five wires (also called "conductors") come up from the ground and enter the hollow inner cavity of each pole from the bottom. Three of these wires are energized and are housed in coloured plastic insulation ("the current carrying" or "phase wires"). The other two wires consist of an insulated neutral wire and a bare copper-bonding or ground wire. The function of the bonding wire is to provide a method of grounding the non-energized portions of the pole.

[17] There are also five wires which come down through the inside of the pole from the luminaires at the top. These five wires are also comprised of three energized phase wires, an insulated neutral wire and a bare-bonding or ground wire. The five wires which come up from the base of the pole are connected to these five matching wires using split-bolt connectors. The connections are made at an opening in the pole called a handhole, which provides access to the interior of the pole. The access hole is located about three feet above ground and is covered by a metal plate ("cover-plate") which is screwed into place in a recessed area around the perimeter of the handhole.

2. Expert evidence on origin and cause

[18] The court heard from three witnesses who were qualified as experts in electrical engineering. They provided opinion evidence on the origin and cause of the current leakage that caused Zoe's shock.

(a) Michael Learmonth

[19] Michael Learmonth testified for the Town of Whitby. He undertook a site examination on November 8, 2013 and issued a report dated April 30, 2014. He issued a supplementary report dated July 6, 2018.

[20] As part of his investigation, Mr. Learmonth spoke with Jody Cameron, a licensed electrician who was employed by the Town at the time of the incident. Mr. Cameron was the first technical person to attend the site the morning after the incident. The incident had already been reported to the Electrical Safety Authority ("ESA"). On its instructions, Mr. Cameron took photographs of what he observed were damaged conductors and connectors at the location of the handhole in the subject pole.

[21] Mr. Learmonth reported that the photographs revealed that the bonding wire had melted and burned in the area of the handhole. The split-bolt connector connecting the upper and lower ends of the bonding wire was no longer visible and the two ends of the bonding wire had separated. Mr. Learmonth noted that there was a piece of molten copper at the end of the bonding wire. He concluded from this that the wire and split-bolt connector had reached a temperature of 1984 degrees Fahrenheit or more–the temperature required to melt copper.

[22] The photographs revealed that the insulating tape which had been wound around two of the split-bolt connectors connecting the energized phase wires had sustained heat damage. Mr. Learmonth noted that the end of one of these live wires was now exposed, the insulation having burned off.

[23] Mr. Learmonth also noted damage to the inside of the handhole cover-plate which appeared to him to have been caused by electrical arcing.

[24] McTeague Electric ("McTeague") repaired the wiring on behalf of the Town. Douglas McTeague, a licensed Master Electrician, reported that after arriving on site, his electricians first examined the existing wires located in the ground at the base of the pole and determined that they had not been damaged. Thereafter, they installed a new length of electrical cable between an underground splice in the existing service and the wires that ran inside the pole, using split-bolt connectors. Mr. McTeague confirmed that after they completed this work, the circuit was re-energized and all the luminaires on the subject pole operated correctly.

[25] Mr. Learmonth reported that Cable 3000, an electrical testing company, was retained by Whitby after the repairs were completed to undertake three ground tests: ground resistance, continuity, and insulation resistance. The results of the tests were such that the values were deemed to be acceptable and safe.

[26] As to the origin and cause of the current leakage from the pole to the ground, Mr. Learmonth testified that his investigation led to the conclusion that after the insulation protecting the phase wires had become compromised, current was able to leak onto the inside wall of the pole from one of the exposed phase wires. He opined that in normal circumstances such leakage would have been safely drained away by the bonding wire. However, in this case the bonding wire had melted and separated, disconnecting from the pole. As a result, the leakage current flowed from the damaged uninsulated phase wire onto the surface of the pole and then down the pole into the ground at its base.

[27] Mr. Learmonth further opined that Zoe was likely shocked because leakage current generated in the above manner results in a voltage gradient between the lighting pole and across the surrounding ground. A voltage gradient causes a fraction of the leakage current to flow through any conductive medium that spans a fraction of the area where current is dissipating. In this case, the conductive medium was provided by Zoe while she was getting back to her feet: current flowed between her knees and hands.

[28] In Mr. Learmonth's view, the damage to the internal wires of the pole was indicative of a lightning strike, powerful enough to melt and vaporize the bonding wire but brief enough to leave the handhole cover essentially undamaged. He theorized that this lightning strike must have hit an electrically-bonded component on the pole and then followed the bonding wire down toward the ground. The current from the lightning then melted and severed the bonding wire and the split-volt connector at the handhole, destroying its continuity and providing the heat that damaged the insulation on the phase or energized wire connections.

[29] Mr. Learmonth described the effects of this lightning strike as unique. The damage was such that no short-circuit path had been created in the electronics of the luminaires. The current-carrying wires and fuses remained intact, allowing the luminaires to continue functioning normally when energized after the incident. Leakage current escaped from the damaged phase conductor, but the nature of the damage was such that it prevented the leakage current from being safely drained away by an intact bonding wire. Instead, the leakage current migrated down the pole and onto the ground. The fact that the luminaires continued to function normally, together with the absence of any visible damage to the outside of the pole, prevented anyone from noticing that there was a problem with the pole before Zoe was shocked.

[30] With respect to the timing of the damage to the pole, Mr. Learmonth reported that there was a lightning strike in the Town of Whitby at Victoria Park on July 15, 2012, approximately one month before Zoe's shock. This strike occurred during an event called "Ribfest" ("the Ribfest strike"). Victoria Park is situated adjacent to and immediately south of the Sports Centre. News reports indicated that the lightning strike sent several people to hospital.

[31] Notwithstanding the proximity in time and place of the Ribfest strike to the location of the shock incident, Mr. Learmonth opined that he does not believe the damage to the pole was caused by the July 15, 2012 lightning strike. He bases this opinion on the fact that the location of this strike was still a considerable distance from the subject pole, which was located at the north end of the Sports Centre. He also notes that the electrical service from the location of the lightning strike to the subject pole followed a long, circuitous route, and that this route included lightning arrestors. Also, the electrical service from the location of the strike to the pole was mostly underground, and therefore protected from most lightning strikes. It ran through two electrical rooms and a bunker none of which had any damages.

[32] Mr. Learmonth opined that the lightning strike which struck the pole likely pre-dated the strikes which occurred at Ribfest on July 15, 2012, since there was no evidence of lightning strikes in the immediate vicinity of the Sports Centre after this date that were sufficiently intense to cause the amount of damage he observed inside the pole. However, he does not believe the strikes which caused the damage occurred much earlier than the Ribfest strikes either. In his opinion, if the damage had been present for a lengthy period, it is likely that someone else would have been shocked on an earlier date. Also, he noted that current leakage into the ground has the effect of ruining grass in the vicinity of the leakage and the photographs he reviewed did not reveal any dead spots on the grass around the pole. He concluded that the lighting strike which damaged the pole most likely occurred sometime after the spring of 2012, but before Ribfest.

(b) Mazen Habash

[33] The Electrical Safety Authority for the Province of Ontario is designated pursuant to *Ontario Regulation 89/99* as the authority responsible for electrical safety in the Province,

including the administration and enforcement of the *Electricity Act, 1989*, S.O. 1998, C.15 and the *Ontario Electrical Safety Code* ("the Electrical Code").

[34] Following the shock incident, the ESA retained Mazen Habash to provide an origin and cause opinion. His testimony was supported by a report dated November 24, 2016.

[35] Mr. Habash notes that damaged wiring was discovered when the access metal plate was removed near the base of the subject pole. Upon review of the photographs, he noted that:

a) A no. 6 AWG copper-bonding conductor inside the pole was damaged. A length of this conductor measuring approximately 8 to 10 inches had melted away or was vaporized, leaving behind a gap in the bonding conductor.

b) A phased or current-carrying conductor with a split-bolt connector was found such that the electrical tape or insulation material on the connector itself was partially melted away and/or missing, resulting in portions of the conductor being exposed.

c) Evidence of arcing was noted on the interior of the metal cover-plate.

[36] Mr. Habash testified that his investigation revealed that all the light poles were functional in the time leading up to and following the shock incident. Therefore, there was no clue of any issues in the electrical wiring within any of the light poles associated with the soccer field. He states in his report: "again, this is wiring contained within the hollow concrete constructed light pole that is the subject of this shock incident and not wiring that is exposed and/or visible outside of the light pole."

[37] Mr. Habash reported that as part of its electrical maintenance program, Whitby had entered into a Continuous Safety Services Agreement ("CSSA") with the ESA. One of the terms of this agreement was that an ESA inspector would visit the Sports Centre annually and inspect the premises, accompanied by a Town of Whitby electrician. Mr. Habash notes that the most recent ESA inspection occurred on July 6, 2012, approximately 40 days before the shock incident. At that time, no deficiencies were noted and/or reported to Whitby relating to the light poles on the soccer pitch.

[38] Mr. Habash endorses Mr. Learmonth's theory of the cause and effect of the electrical failure. However, he disagrees that the Ribfest strike did not cause the damage in the subject pole.

[39] In support of his position that the damage most likely occurred on July 15, 2012, Mr. Habash reported that his review of lightning strike reports for the Whitby area revealed that two electrical storms had passed through the area during the weeks before the shock incident: one on July 7, 2012 and the other on July 15, 2012. He notes that both lightning reports confirm that lightning in the form of cloud-to-ground strokes had been registered by the National Lightning Detection Network in the general area of five miles around Iroquois Park.

[40] On review of these reports, Mr. Habash dismisses the strike of July 7, 2012 as having caused the damage at the subject pole on the basis that the lightning strikes associated with this day appear to have occurred remote from the Sports Centre itself. As such, they were not viable enough to damage the pole's internal wiring.

[41] However, the National Lightning Detection Network reported a total of 73 cloud-to-ground lightning strokes within a five-mile radius of the Sports Centre on July 15, 2012. Significantly, based on the confidence ellipses for lightning strokes shown in the report, there was one strike whose lightning confidence ellipse indicated a 99% certainty that the recorded lightning event contacted the ground within the bounds of the ellipse and that this strike encompassed the geographical spread of the entire Iroquois Sports Centre.

[42] At page 4 of his report, Mr. Habash summarizes his conclusions as follows:

> This (the CoreLogic results) clearly shows the possibility of a lightning stroke having occurred at or near the area of the soccer field and even possibly at or onto the subject light pole, resulting in damage to wiring, which created conditions that eventually manifested into a shock hazard, explaining the reported shock incident that occurred on August 15, 2012.
>
> With the possibility of a lightning stroke damaging internal wiring to the subject light pole on July 15, 2012, it is entirely possible and in fact probable that the damage to the internal wiring for this light pole did not pre-exist July 15, 2012, and certainly the possibility is that such damage would not have existed at the time of the ESA inspection visit on July 6, 2012.

[43] Although Mr. Habash disagrees with Mr. Learmonth as to the timing of the damage, he does agree with Mr. Learmonth that such damage could not have been detected by the inspector during the July 6 ESA visit. He states:

> I do not agree with Mr. Learmonth that the damage inside the light pole was likely already present at the time of the ESA inspector's visit on July 6, 2012. Clearly, it has been shown based on the review of the lightning strike report that a lightning stroke could have occurred, damaging the wiring within the light pole on July 15, 2012, several days after the ESA inspector's presence at the park, However, in any event, I do agree with Mr. Learmonth that any damage to the internal wiring within the light pole would not have been visually apparent or detectable by the ESA inspector during his visit, regardless of when the damage to the wiring occurred.

(c) Dave Gillingham

[44] Dave Gillingham testified as an expert in electrical engineering on behalf of the Plaintiffs. He filed an initial report dated January 20, 2017 and a supplemental report dated September 17, 2018.

[45] In his written reports, Mr. Gillingham agreed that the damage to the wiring in the pole was likely caused by a lighting strike. He writes at page 9 of his first report that:

> "based on the information available, it is plausible that the arc damage observed by Mr. Learmonth on the severed ends of the subject bonding conductor could be consistent with damage caused by the high current from a lightning strike.

[46] Referring to the melted bonding conductor, Mr. Gillingham reports on the same page:

> "The subject bonding conductor, however, would have been sized to handle the calculated fault current from the luminaires, not the larger current from a lightning strike. It would therefore be expected that lightning striking the bonded metal equipment at the top of the pole would have generated sufficiently high current in the bonding conductor to cause severe damage, such as that observed.

[47] At page 10 of his report, Mr. Gillingham writes of the damage to the phase or current-carrying wiring and the eventual leakage:

> Furthermore, it was reported that there was damage to the insulation on the adjacent phase conductors within the pole. The damage to the insulation resulted in the exposure of the energized conductors within. It is probable, therefore, that this exposed conductor came into contact with either the handhole cover-plate, the concrete pole interior, or the ground-bonding conductor itself. Regardless, this would have resulted in the energization of the metallic rebar within the pole to the voltage potential. As stated in the Learmonth report, it is agreed that with no direct current path to ground through the severed bonding conductor, the only remaining ground path for the leakage current from the energized conductor would have been through the concrete pole onto the surface into the ground.

[48] As to the timing of the lightning strike, Mr. Gillingham supports Mr. Habash's position that the lightning event of July 15, 2012 was a likely cause of the damage to the subject pole. He notes at page 11 of his report that:

> CEP's (Gillingham's) own analysis of the lightning strike report of July 15, 2012 revealed four such confidence ellipse that encompassed the "park", along with several more that bounded the area. It is highly likely, therefore, that one of these lightning strikes did damage the conductors in the subject lighting pole. The poles were manufactured in 1978, and likely installed around that time. It is highly unlikely that the conductors would have been damaged during installation and that this unsafe ground condition would have existed for over 30 years without incident or remediation. It is plausible therefore that the most probable cause of the conductor damage was due to a lightning strike event sometime before the subject incident.

[49] At page 19 of his report, Mr. Gillingham summarizes his findings as follows:

> The damage that was observed by Mr. Learmonth to the conductors within the subject light pole was consistent with that of a high-current event; probably a lightning strike. Because the conductors were concealed within the pole, and the HID luminaires continued to function as intended, this remained a hidden failure that did not become

> evident until that leakage current through the pole energised the surrounding ground. This current leakage created a voltage gradient across the surface of the ground, exposing people to possible injury through what is known as "step potential", should they inadvertently create a short-circuit path through their body.

(d) Gillingham's testimony at trial: an alternative theory

[50] In his testimony, Mr. Gillingham proposed an alternative theory for the cause and origin of the damage to the pole. He suggested that the wires and the connectors in the electrical system powering the lights could have deteriorated through degradation. Such degradation could have occurred due to a lack of an effective maintenance and inspection program of the electrical system by the Town of Whitby. Mr. Gillingham maintained that in his opinion it was equally possible that the damage resulted from a lightning strike as from degradation of the conductors.

[51] In support of this alternative theory, Mr. Gillingham relies on information he compiled and reviewed following the release of his first report in January 2017. This information pertained primarily to a streetlighting remediation project embarked on by Toronto Hydro Energy Services Inc. ("Toronto Hydro"), more specifically referred to as the *Toronto Hydro ICM Project – Underground Infrastructure and Cable – Handwell Replacement Segment* ("the Handwell Replacement Project"). Particulars of this project were appended to his supplemental report. In addition, he relied on a set of guidelines for streetlighting drafted by the ESA in response to the safety concerns giving rise to the Handwell Replacement Project ("the ESA Street Lighting Guidelines" discussed below) and an ESA Flash Notice pertaining to electrical hazards found at baseball diamonds.

(i) The Handwell Replacement Project

[52] Mr. Gillingham reported that in 2008 and 2009, several incidents occurred in Toronto in which children and dogs were injured due to stray voltage in streetlighting handwells.

[53] A handwell is a junction box which is embedded in a sidewalk or other pavement where connections are made between wires running to the streetlight pole and the main service conductors running along the street. Although a handwell serves essentially the same purpose as a handhole, a handhole is located above ground within the confines of a hollow pole whereas a handwell is located below ground. Another difference is that handwells are comprised of a box situated in the ground whereas a handhole is merely an entry hole into a hollow pole. Also, handwells are generally covered at the top by a lid whereas a handhole is covered by a metal plate screwed into a recessed area above the ground and on the outside of the pole.

[54] The handwells and handwell lids subject to the Handwell Replacement Project were constructed of metal.

[55] Consequent to the Toronto stray voltage incidents, Toronto Hydro undertook the Handwell Replacement Project, at a cost of $33.63 million. The work was scheduled to occur between 2012 and 2014 with the object of replacing 90% of the streetlight handwells, at an estimated cost of $6,900 per handwell.

[56] As part of the project, the metal handwells and metal lids were replaced with handwells and lids comprised of a current-resistant composite material.

[57] Appended to Mr. Gillingham's supplemental report is a report prepared by Toronto Hydro summarizing the scope of and reasons for the project. Some relevant excerpts from this report are as follows:

> **Executive Summary**
>
> **1.** Project Description
>
> Owing to their location (i.e. the handwells), which exposes them to corrosion from salt and water and construction damage, the handwells themselves may become a source of contact voltage, and damage to the wires and connections within them may allow other equipment, such as streetlight poles to become energized.
>
> …By the end of 2011, Toronto had replaced almost 5,600 existing handwells with new, non-conducting composite handwells. These replacements were concentrated in the downtown core because that is where both the number of handwells and potential exposure to contact voltage are greatest.
>
> **2.** Why the Project is Needed Now
>
> Handwells are among the top three structures with the highest number of contact voltage hits as assessed by mobile scanning inspections. Common causes include damage from the elements, as handwells are exposed to harsh environmental conditions, third party damage whenever the sidewalk is rebuilt or repaired, degradation of cable insulation, and substandard installation of connections. If left untreated, the public may be exposed to the potential safety risk posed by electric shock through contact voltage…
>
> **Project Description**
>
> 2. Handwells and Contact Voltage
>
> Contact voltage is an intermittent condition when electricity or voltage is present on street equipment. Secondary electrical plant installed in the field is constantly subjected to environmental factors and susceptible to third party damage whenever the sidewalk is rebuilt or repaired. It endures water, salt and contamination ingress and wide variations in temperature.
>
> …

> As shown in Figure 1, handwells and the wiring within them can corrode due to age and environmental factors. Handwell covers can also corrode (see Figure 2a, below). This corrosion and degradation of components eventually caused the integrity of the connections to deteriorate to the extent that live electrical wires become exposed. This can create a potential safety risk to the public…

(ii) Guidelines for the Design, Installation, Operation and Maintenance of Street Lighting Assets: the ESA Street Lighting Guidelines

[58] Mr. Gillingham reports that on August 20, 2009, the ESA held a symposium on public safety with respect to street lighting. Following the symposium, a committee of stakeholders was created to draft guidelines to assist asset owners in ensuring public safety. Included as an appendix to Mr. Gillingham's second report was a document entitled "Guidelines for the Design, Installation, Operation and Maintenance of Street Lighting Assets (version 2: 2015)". I refer to these as the ESA Street Lighting Guidelines.

[59] The ESA Street Lighting Guidelines provided asset owners with guidance on the following subjects relating to their street lighting assets:

- Design and construction of street lighting systems;
- Grounding and bonding of street lighting systems;
- Routine and non-routine maintenance;
- Detection and testing for contact voltage;
- Development of a contact voltage detection program; and
- Condition surveys of street lighting assets.

(iii) ESA Flash Notice 08-01-FL-Electrical Hazards Found at Baseball Diamonds

[60] Mr. Gillingham reports that in June 2008, the ESA issued Flash Notice 09-01-FL ("the Flash Notice") to inform owners of sports field lighting systems of electrical hazards that may be present in these systems. According to Mr. Gillingham, although the flash notice title is specific to baseball diamonds, it can be extended to include lighting systems on soccer and football fields as well.

[61] Mr. Gillingham acknowledges that this flash notice focuses primarily on damaged electrical metallic tubing ("EMT") and corroded electrical panels (items which presumably would not present an issue at the Sports Centre given that the wiring is almost all underground or encased in the poles and the electrical panels are housed in concrete bunkers). However, he notes that the flash notice also states, "Municipalities are being advised to take a closer look at the electrical installations at their sports fields to ensure there are no electrical hazards, or damaged or deteriorated equipment". Mr. Gillingham suggests that this comment places

an affirmative obligation on municipalities to take the initiative to identify and rectify any electrical issues they find.

3. Origin and cause – analysis and conclusions

[62] All 3 experts (Mssrs. Learmonth, Habash and Gillingham) opined in their reports that the probable cause of the internal damage to the pole was lightning. The testimony of Mssrs. Learmonth and Habash was consistent with their written reports. At trial, Mr. Gillingham raised a new theory of causation, namely the degradation of electrical components. He used the example of the Toronto Handwell Project which identified degradation in Toronto streetlighting electrical systems due to environmental conditions in support of his theory.

[63] In my view, the evidence thoroughly refuted Mr. Gillingham's theory that the degradation of the electrical components may have caused or contributed to the electrical failure. My reasons for coming to this conclusion include the following.

[64] First, the Toronto Handwell project was undertaken in response to the degradation of electrical services in underground handwells associated with streetlighting. These handwells were exposed to harsh environmental conditions, including vibrations and water and salt infiltration. In contrast to the streetlight poles subject to the Toronto Handwell Project, the poles in the Sports Centre are park light poles which are designed with handholes. With handholes, the wire connectors are located within the poles behind a cover-plate and well above ground. Because of their location on fields, rather than streets, park light poles designed with handholes are not subject to the intrusion of road salt and water or street vibrations. Therefore, they are not subject to the same forces which lead to degradation in streetlighting handwells.

[65] Second, in his cross-examination, Mr. Gillingham admitted that he could not identify any degradation on or in the subject pole or equipment.

[66] Third, streetlight systems operate year-round. By contrast, park light systems are designed to operate seasonally, on an as-needed basis and are therefore not subject to the same wear and tear as streetlight systems.

[67] Fourth, and most significantly, the nature of the damage which was observed in the pole (the melting or partial vapourizing of the bonding and the split-bolt connector inside the cover-plate) was such that it could only have been caused by a lightning strike.

[68] Mr. Learmonth's evidence, which was not challenged, was that it would require heat of at least 1,984 degrees Fahrenheit to vapourize bare copper wire. The source of such heat could only have been a lightning strike which creates a brief moment of extreme heat. Plastic insulation melts at between 200- and 400-degrees Fahrenheit and only part of the insulation was melted which suggests that only a brief moment of high heat was directed at the live insulated wires.

[69] In conclusion, I find that the most probable cause of the electrical failure was a lightning strike, occurring sometime after the spring of 2012 and before August 15, 2012.

B. The Occupiers' Liability Act and the standard of care

1. The law

[70] The standard of care in this action is governed by s. 3(1) of the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2:

> An occupier of premises owes a duty to take such care as in all the circumstances is reasonable to see that persons entering the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

[71] The *OLA* assimilates the provisions of occupiers' liability with the common law of negligence. The Court of Appeal for Ontario summarized the change in the law effected by the *OLA* in *Waldick v. Malcolm*, [1989] 70 O.R. (2d) 717 at para. 19, aff'd [1991] 2 S.C.R. 456 as follows:

> A similarly worded statement of an occupier's duty occurs in all other Occupiers' Liability Acts. All courts have agreed that the section imposes on occupiers an affirmative duty to make the premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm. The section assimilates occupiers' liability with the modern law of negligence. The duty is not absolute, and occupiers are not insurers liable for any damages suffered by persons entering their premises. Their responsibility is only to take "such care as in all the circumstances of the case is reasonable". The trier of fact in every case must determine what standard of care is reasonable and whether it has been met.

[72] The Supreme Court of Canada described the standard of care in *Ryan v Victoria (City)*, [1999] 1 S.C.R. 201, at para. 28, rev'g [1996] 82 B.C.A.C 40 (*Ryan*) as follows:

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[73] The application of section 3(1) of the *OLA* is therefore to be determined by applying the test set out in *Ryan*, namely by assessing:

a. the likelihood of a known or foreseeable harm,

b. the gravity of that harm,

c. the burden or cost which would be incurred to prevent the injury, and in addition consideration of

d. external factors i.e. custom, industry practice, regulatory standards.

[74] Mr. Justice Rady, quoting from A.M. Linden and B. Feldthusen, *Canadian Tort Law*, 10th ed (LexisNexis, 2015), elaborates on this concept in *Paul Porchak v. Pizza Pizza Limited*, 2016 ONSC 4551, at para. 31 ("*Porchak*"):

> 5.6 Conduct is negligent if it creates an unreasonable risk of harm. This does not mean that all risky conduct attracts liability, for virtually everything that anybody does creates some hazard to somebody. If every act involving danger to someone entailed liability, many worthwhile activities of our society might be too costly to conduct. The law of negligence seeks to prevent only those acts that produce an unreasonable risk of harm. In measuring whether the hazard is an unreasonable one, the court balances the danger created by the defendant's conduct, on one hand, and the utility of that conduct, on the other hand. If the hazard outweighs the social value of the activity, liability is imposed; if it does not, the defendant is exonerated.
>
> 5.7 The two sides of this equation may be broken down further. In assessing the risk, the courts look at two components: (1) the chance or likelihood that the harm will culminate, and (2) the gravity or severity of the potential harm that will ensue if the accident transpires. The other side of the equation also comprises two elements: (1) the purpose or object of the act in question, and (2) the cost or burden to the actor to eliminate the hazard.

2. Application of the law to the facts of the case

(a) Position of the Parties

[75] The Town of Whitby submits that the nature of the damage to the wires inside the pole and the consequences flowing therefrom were unique and unusual, and beyond its reasonable contemplation.

[76] The Town further submits that it followed recommended inspection and maintenance protocols, and that these protocols provided a reasonable degree of safety to users of the field, keeping them safe from reasonably foreseeable injuries.

[77] The Plaintiffs submit that the harm sustained by Zoe was reasonably foreseeable in the circumstances of the case. Further, the Town failed to heed the warning of the ESA Flash Notice and failed to implement reasonable inspection and maintenance protocols such as those set out in the ESA Streetlighting Guidelines

(b) The gravity of the harm

[78] It is not an issue that stray ground current can be hazardous. The evidence was that the Toronto Handwell Replacement project was undertaken in response to injuries sustained by dogs and children.

(c) Foreseeability: was the internal damage to the pole and the resulting harm to Zoe a known or reasonably foreseeable harm?

[79] The Supreme Court of Canada has recently provided direction on the application of foreseeability in occupiers' liability cases. In *Rankin (Rankin's Garage & Sales)* v. *J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587 (*Rankin*) Karakatsanis J., for the majority, allowed an appeal, absolving a dealership from liability after one of its vehicles that had been left unlocked on its premises with the keys in the ashtray was stolen by a teenager whose inexperience in driving contributed to an accident that rendered his passenger catastrophically injured. At paragraph 22, the Court reiterated that:

> … foreseeability operates as the "fundamental moral glue of tort", shaping the legal obligations we owe to one another, and defining the boundaries of our individual liability…

[80] The Court further cautioned at para. 46 that:

> The fact that something is *possible* does not mean that it is reasonably foreseeable. Obviously, any harm that has occurred was by definition possible. Thus, for harm to be reasonably foreseeable, a higher threshold than mere possibility must be met. [Emphasis original, citations omitted].

[81] It is not unusual for a light pole to be hit by lightning. Clearly it was foreseeable that one of the light poles at the Sports Centre might occasionally be struck by lightning and consequently be damaged, causing the lights to malfunction. However, in my view this should not lead to the assumption that it was reasonably foreseeable that lightning damage to a light pole would result in the *type of damage* which occurred in the circumstances of this case, along with the resulting personal injury to a user of the field. By type of damage, I mean:

- Damage which was restricted to the internal wiring of the pole
- Damage which was not visible, absent an inspection of the interior of the pole
- Damage which did not affect the normal functioning of the lights
- Damage that did not cause the circuit breakers to trip
- Damage that resulted in potentially hazardous current leaking onto the ground in the vicinity of the pole.

[82] The court heard evidence from three experts in electrical engineering. The evidence was that poles which are damaged by lightning almost always exhibit some overt indication of malfunction, either through tripping of the short-circuit breaker or otherwise failing to light.

Such malfunction in turn triggers a duty to limit access to the pole by the public until the damage is investigated and repaired.

[83] The court also heard from Jim Fraser, a master licenced electrician employed by the ESA as general manager for the Whitby Region. It heard from Douglas McTeague, another master licenced electrician, who owns the company which repaired the damages at the soccer pitch. The consensus of these five witnesses was that the type of damage to the pole caused by the lightning strike was unusual. As Mr. Learmonth stated at page 17 of his April 30, 2014 report:

> In this rather unique case, only the bonding wire was severed and the insulation on one of the phase conductors was compromised. No short-circuit path had been created in the electronics…allowing the luminaires to function normally when re-energized.

[84] I note that there was no evidence that current leakage is a common problem on the Sports Centre field or on sports fields in general. Nor was there evidence that anyone had ever been shocked or injured because of electric ground current leaking from a light pole on a sports field. I also note that the evidence was that there was no visible sign that electric current was leaking from the subject pole, such as dead grass surrounding the pole. Furthermore, there was no record of complaints of shocks or tingling felt by other users of the field before the incident, although the area around the pole was used daily.

[85] In my view, damage of this nature, and the consequences flowing therefrom were not reasonably foreseeable and could not have been within the reasonable contemplation of the Town in the circumstances of this case. This is consistent with the view of the Supreme Court in *Rankin* on the issue of foreseeability.

[86] To reiterate, although I find that the risk of lightning striking an electrical pole is foreseeable, it was not reasonably foreseeable that such a strike would cause the damage at issue in this case, with the resulting injury to a user of the field. In almost all circumstances apart from the 'rather unique case' at bar, the operation of the pole would have been notably compromised, the breakers tripped, or the lights flickering or not working at all, and any stray current would have been carried away by an intact bonding wire.

[87] Accordingly, I find that the circumstances here were such that the risk of harm to persons was objectively unreasonable.

(d) Were Whitby's inspections and preventive measures adequate? If not, did the failure to properly inspect or take reasonable preventive measures cause or contribute to the shock incident?

[88] Notwithstanding my finding that the type of damage sustained by the pole was not reasonably foreseeable, I will respond to the Plaintiffs' submissions that the Town failed to implement or conduct reasonable inspections of the light poles.

(i) Whitby's maintenance program for the Sports Centre: The Continuous Safety Services Agreement

[89] As noted above, the Electrical Safety Authority for the Province of Ontario is designated pursuant to *Ontario Regulation 89/99* as the authority responsible for electrical safety in the province, including the administration and enforcement of the *Electricity Act* 1998, S.O. 1998, c.15 and the *Electrical Safety Code, Ontario Regulation 164/99*.

[90] Rule 2-006 of the *Electrical Code* provides for periodic inspections of electrical installations in prescribed circumstances. By way of agreement with the ESA, users of electricity ("the customer") in the province can arrange to have the ESA conduct these periodic inspections through a program known as the Continuous Safety Services Agreement. This program is optional on the part of a municipality.

[91] In addition to carrying out regularly scheduled inspection of facilities, the CSSA provides that the ESA will assist the customer in meeting its due diligence, risk management and quality control obligations and objectives in respect of electrical safety in accordance with the terms and conditions of the Agreement.

[92] On September 1, 2009 the Town of Whitby entered into a Continuous Safety Services Agreement with the ESA ("the ESA Agreement").

[93] Pursuant to the terms of the ESA Agreement, the ESA agreed to include the following electrical systems at the Sports Centre in its scope of coverage:

a) Panels and distribution system;

b) Service and electrical equipment;

c) Building and general wiring; and

d) Like-for-like or equivalent retrofits of components of the equipment and systems included in these components.

[94] The schedule of inspections provided that the ESA would attend at the premises to annually inspect the electrical systems and equipment in the facilities and the work which had been performed on these systems and equipment from time to time. Electrical hazards, deficiencies and work which did not comply with the *Electrical Code*, as identified during scheduled inspections would be reported to the customer.

[95] In the course of performing scheduled inspections, ESA would also advise the Town on compliance with the requirements of the *Electrical Code*, and the Town would have access to an ESA Technical Advisor during ESA's normal business hours. Flash Notices, Electrical Code Bulletins and amendments to the *Electrical Code* would be provided to the Town as they became available.

[96] In addition, the ESA Agreement provided that the ESA would assist the Town in setting up a Record of Electrical Work to facilitate compliance with Rules 2-003 and 2-006 of the *Electrical Code*.

[97] The terms of the ESA Agreement provided that it would be renewed from year to year unless it was terminated by way of written notice by one of the parties. The evidence at trial confirmed that the ESA Agreement has remained in effect continually from September 1, 2009 to the present.

[98] James Fraser testified that the purpose of the ESA inspections was to ensure that the public was safe, that the electrical equipment covered by the agreement was maintained in proper operating condition and that code requirements were met.

[99] Mr. Fraser confirmed that ESA determined the frequency of the periodic inspections, and in the case of the Sports Centre, the ESA determined that the inspections should take place on an annual basis. He also confirmed that the scope of the inspections included all 63 lighting standards at the Centre.

[100] Mr. Fraser testified that he believes Whitby took the necessary steps to meet the provincial *Electrical Code* requirements, filed the required reports with the ESA in relation to any electrical incidents and followed the directives issued by the ESA.

[101] Upon reviewing the photographs of the wiring in the subject pole, Mr. Fraser confirmed that the split-bolt connectors which were visible at the handhole were code compliant. He also confirmed that a visual inspection of the pole did not reveal any external evidence that it had been struck by lightning and that there was no record of the pole being hit by lightning or otherwise sustaining damage.

[102] Mr. Fraser testified that the only theory the ESA could conjecture for the damage to the wires was that it resulted from a lighting strike. The incident was reported to the ESA late on August 15, 2012 or early the following day and inspected immediately thereafter and no other defects or deficiencies were noted.

[103] Mr. Fraser was asked whether the ESA had ever recommended to its customers that the wiring inside every pole be inspected in the event of a lightning strike proximate to the pole. He answered that this recommendation would be unreasonable, given the number of lightning storms and the number of poles which could possibly be affected following a storm. However, he agreed that if a pole or a structure on a pole sustained damage or if the lights did not operate properly following a lightning strike, then it would be reasonable to remove the handhole cover and inspect the internal wiring.

[104] Mr. Fraser confirmed that on July 6, 2012, the ESA carried out its annual inspection of the soccer field in the company of a Town of Whitby electrician and that no electrical issues with the poles or wiring were identified.

[105] John Romano, who was employed as Supervisor of Facilities in the summer of 2012, testified that in addition to the annual inspections carried out by the ESA, the maintenance operations and grounds staff, as well as the three staff electricians who are based at the site were also mandated to report any visible defects or malfunctions which came to their attention. He confirmed that there was always a responsible person available at the Sports Centre to whom complaints or concerns could be directed. No complaints of persons being shocked had been reported to him before the incident involving Zoe.

[106] William Sittsworth was executive director of the Whitby Iroquois Soccer Club in 2012 and had held this position since 2009. He testified that in his capacity as executive director, all complaints concerning issues with the fields or the lighting were directed to him. At no time did he receive a complaint about anyone being shocked, or of anything resembling a shock such as a tingling before the August 15, 2012 incident.

(ii) Whitby's failure to introduce a Stray Voltage Detection Program

[107] The Plaintiffs' counsel submits that the Town should have introduced a stray voltage detection program at the Sports Centre such as that proposed in the ESA Street Lighting Guidelines and by Mr. Gillingham in his testimony. A stray voltage inspection program, depending on the scheduling thereof, could have prevented the electrical shock to Zoe. They argue that the Town's failure to do so is evidence that it failed its duty to properly protect the users of the soccer pitch.

[108] For the following reasons, I cannot accept this argument:

[109] First, and as previously noted, an occupier's obligations is always guided by a consideration of foreseeability.

[110] In this case, all the experts agreed that the circumstances resulting in the stray voltage leakage were extremely unusual. There were no prior complaints or reports of shocks to people on the premises. There was no damage to the outside of the subject pole and the luminaires continued to function. In fact, there was no evidence that stray voltage had ever been a problem at the Whitby Sports Centre or any other sports fields.

[111] Admittedly, stray current has been a problem with streetlight installations, as opposed to park lighting installations. Hence, the *Toronto Handwell Replacement Project*. However, sports fields are not subject to the same stresses and environmental conditions as streetlight installations, and there is no evidence that stray current has been a problem with sports field installations. The ESA *Street Lighting Guidelines*, which were drafted in response to the Toronto Hydro streetlighting incidents, specifically excluded sports fields from their coverage. This reflects the higher degree of foreseeability of stray voltage injuries in the streetlighting (handwell) context than in the park lighting (handhole) context. The ESA *Street Lighting Guidelines* therefore are not intended to be applied directly to park lighting installations.

[112] Second, the evidence does not convince me that there is a cost-effective and reliable stray-voltage ground detection device available which can be used in the context of park light poles with handholes.

[113] Mr. Gillingham suggested that a simple inexpensive pen tester could be used to determine the presence of live current on or around the pole. Pen testers are designed to detect live current, and by touching a pole and surrounding area on a regular basis an occupier could protect against injuries from stray current.

[114] Mr. Learmonth expressed significant reservations about the effectiveness and practicality of using pen testers to detect ground-level stray current on and around park light poles. He explained that a noncontact pen sensor such as that proposed by Mr. Gillingham is designed to sense the steady state electrostatic field produced by AC voltage through insulation without requiring contact with the current-carrying bare wire. Therefore, the problem with using such a device to detect stray current on a soccer pitch is that it does not differentiate between whether the electric field is from the normal wires powering the lights, or from electric current leaking from those wires. In other words, it is just designed to detect current, even current flowing through an insulated wire.

[115] Mr. Learmonth explained that in the case of the Sports Centre field, where the energized wires run underground and inside poles, only the electric field from leaking current would be relevant and potentially dangerous. If the device cannot differentiate between normally energized wiring and leaking current, then it would be essentially useless in diagnosing this hazard. For steel reinforced concrete, as was the case in this incident, a non-contact voltage detector may trigger an alert whenever the lights are normally and safely energized. There are 6 lights on the subject pole, each 1000 watts at 347 volts to ground. That is considerable voltage and generates a significant electrical field when operating, even when perfectly safe.

[116] Mr. Learmonth concluded that just sticking the non-contact voltage detector into the grass a foot away from the pole or even touching it to the handhole cover likely would not be accurate in determining that there is leaking current or whether the detected current is simply safely energized and properly insulated current.

[117] According to Mr. Learmonth, the use of pen testers to search for stray current on a soccer field would be akin to searching for a needle in a haystack. He suggested that the best indication of leaking electrical current in these conditions (in the absence of reported shock incidents or external damage to the pole or wires) is evidence of dead grass around the leakage. He noted that there was no evidence of dead grass around the pole in this case, suggesting that the lightning strike and resulting internal electrical damage was of recent origin.

[118] Upon considering the evidence, I am not persuaded that the testing method proposed by Mr. Gillingham is a reliable or effective stray voltage testing program.

[119] Third, in *Ryan*, the Supreme Court encouraged courts to look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards,

in determining what constitutes a reasonable standard of care. I note that there was no evidence that it is common practice that owners of sports fields include in their maintenance and inspection program regularly scheduled testing for stray voltage. A stray voltage detection program is not a requirement under the *Electrical Code* either. I note as well that the ESA inspection team did not express concerns about the absence of stray voltage testing when it carried out its annual test on the fields approximately 6 weeks before August 15, 2012. If such an inspection policy had been deemed necessary or reasonable, I expect that the ESA would have directed the Town to undertake it.

[120] For these reasons, I am satisfied that the absence of a stray voltage detection program did not constitute a breach of the Town's duty to take reasonable care in the circumstances of this case.

(iii) Whitby's failure to install lightning rods and arrestors on its light poles

[121] Counsel for the Plaintiffs submitted in closing that the Town failed to install lightning rods and lightning arrestors on its light poles, thereby failing its duty to exercise due care.

[122] In cross-examination, Mr. Gillingham suggested that the town could have installed lightning rods on its light poles as a safety measure.

[123] Mr. Gillingham did not explain how or why lightning rods would serve as an effective deterrent to lightning damage or how a lightning rod would have mitigated the risk that lightning poses to the integrity of the electrical system inside the poles. The Plaintiffs adduced no evidence in support of Mr. Gillingham's suggestion.

[124] Mr. Gillingham agreed that the installation of lightning rods on light poles is not an *Electrical Code* requirement. He also agreed that he was not suggesting that Whitby install lightning rods on everyone of its 6500 light poles.

[125] Based on the sparse evidence before me on the merits of lightning rods in the circumstances of this case, I cannot find that the Town breached its duty under the *OLA* by failing to install lightning rods on its light poles. I add that I am surprised that the issue of lightning rods was raised in final submissions since it received virtually no attention during trial, nor was evidence led as to how or why lightning rods would be effective on a light pole, or whether it was industry practice to so place them.

[126] The Plaintiffs' counsel also suggested in cross-examining Mr. Learmonth that the installation of lightning arrestors on each pole would have represented a reasonable preventative maintenance measure. Mr. Learmonth responded that lightning arrestors are installed on the energized phase conductors and not the bonding wire. At Iroquois Park, arrestors were installed on the above-ground service before the service went underground. He submitted that even if a lightning arrestor had been installed on the subject pole (albeit

not a *Code* requirement), it would not have prevented the lightning from damaging the unenergized bonding wire, as occurred in this case.

[127] I am satisfied that the installation of lightning rods and arrestors on light poles is not an *Electrical Code* requirement. Further, there is no evidence before the court that the installation of such devices on light standards is consistent with industry practice, that such installations would be an effective preventive measure in the circumstances of this case, or that the ESA at any time directed or recommended the Town install such devices on its light posts. In the circumstances, I do not find that the Town breached its duty of care by failing to install these devices.

(iv) Whitby's failure to record a 2011 field repair

[128] The ESA Agreement requires the Town to log a record of its electrical failures and repairs with the ESA.

[129] The Town replaced one of the light poles on the soccer field in late 2011. It is agreed that this was not the subject pole responsible for Zoe's shock. The repair was logged with the ESA, but the Town has been unable to locate the invoice therefore, identifying exactly how and why the work was done. Mr. McTeague testified that he recalls that the top of the pole was damaged, probably as a result of lightning, and that this prompted the repair.

[130] A bill from McTeague dated April 27, 2012 was entered into evidence. This bill referenced tracing and locating a burned underground cable on the west side of the field. Notwithstanding the bill date, the evidence is that the work relating to the bill was completed in the summer of 2011. There is no evidence that this repair was logged with the ESA.

[131] The Plaintiffs submit that the Town's failure to properly log and maintain these records demonstrates its wilful failure to comply with its agreement with the ESA. Further, the failure to report a repair meant that the ESA was unable to inspect the McTeague repair and to determine whether it may have caused or contributed to the August 15, 2012 incident.

[132] I disagree with these submissions for the following reasons.

[133] First, although I agree that there are some record-keeping miscues on the Town's part, I cannot conclude that they were wilful or that they reflect the Town's general disregard of its obligations under the ESA Agreement. The records of communication between the parties to the agreement indicate that they communicated regularly. The ESA was promptly notified of the August 15, 2012 occurrence and before undertaking any repairs, the Town took extensive photographs as the ESA directed. Mr. Fraser testified that he believes the Town took the necessary steps to meet the provincial *Electrical Code* requirements, filed the required reports with the ESA in relation to any electrical incidents, and followed the ESA directives.

[134] Second, there cannot have been a causal connection between the 2011 McTeague electric field wire repairs and the August 15, 2012 incident. It is clear from the nature of the damage inside the subject pole that the damage arose from a lightning strike and that the electrical surge was so strong that it vapourized the bonding wire and the split-bolt connector. This kind of damage could only have been caused by lightning and was therefore unconnected to the earlier electrical repairs.

[135] Third, on July 6, 2019, the ESA carried out its annual inspection of the premises in the company of a Town electrician. The comprehensive inspection report did not detect a single high or medium risk defect for any of the 22 Whitby facilities which were inspected after the subject pole was repaired. Nor did the Cable 3000 team retained to inspect the field after the pole was repaired. Instead, Cable 3000 reported that all the other electrical facilities in the field were working properly. In my view, the positive results of these two inspections confirm that the repairs done before August 15, 2012 were properly and safely completed. Even Mr. Gillingham agreed in his report that it was unlikely that a potential ground gradient had existed undetected for an entire month.

(v) The light poles were beyond their life expectancy

[136] The Plaintiffs argue that the light poles were at, if not beyond, their life cycle at the time Zoe was shocked. They were, therefore, more susceptible to deterioration and there was, thus, a higher obligation on Whitby to engage in preventative maintenance.

[137] I do not agree that the age of the light poles was a relevant factor in relation to the shock incident.

[138] First, the suggestion that the light poles were beyond their life expectancy is based on Mr. Gillingham's reference to the 2015 ESA *Street Lighting Guidelines* referenced above, particularly section 4.3 entitled "Expected Service Life of Roadway Lighting Assets". As already mentioned, this guideline, which was published after Zoe's accident, pertained to the much more severe environment in which streetlight poles are installed, not the Sports Centre light pole that was relevant to this incident.

[139] Second, the guideline contains the following references which Mr. Gillingham failed to acknowledge:

> The expected service life numbers are intended to be used for capital planning and asset management purposes. These numbers are NOT intended to be an estimate of the elements' design life or their mean time between failure [emphasis in original].

[140] Third, none of the experts mentioned that the poles were deteriorated, or that this deterioration caused or contributed to the incident. In fact, Mr. Learmonth testified that the poles were in reasonably good condition, showing no evidence of spalling or significant concrete deterioration.

[141] Fourth, and most importantly, the condition of the subject pole itself was immaterial to the incident, as it was the internal wires which were damaged by lightning. It was the damaged wires, not a deteriorated light pole, that caused the incident. Mr. Learmonth testified that given the cause of the incident, even had the pole been replaced with all new wiring and light fixtures and then inspected by the ESA – on the day before the incident – the results would have been the same in the same lightning event. The damage would have been invisible and nothing further in maintenance would have prevented it.

[142] Finally, after the incident, Cable 3000 was asked to perform a series of measurements relating to safety concerns around the light standards at the soccer pitch. The tests were performed on all the poles. Cable 3000 reported no issues with either the poles or the wiring at the field.

(vi) Whitby's failure to comply with Rule 2-300(3) of the Ontario Safety Electrical Code – infrequently used electrical equipment

[143] In his testimony, Mr. Gillingham pointed out that the Town failed to comply with Rule 2-300(3) of the *Code*. The Plaintiffs submit that this failure illustrates the Town's disregard for the electrical maintenance provisions in the *Code* which caused or contributed to the electrical incident.

[144] The rule reads as follows:

> 2-300(3) …Infrequently used electrical equipment maintained for future service shall be thoroughly inspected before use in order to determine its fitness for service.

[145] In cross-examination, Mr. Gillingham admitted that the terms "infrequently used", "maintained for future service" and "thoroughly inspected" were not defined in the *Code*. No further guidance was provided to the court with respect to how these terms should be interpreted.

[146] Mr. Gillingham confirmed that he did not believe that the Town had ever been "cited" for a failure to carry out such a pre-soccer season inspection.

[147] The Town agrees that it lacks records confirming a formal inspection of the park light system at the commencement of the soccer season, beyond the usual visual inspection to determine that the lights were working properly.

[148] The evidence is that the soccer field is regularly used during the soccer season: from spring to late summer. I have considerable doubt that the terms "infrequently used" and "maintained for future service" apply to the frequent but seasonal use of soccer field lights. In any event, if the section does apply to the circumstances of this case, and if no "thorough inspection" occurred before the commencement of the season, I fail to see a causal relationship between the Town's failure of such an inspection and the August 15, 2019 shock incident.

[149] The evidence supports a finding that the field was inspected before and following the August 15, 2012 incident. Both times it was found to be in good condition. Mr. Fraser testified that on July 6, 2012 the ESA conducted its annual inspection of the soccer field in the company of a Town electrician. No electrical issues with the poles or wiring were identified. As already noted, following the August 15, 2012 incident, Cable 3000 was retained to perform a test and the test results were such that Cable 3000 reported no issues with the poles and wiring. Most significantly, the nature of the damage (lightning strike with damage to bonding wire) was such that even a thorough inspection of the electrical system could not have prevented the incident.

[150] In conclusion, assuming section 2-300(3) does apply to the maintenance of a seasonally used soccer field, I find that any failure by the Town to carry out a pre-season thorough inspection was not causally related to the injury to Zoe, and does not result in a finding of liability on the part of the Town in relation to the Plaintiffs' claims.

(vii) Whitby's failure to adopt a pro-active inspection strategy which included opening and inspecting inside each handhole

[151] Counsel for the Plaintiffs submits that the Town should have implemented and followed a program of inspections of its light poles which included removing the handhole cover-plates and inspecting the internal wires and connectors. These should have been scheduled to occur after each lightning event or on a regularly scheduled basis. Assuming such an inspection program had been in place, and depending on its scheduling, the damage to the internal wiring would have been detected and remedied, thus preventing the injury to Zoe.

[152] I am not persuaded that the absence of such an inspection program is a failure to take reasonable care on the part of the Town. My reasons include the following.

[153] First, although a program of regular inspection of handwells is now in place for streetlight installations, as I have noted, there is significant difference between handwells and handholes. Handholes provide a protected and safe environment wherein electrical connections can be made and preserved. Unlike handwells, handholes exist above ground and once the metal cover is in place, the covered handhole area and the wiring therein is safe from environmental factors such as wind, moisture and vibrations. Homeowners are not expected to remove the covers from junction boxes in their homes on a regular basis or after every lightning storm to inspect the apparatus. By the same token, I see no reason why such inspections should be scheduled for light poles. Again, there is significantly less foreseeability of injury resulting from stray voltage in a handhole/park lighting context than in a streetlighting context, and the ESA Guidelines do not apply to park light installations.

[154] Second, the Plaintiffs' proposed inspection strategy suggests that handholes are a particularly incident-prone area of a light pole. There is no evidence of this. In the circumstances of this case, the damage to the bonding wire at the handhole is pure happenstance. The evidence is that there were other vulnerable connection points in and

around the pole that could have been damaged with the same result: the connections at the top of the light pole or the connections underground.

[155] Third, the only way to properly inspect the wires and connectors in a handhole would be to pull them out into the light. Mr. Learmonth expressed concern about regularly pulling out the wires, opining that anytime the wires are bent or manipulated their copper component can weaken and become compromised, thereby increasing the risk of future failure.

[156] Fourth, I note that neither Mssrs. Learmonth, Fraser nor Habash advocated for such an inspection strategy. Mr. Fraser was specifically asked whether routine inspections like those suggested by Mr. Gillingham were recommended. He answered that such inspections were not necessary because when the electrical system is installed it is inspected by the ESA. Thereafter, there is no reason to inspect absence some external evidence of a failure in the system.

[157] Finally, the evidence is that there are 63 light poles located on the premises of the Sports Centre. All would have to be included in any inspection program and if the program were to effectively meet the objectives advanced by the Plaintiffs, all wiring, inside and outside the pole, would have to be inspected. I find that the cost of such inspections after each lightning event or even on a periodic basis would be prohibitive and unjustified given the sparse risk that the interior wires would be damaged–in the absence of external evidence thereof: such as damage to the exterior of the pole, failure of lights to operate, tripping of circuit breakers.

3. Liability – summary and conclusions

[158] The evidence was that the Town entered into an agreement with the ESA which provided for comprehensive annual inspections of its park lights. The ESA agreed that the Town had complied with the terms of this agreement.

[159] The evidence was also that the Town's park light installations complied with the *Electrical Code* and that the Town's inspection and maintenance protocols were designed to protect users of its sports fields from injuries caused by foreseeable risks.

[160] The *OLA* requires the Town as occupier to take reasonable steps to ensure the safety of the users of the Sports Centre fields. I have found that the nature and type of damage was such that it was not reasonably foreseeable by the Town. I am satisfied in the circumstances of the case that the Town took the necessary reasonable steps in relation to any foreseeable electrical mishaps.

[161] Accordingly, I find that the Town of Whitby not liable for the injuries sustained by Zoe Onley on August 15, 2012.

II. Second Issue: Damages

[162] Although I have decided that the defendant is not liable for the damages incurred by the Plaintiffs in this case, I provide my views on the merits of their damage claim.

A. Summary of Zoe's medical, academic and employment progress post August 15, 2012

1. Final year of high school to commencement of university: August 2012 – September, 2013

[163] Following the electrical shock Zoe was taken by ambulance to Rouge Valley Health System–Ajax Pickering Hospital ("Rouge Valley Hospital"). There she was examined and give intravenous fluids and pain management medication. She was under observation for several hours and was informed that she would likely feel quite unwell in the ensuing days. She was subsequently released with a recommendation to follow up with her family physician, Dr. Keith Cross.

[164] The emergency triage record from Rouge Valley Hospital reads:

> …chief complaint: Headache…HPI: Playing soccer and fell on hands and knees. Felt electrical shock go through whole body approx. …45 mins ago. Same felt by bystanders c/o tinging to extremities with frontal headache. Nausea has resolved. Sinus tach on monitor alert…CS 15/15…ambulatory on discharge…

[165] Zoe was not satisfied with the care she received at Rouge Valley Hospital and when symptoms of tingling, numbness and neuropathic pain persisted into the next day, her mother drove her to Sunnybrook Hospital in Toronto for an evaluation. Fortunately, an emergency room doctor was available who had expertise treating electric shock victims.

[166] The Sunnybrook emergency record indicates that Zoe was diagnosed with "Myalgia, secondary to Electrical Injury". Zoe testified that the emergency doctor informed her that she would likely feel like she "had the crap kicked out of her for about a month".

[167] In September 2012, Zoe returned to high school for a fifth year. She testified that she underwent shoulder surgery during her fourth year of high school and that although she could return to classes following her surgery, she could not play basketball. By returning for a fifth year or 'victory lap' she could play one more season of basketball. Her marks improved during this fifth year and she testified that she received a 79% average.

[168] During the months following her visit to Sunnybrook, Zoe complained of physical symptoms, including tingling and numbness, pins and needles in her legs and hands, skin appearances and texture changes, heart palpitations, nausea, confusion and disorientation. Notwithstanding these complaints, it appears that Zoe was able to continue with most of her activities.

[169] In response to her continued complaints, Dr. Cross referred Zoe to Dr. Timothy Lapp, a physiatrist for assessment. Dr. Lapp conducted tests but had difficulty arriving at a diagnosis, as revealed in this excerpt from his January 11, 2013 physiatry assessment report:

> She was taken to the Ajax hospital by ambulance. Apparently, there was some testing done there including blood work I presume looking for rhabdomyolysis. Her mother assures me the results at that time were negative, although I have not seen them.
>
> She struggled thereafter with ongoing symptoms, including aching and sharp sensation about her ankles and tibia. She was seen at Sunnybrook Hospital by a specialist in electrical exposures…Her mother again assures me that testing at that time proved negative.
>
> Her past medical history is otherwise non-contributory…She remained extremely active exercising daily. She participates in an OBA team in Barrie, anticipates going to University next year.
>
> I competed standard nerve conduction studies on both lower limbs. The peroneal and tibial motor conduction parameters all fell within normal limits…The sural and superficial peroneal sensory parameters also fell within normal limits.
>
> Summary: I'm hard pressed to explain Zoe's persistent post-exercise related ankle and tibial discomfort. The timing suggest it may well have related to the electrical exposure last summer. There's no premorbid history of similar phenomena. There is certainly nothing to find from a soft tissue standpoint today, and I'm reassured that neurologically she was intact both clinically and electro physiologically. I don't think there's more to be done on Zoe's behalf at this time. I've encouraged her to be as active as she chooses.

[170] Zoe saw Dr. Lapp for a follow up on April 2, 2013 for what he referred to as "her lower extremity sensory complaints". Once again, he had difficulty diagnosing these complaints. Excerpts from his notes include the following:

> Summary: I'm reassured that Zoe felt well enough to finish her basketball season and compete. I'm puzzled by her recurrent symptoms recently. I will arrange for some further blood work to investigate an underlying metabolic disorder that might account for the cramping. Most of these studies were done last December and were negative.
>
> I'll see her back again in about a month to follow up on all of this. In the interim I've encouraged her to be as active as she can tolerate. I don't think there's any sinister underlying neuromuscular disorder.

[171] Zoe saw Dr. Lapp once more on May 6, 2013. Dr. Lapp noted that while he was reassured by the negative results of Zoe's blood work, the results did not rule out the possibility of recurrent cramping. Excerpts from his report include the following:

> Fortunately for Zoe, her symptoms seem to have settled substantially since we met back in early April. She remains active in basketball and is looking forward to the soccer season. She describes diminishing cramping and discomfort.

[172] In June 2013, Zoe graduated from high school in Bracebridge. In September 2013, she moved from Bracebridge into a dormitory at the University of Waterloo where she had enrolled in an undergraduate program.

2. First year of university: early anxiety issues

[173] Before the shock incident, Zoe had experienced some issues with anxiety. In January 2012, she complained about anxiety to Denise Lorbetskie, a nurse practitioner in Dr. Cross's office and Ms. Lorbetskie referred her for counselling. Between February 28 and April 23, 2012, Zoe had 3 counselling sessions with Maureen Smedling. Ms. Smedling testified that the anxiety-inducing topics they discussed included Zoe's boyfriend, Zoe's shoulder surgery and the possible impact of the surgery on Zoe's sporting activities.

[174] Within days of arriving at university, Zoe had a recurrence of anxiety symptoms and a panic attack. She returned home on the September 15, 2013 weekend. While at home, she received what she described as a disturbing email from her roommate which increased her anxiety. She and her mother then attempted to obtain a doctors' note from Dr. Cross's office that weekend to support her application for a single-occupancy dorm room. However, they were unsuccessful. Dr. Cross's notes dated September 16, 2013 are as follows:

> Discussed above Denise … KC has not attended to Zoe since began EMR [only one flu shot] …DL has not attended Zoe for anxiety since March 2012. Neither felt sufficient current contact to document anxiety /stress and need for room change. Message left proposing involve health services at Waterloo… more accessible and probably better positioned to help adjustment and facilitate room moves if needed.

[175] Zoe returned to university and eventually her anxiety issues resolved.

[176] Zoe underwent a complete physical examination with Dr. Cross on October 11, 2013. Under the heading, "Subjective Patient Concerns," of his clinical notes, Dr. Cross wrote:

1. Lesion on upper leg – months – no puritus;
2. School improved – no concerns with stressors;
3. Continues to have aching in bilat feet and ankles that radiates up both calves since electrocution.

[177] Under the heading, "Psych," Dr. Cross noted:

1. No hx of depression;
2. Generally, enjoys in day to day activities;
3. Good social support/relationships with family, friends.

[178] Under the heading, "Activities and Exercise," Dr. Cross noted:

1. cardio resistance flexibility…walking daily

3. February 2014: admission to the Amen Clinic and PTSD diagnosis

[179] Zoe testified that notwithstanding the initial assurances from her doctors that she could expect to recover from her shock-related symptoms in a relatively short period, she continued to have what she believed were symptoms of the incident. On her father's advice she attended the Amen Clinic in Atlanta, Georgia for a three-day assessment in February 2014. The Amen Clinic is a mental and physical health clinic that performs clinical evaluations and brain SPECT imaging, focusing on mood and behaviour disorders.

[180] At the Amen Clinic, Zoe was diagnosed with post-traumatic stress disorder (PTSD) related to the shock incident. The clinic recommended that she engage in Eye Movement Desensitization and Reprocessing (EMDR) therapy.

4. February 2014 to present: treatment by Rhonda Kane and academic/employment history

[181] In March 2014, Zoe began EMDR therapy with Rhonda Kane at the Kane Centre in Kitchener, Ontario. She has been treated by Ms. Kane since that time.

[182] Zoe met with Rhonda Kane once per week for approximately two months and she has attended intermittently on an as-needed basis since then. At the Kane Centre, she worked on coping strategies for her PTSD. Ms. Kane noted that Zoe's symptoms then included flashbacks of the accident, hypervigilance, anxiety, sadness, and somatic reactions, nightmares and phantom pains in her feet, muscles and joints. Ms. Kane also noted three pre-existing anxiety triggers: a fall off a roof, a robbery in the Bahamas and injuries to her shoulder. Ms. Kane noted the following after Zoe's June 11, 2014 attendance. This marked the last of her initial 9 attendances:

> Adaptive Resolution Reached!
>
> Stable and non-dissociative

[183] In May 2014, Zoe completed her first year of university with a 72% average. She was now almost 2 years post-shock.

[184] Zoe's second year at Waterloo (2014/2015) appears to have been relatively uneventful. She reached out to Ms. Kane several times in 2015. On March 5, 2015, she spoke to her by telephone concerning the breakup with her boyfriend. Ms. Kane's notes include the following comment:

> Assessed for traumatic response. Heightened emotions given context of earlier trauma of the soccer field electrocution…EMDR to process this experience of loss.

[185] On March 22, 2015 Zoe met with Ms. Kane for an EMDR session. Ms. Kane's notes of the session read:

> "P/C "I can choose to trust again"
>
> Adaptive Resolution Reached

[186] During the 2015 summer break, Zoe worked as a painter with College Pro Painters in Port Carling, Ontario. On August 21, 2015, she saw her family doctor. More than three years had now passed since the shock. The doctor's notes indicate that she "generally appears well". There was no reference in the notes to the shock or any symptoms related thereto.

[187] In September 2015, Zoe approached Ms. Kane for counselling and support to assist her in preparing for her upcoming examinations for discovery and her doctor's assessments for this case. She anticipated being triggered by these events.

[188] Ms. Kane saw Zoe on September 23, 2015 for an EMDR session. At the conclusion of the session she noted the following in her notes:

> At close of session, client was grounded and non-dissociative.

[189] Zoe was examined for discovery on October 6, 2015. She scheduled a "de- briefing" visit with Ms. Kane on October 15, 2015. Zoe informed Ms. Kane that she cried five times during discovery when recounting the shock event and the effect it had on her involvement in sports. She informed Ms. Kane that she applied the visualization and DBT resources and techniques she had learned in counselling and these were helpful, and she drove away feeling "relieved and happy in a sense". At the conclusion of her notes, Ms. Kane wrote:

> Containment work effective. Client non-dissociative.

[190] On December 20, 2016, now approximately 14 months after the "de-briefing" session, Zoe scheduled another meeting with Ms. Kane. Ms. Kane's notes indicate that Zoe informed her that she had worked as a supervisor at a summer soccer camp during the 2016 summer break. She did not have PTSD symptoms which she could relate to the shock-incident during the time she worked at the camp but lately she had begun to respond to different anxiety inducing triggers.

[191] Zoe scheduled follow up visits with Ms. Kane on January 19, 2017, February 7, 2019, March 7, 2017, March 13, 2017, and March 28, 2017.

[192] In her April 11, 2017 report to Zoe's counsel, Ms. Kane reports that part of her recent therapy involved strengthening Zoe to withstand various aspects of the legal and medical process, including the rigours of examinations for discovery and additional psychological assessments. For this, Ms. Kane used a future-oriented EMDR approach, which she indicated was "strength-based".

[193] Ms. Kane further reported a recent development where Zoe had static shocks on contact with metal surfaces. She had also been triggered by extreme weather events. Ms. Kane reported that in response to this development, she employed a therapeutic approach which "has centred around helping Zoe desensitize to these triggers, to regulate her emotions concerning her trial and to process through the negative cognitions that have resulted". She explained that the goal for Zoe was "adaptive resolution".

[194] Zoe scheduled regular counselling sessions with Ms. Kane between May 2017 through to the present. During this time, Zoe continued to report an unusual amount of static shocks. The focus of the EMDR sessions was to assist her in becoming resilient to these stressors. Ms. Kane continued to attribute much of Zoe's anxiety to the ongoing unresolved legal dispute. She concluded her last report, dated February 11, 2019, as follows:

> Assessment: Zoe's emotional responses are indicative of the unresolved nature of the mental condition sustained by the on-going legal process. It may be that the triggers will remain unresolvable until the legal process ends. This therapist anticipates adaptive resolution of core targets within one year of ending the legal process. The evidence of on-going dreams and nightmares that awaken her and her arousal at night in an alert state indicates that the brain still does not believe that she is now safe.
>
> Plan: Continue to reinforce strategies to calm the nervous system and return from dissociative experiences. Continue with EMDR.

[195] At trial, Ms. Kane confirmed her diagnosis that Zoe is suffering from PTSD. She did not diagnose Zoe with an anxiety disorder. Her symptoms appear periodically in response to certain triggers, such as lightning. Her trauma was reinforced by the extended legal process.

[196] Ms. Kane's prognosis was generally positive, and she opined that Zoe could expect significant resolution on conclusion of the legal process. However, complete resolution of the symptoms was unlikely, and Zoe could have occasional relapses in response to certain stressors. She recommended that Zoe continue with regular counselling consisting of cognitive therapy and EMDR.

[197] Zoe did not take a full complement of courses during the 2016/2017 year. This allowed her to work part-time as a show ambassador at Grand River Shows in Waterloo. Thereafter, she obtained employment as a bartender and Front of House supervisor at the State and Main restaurant in Kitchener, Ontario. During this time, she completed the remaining course for her undergraduate degree (an online course through Athabasca University) and she graduated with a three-year Bachelor of Arts degree in May 2018, majoring in General Speech Communications with a minor in French Studies.

[198] In September 2018, Zoe obtained employment at the Rebel Creek Golf Club as a Junior Event Manager. She has now moved back to Bracebridge and is currently employed as a Summer Events Ambassador with Muskoka Brewery.

B. Summary of medical assessments (PTSD injury)

[199] Zoe was examined by several physicians in relation to her PTSD diagnosis. The following summarizes some of the evidence and assessment reports relating to her PTSD symptoms.

1. Dr. Joanna Hamilton

[200] Zoe was assessed by Dr. Joanna Hamilton at the request of her counsel. Dr. Hamilton is an expert in neuropsychology and evaluated Zoe in 2017 with a follow up evaluation on December 4, 2018.

[201] Dr. Hamilton agrees that Zoe suffers from PTSD. The symptoms include physical pain in response to certain stressors: soccer fields, light posts, appointments. She also has emotional flashbacks, nightmares, depression. In Dr. Hamilton's opinion, the PTSD has exacerbated the learning difficulties/disability Zoe was diagnosed with before the shock incident.

[202] Dr. Hamilton reviewed the reports of Drs. Waisman and Bradbury who were retained to evaluate Zoe on behalf of the defence. She noted that they all agree that Zoe is suffering from PTSD. However, they disagree about her prognosis. Dr. Hamilton notes that Zoe is now six years post-injury. She continues to present with symptoms and remains triggered by certain situations and events. She believes Zoe will require ongoing treatment in the future.

2. Dr. Zohar Waisman

[203] Zoe was assessed by Dr. Zohar Waisman at the request of defence and he provided expert evidence as a psychiatrist. He filed a report with the court dated April 3, 2018.

[204] Dr. Waisman notes in his review of Zoe's records that she was referred by her parents to Dr. Jeffrey Phillips for a psychological assessment when she was 13 years old, "to determine her psychological status and [the] nature of [her] psychological functioning as, in particular, related to possible learning difficulties." Dr. Philips diagnosed Zoe as follows:

> learning disability as related to executive functioning delays as would pertain to working memory deficits, organizational problems, attentional shifting etc., attentional deficit hyperactivity disorder inattentive type and scotopic sensitivity syndrome.

[205] Dr. Waisman reported that Zoe informed him that in general, she has been able to return to playing intramural sports, including volleyball and basketball, as well as soccer.

[206] In Dr. Waisman's opinion, Zoe has the residual symptoms of Post-Traumatic Stress Disorder, as well as the criteria for an Adjustment Disorder with depressive symptoms and some anxiety features.

[207] Dr. Waisman opined that studies have demonstrated that PTSD is compatible with good functional recovery and it is common to observe individuals with significant PTSD symptoms who function well.

[208] According to Dr. Waisman, Cognitive Behavioural Therapy ("CBT") appears to be the treatment of choice for PTSD. Also, various medications have been used to alleviate its symptoms. He references Selective Serotonin Reuptake Inhibitors ("SSRIs") as a recommended medication.

[209] Dr. Waisman opined that Zoe's treatment to date has been only partly effective. The optimal treatment would include a combination of psychotherapy and psychopharmacology.

[210] Dr. Waisman does not believe that Zoe has sustained a permanent and serous impairment. He points out that from a functional perspective, Zoe was able to proceed with her education, social, and developmental pursuits since the incident. He notes that her condition has improved with time as expected with the help of psychotherapy sessions. According to Dr. Waisman, Zoe's condition cannot be considered permanent since the prognosis for recovery is favourable with additional treatment. Treatment to date has only been partial. She requires additional pharmacological treatment.

3. Dr. Cheryl Bradbury

[211] Zoe was assessed by Dr. Cheryl Bradbury, a clinical Neuropsychologist on behalf of the defendant. According to Dr. Bradbury, the objective of the assessment was to characterize Zoe's post-injury cognitive and emotional functioning at this stage (five and a half years post-injury). An additional aim was to provide Zoe with any additional recommendations that may assist her in better adapting to the changes in her thinking skills and emotional processes post injury. Dr. Bradbury's report was dated April 24, 2018.

[212] Dr. Bradbury administered several tests to Zoe. She summarizes the results of these tests at p. 17 of her report as follows:

> Results from the current neurocognitive evaluation indicate globally intact intellectual capabilities with no indication of any substantive neurocognitive compromise identified.

[213] Dr. Bradbury refers to Zoe as a very conscientious and resilient young woman who undoubtedly suffered from signs of post-traumatic stress subsequent to the shock incident. She believes it conceivable to assume that during her acute recovery course, when her post-traumatic symptoms were likely to have been more prominent, that some tendencies toward increased subjective cognitive concerns and attentional difficulties may have been reported, as symptomatology of this nature is often described in individuals who are experiencing acute signs of traumatic stress and emotional distress. However, she does not believe substantive cognitive difficulties are present or would be anticipated at this later state in her recovery.

[214] Dr. Bradbury opines that at this juncture, Zoe is presenting with only minimal psychological concerns, scoring within normal limits on all psychological self-report questionnaires administered to her. Further, she notes that during her clinical interview with Zoe, only residual psychological signs of post-traumatic stress were attributed to her recent medical evaluations and legal processes. As such, Zoe's current clinical presentation, in conjunction with her mechanism of injury, was not reflective of any injury-related traumatic brain injury. Zoe's post-traumatic stress appears to have followed a positive and anticipated recovery trajectory. Based on the test results and her interviews with Zoe, Dr. Bradbury concludes that at this time Zoe meets the DSM-5 diagnostic criteria for the following:

> 309.81 Post-Traumatic Stress Disorder, nearly resolved

[215] In summary, Dr. Bradbury concludes that although Zoe did have symptoms of post-traumatic stress because of the electrical injury, she has over time recovered favourably and any residual symptomatology should be classified as "mild". The test results place her clinical profile within normal limits and there is no indication that she has any significant or lasting neuropsychological impairment. Zoe's clinical presentation does not pose any neuropsychological/psychological substantive barriers to her resuming all her pre-injury quotidian activities.

4. Dr. Van Reekum

[216] Dr. Van Reekum is a consultant and clinical investigator with a specialty in neuropsychology. He was asked by counsel for the Plaintiffs to undertake a neuropsychiatric assessment of Zoe.

[217] Dr. Van Reekum first comprehensively reviewed Zoe's medical records. Thereafter, he interviewed Zoe on May 12, 2016.

[218] Dr. Van Reekum notes that his information suggests that Zoe had generally been healthy, happy and active. She had some difficulty learning to read and with math, "for which she may have received tutoring but did not require special education". She may also have had some "borderline" attentional difficulties (not diagnosed as ADD and not treated pharmacologically), but she did not have any school failures and was accepted to university after completing a fifth year of high school in 2013.

[219] Dr. Van Reekum notes that Zoe had a brief period of anxiety pre-incident which was associated with meeting her boyfriend's parents in the winter of 2012 and for which she attended some counselling sessions. He notes that Zoe likely had a "thin skull" for future difficulties with anxiety, but it did not appear that she suffered from an anxiety disorder before the shock incident.

[220] Dr. Van Reekum summarizes the sequelae from the incident as follows:

1. Paresthesia (pins and needles), which Zoe described as having been painful initially. Zoe reported that this symptom has now improved to the point that it is generally absent except when experiencing a "flashback").

2. Intermittent muscle pains initially earlier after the incident, particularly in her left foot and that she had been receiving muscle spasms. Zoe reported that these pains have generally improved but still occur occasionally.

3. Perceived weakness in her muscles; she believes that her muscle strength is now back to 75% of her pre-incident baseline.

4. Symptoms typical of PTSD, such as aversive memories of the incident, occasional flashbacks and an increase in her startle reflex. Dr. Reekum opined that Zoe probably developed PTSD as a primary result of the incident and although the PTSD is now improved it is only in partial remission at this time and she remains at risk for future full recurrences.

5. Panic Attacks. Zoe recalls experiencing four of such attacks and according to Dr. Van Reekum she is at risk for further attacks.

6. Symptoms of depression such as sadness, reduced energy and appetite. Dr. Van Reekum notes that her earlier diagnosis of an adjustment disorder is now in remission, but she remains at risk for recurrences.

7. Zoe reported that she had some cognitive difficulties earlier on after the incident; she feels that her cognitive functioning has now retuned to normal. Dr. Van Reekum suggested that some cognitive testing was in order because individuals who have such difficulties cannot always accurately self-assess.

[221] With respect to any functional impairments for which this incident may have been responsible, Dr. Van Reekum notes that Zoe was probably handicapped by the sequelae of the incident, by which he means that she was probably disadvantaged in the maintenance and pursuit of her usual and expected social roles.

[222] Zoe reported to Dr. Van Reekum that although she was admitted to university, she found it difficult. As such, she had not yet taken a full course load. He notes that Zoe had some difficulties with learning earlier in her life, in reading and mathematics. Since he was not in receipt of her academic records, he could not opine as to whether the shock incident was contributing to Zoe's difficulty at university. He does note that many of the sequelae which have been described would likely have made learning more difficult for her.

[223] Dr. Van Reekum appears to be optimistic about Zoe's recovery and prospects for further recovery. He notes that overall the bulk of Zoe's incident-related sequelae have improved significantly and that it follows that Zoe's incident-related functional impairment or "handicap" has likely decreased significantly as well. She remains at risk, however.

[224] With respect to future treatment, Dr. Van Reekum suggested that Zoe may benefit from a trial of antidepressants should the PTSD and/or the MDE recur. Psychotherapeutic intervention may also be beneficial. In future, depending on her condition and circumstances, Zoe could benefit from supportive therapy, cognitive behavioural therapy, help with planning and insight, and grief work.

C. Discussion

1. Physical pain (legs, feet, and muscle cramping

[225] Zoe was advised at Sunnybrook that she would likely feel unwell for about a month following the shock incident. Accordingly, she did not seek further medical intervention until October 1, 2012, when she consulted her nurse practitioner, Denise Lorbetskie, complaining about pain and discomfort in her legs and feet.

[226] Ms. Lorbetskie examined Zoe and noted that Zoe "generally appears well". Specifically, with respect to Zoe's ankles she observed "no obvious deformity, no redness, no edema, no ecchymosis and no rash or lesions." With respect to Zoe's range of motion, Ms. Lorbetskie observed normal flexion, normal extension, normal medial/lateral rotation, normal abduction, normal adduction and no pain with pain opposing force.

[227] Zoe was referred to Dr. Timothy Lapp, a physiatrist for further investigation and she booked an appointment to see him on January 11, 2013. Before she was seen by him however, she attended at the Muskoka Algonquin Hospital in Bracebridge on November 7, 2013 complaining of left ankle pain from an injury which she had sustained about 3 weeks earlier, and which she had re-injured about 1 week thereafter. The incident suggests that notwithstanding her complaints to Ms. Lorbetskie, Zoe remained physically active.

[228] Zoe was seen by Dr. Lapp on three occasions between January 11, 2013 and April 2, 2013. His clinical notes, which are summarized above, reveal that he was puzzled by Zoe's recurrent symptoms. His examinations revealed what he described as a "fit appearing 19-year-old" who he reported had "participated in and completed her regular basketball season and had returned to regular training".

[229] Dr. Lapp's notes from Zoe's final visit indicate that he was "reassured by her clinical examination and negative investigations" and he suspected that she would continue to increase her activities with "fewer and fewer complaints".

[230] Zoe testified that several days after the shock incident, she noticed that both of her feet had discoloured. She took photographs of her feet which she later provided to her counsel.

[231] The Town of Whitby contests these reports and submits that they are without merit on account of:

- On the night of the incident, the paramedics recorded that Zoe complained of "tingling in her extremities but that no burn marks were found on the patient's body."

- The triage nurse at the Rouge Valley Hospital also observed "no burn marks seen at this time".

- The Sunnybrook Hospital records did not include any observation of disfigurement of the toes.

- Denise Lorbetskie did not record any complaints of burn marks when she examined Zoe on October 1, 2012.

- Dr. Lapp did not reference any complaints of burn marks.

- Mr. Learmonth, the Town's expert, explained that soccer shoes are good insulators. They would not conduct electrical current through Zoe's feet as would her hands or her bare feet.

[232] Counsel for Zoe arranged for her to see Dr. Mansour Bendago, a plastic surgeon and burn specialist on March 12, 2019, which is approximately 6 ½ years post-shock. Based on a review of Zoe's available medical records, his interview with Zoe and his review of the photographs, Dr. Bendago opined that the photos provided "evidence of a physical injury that could be explained by an electrical injury, given that the top (dorsum) of the feet were on the ground. Further, such an electrical injury "could have caused damage to the musculoskeletal system, although it did not show in the urine test as a rhabdomyolysis". He opined that the extent of the muscle injury that Ms. Onley might have suffered was difficult to quantify, but based on her symptoms, she did suffer some degree of muscle injury.

[233] Dr. Bendago noted that at the time Zoe's hands and feet have normal skin colour, consistent with the colour of the rest of her body. He noted intact sensation and palpable arterial pulses, no muscle wasting and grossly normal muscle power. He concluded that Zoe does not require attendant care or home modifications from a physical functional perspective.

[234] The Town arranged for Zoe to be assessed by Dr. S. Krajden whose report was filed with the court. Dr. Krajden holds a specialist certificate in Plastic and Reconstructive Surgery and is Division Head of Plastic Surgery at William Osler Health System. Dr. Krajden was provided with copies of Zoe's clinical records and expert reports and he examined Zoe on January 18, 2019.

[235] In his report, Dr. Krajden noted that his examination did not reveal any clinical evidence of significant pre-existing integumentary, soft-tissue, neurological or musculoskeletal abnormalities involving Zoe's lower extremities. His vascular examination and motor neurological examination were unremarkable.

[236] With respect to Zoe's complaints of paresthesia and dysesthesias involving her lower extremities, he noted that there was no defined anatomic dermatome involved nor were they within the distribution of a major/named peripheral sensory nerve.

[237] Regarding his integumentary (skin) examination, Dr. Krajden noted discoloration involving the dorsal aspect of Zoe's toes. This hyperpigmentation did not have associated hypertrophic changes or keloid healing.

[238] Based on Zoe's clinical history and the documents he reviewed, as well as his own physical examination, Dr. Krajden opined that on the balance of probabilities, Zoe sustained a low voltage electrical injury on August 15, 2012 of uncertain duration. He also opined that low energy/voltage electrical injuries can lead to long-term sensory neurological symptomatology, despite relatively normal objective testing, including clinical/physical examination and electrophysiological assessment.

[239] With respect to Zoe's future quotidian activities, Dr. Krajden opined that the lack of any lower extremity gross motor weakness or major sensory deficits should allow Zoe to perform the majority of her activities, home maintenance duties and vocational and avocational activities as tolerated and with appropriate pacing. With respect to Zoe's prognosis, he opined that on the balance of probabilities no further deterioration was to be anticipated.

[240] In view of the evidence of Drs. Krajden and Bendago, I am not convinced that the issue of whether Zoe suffered a *visible* injury to her feet is significant in determining the nature or extent of her injuries. As noted by Dr. Krajden, an injury could have occurred notwithstanding the absence of any clinical objective features.

[241] Rhonda Kane referred to Zoe's complaints of physical pain as "phantom pains in her feet, muscles and joints". Whether they are properly described as phantom or otherwise, I am satisfied on the evidence that Zoe has achieved substantial recovery in relation to these injuries, although she may continue to have some occasional discomfort in the form of muscle cramping, as noted by Dr. Van Reekum.

[242] It appears that the physicians who examined Zoe also concur that she has achieved substantial resolution of her physical injuries. Eight months after this incident, Dr. Lapp reported that Zoe had returned to regular physical training and team sports. Her remaining complaints consisted of some nocturnal pain, occasional cramping in her lower extremities and shock-like sensations from time to time. His overall prognosis was positive, and Zoe did not book any follow up appointments with him. Dr. Bendago noted intact sensation and palpable arterial pulses, no muscle wasting and grossly normal muscle power. In his opinion, Zoe would not require functional assistance in the future.

[243] Dr. Krajden observed no clinical evidence of significant pre-existing integumentary, soft-tissue, neurological or musculoskeletal abnormalities. His vascular examination and motor neurological examination were unremarkable, and he opined that Zoe completed her quotidian activities and would not require functional assistance in the future. Dr. Waisman reported that Zoe informed him that she has been able to return to playing intramural sports,

including volleyball, basketball and soccer. Dr. Van Reekum reports that Zoe informed him that she had intermittent muscle pains and spasms initially, particularly in her left foot, but these pains have now generally improved although they recur occasionally. He further reports that Zoe believes her muscle strength is now back to 75% of her baseline.

[244] In support of my finding that Zoe has achieved substantial recovery, I note that following the shock incident she has variously been employed as a sales associate, painter, waitress, bartender, camp-supervisor, show ambassador, restaurant supervisor and, most recently, an events ambassador. These positions all require an able and mobile body and there is no evidence that Zoe was compromised in performing any of them. That Zoe sought out and applied for these positions also suggests that she herself has a high degree of confidence in her own physical abilities.

2. Psychological injuries (PTSD)

[245] Zoe was first diagnosed with PTSD related to the shock incident when she attended at the Amen clinic in February 2014. The treatment recommended by the clinic was Eye Movement Desensitization and Reprocessing ("EMDR") therapy. Upon her return to Waterloo she began EMDR therapy with Rhonda Kane at the Kane Centre. Initially she met with Ms. Kane once per week for 9 weeks and thereafter she has scheduled visits on an as-needed basis through to the present.

[246] There is consensus among the physicians that Zoe suffers from PTSD and that this is related to the shock incident. However, they have differing views on Zoe's prognosis.

[247] Dr. Hamilton opines that Zoe will require some ongoing treatment because six years post-injury she continues to present with symptoms and remains triggered by certain situations and events.

[248] Dr. Waisman points out that, functionally, Zoe has progressed significantly by continuing her pre-incident education, social and development pursuits. He refers to her to-date treatment at the Kane centre as "partial" and recommends additional pharmacological treatment. He says her prognosis for complete recovery is favourable with this additional treatment.

[249] Dr. Bradbury refers to Zoe's present condition as "nearly resolved".

[250] Dr. Van Reekum is optimistic about Zoe's recovery and notes that her symptoms show significant improvement. He says she remains at risk for further PTSD symptoms and he suggests that she may benefit from antidepressants, if symptoms recur. In future, she could also benefit from supportive therapy and cognitive behavioural therapy.

[251] Dr. Van Reekum also notes that Zoe had issues with anxiety before the shock incident. He refers to Zoe as someone who likely has a "thin skull" for future difficulties with anxiety,

albeit he agrees that she did not appear to be suffering from an anxiety disorder before August 15, 2012.

[252] Ms. Kane's notes indicate that she has seen significant improvement. In March 2018, she notes that Zoe had "less intensity to her emotional flashbacks" and "is improving and getting better". On April 9, 2018 she wrote, "This client is finally becoming unstuck".

[253] Ms. Kane's notes also indicate that much time and attention was devoted to helping Zoe cope and deal with the demands and stresses which were imposed on her in relation to this lawsuit, such as preparing for and attending examinations for discovery and medical assessments.

[254] Quite clearly, Ms. Kane viewed Zoe's engagement in legal process as a major barrier to her recovery. In her report to the Plaintiffs' counsel dated April 11, 2017 she notes that:

> I suspect that the length of time it has taken to resolve this legal case is a strong factor in Zoe not being able to progress and being blocked in her processing efforts. I would recommend that this legal case be expedited to its final conclusion soon.

D. Assessment of damages

1. General damages

[255] Counsel filed several precedent cases to assist the court in assessing Zoe's general damages. The Plaintiffs submit that damages should be assessed in the range of $100,000 to $200,000 and filed precedents in support of this position. The Town submits that damages assessed in a range of $25,000 to $30,000 is appropriate and filed precedents which supported this lower assessment.

[256] The Town submits that the factual matrix of the Plaintiffs' cases are distinguishable from this case. Those cases, unlike the circumstances of this case, involve PTSD in conjunction with chronic or otherwise horrendous physical injuries.

[257] My review of the Plaintiffs' cases indicates that the PTSD diagnosis in those cases was generally associated with serious physical injuries including chemical burns, disabilities from being slashed with a bottle, assaults with a two-by-four and golf club, and bite wounds from attacks by pit bulls. The symptoms related to the PTSD were generally also more permanent, severe and debilitating than Zoe's symptoms.

[258] The cases filed by the Town can also be distinguished. The symptoms associated with the PTSD diagnosis in those cases were generally milder and of a shorter duration than Zoe's symptoms.

[259] I do not view Zoe's case of PTSD as serious and debilitating. Zoe has performed remarkedly well in every area of her life following the shock incident. The evidence is that

she quickly re-engaged in school and club sports. She has been employed in physically demanding positions and admits to only occasional pain and discomfort in her legs and feet, often associated with stressors. In less than a year following the incident, she successfully completed her final courses in high school with a 79% average–a higher average than she had achieved in previous years. She has now completed her university degree, maintaining marks in the average to high average range.

[260] I find Dr. Bradbury's evidence particularly helpful. Dr. Bradbury administered several objective tests to Zoe all of which demonstrated positive outcomes. In numerous performance domains, Zoe scored in the average to high average range. Dr. Bradbury notes:

> With regard to domain specific performance, her strengths and weaknesses were measured as follows: crystallized intellectual capacity (average range); simple and complex auditory attention (low average to high average); visual spatial simple and complex attention (average to high average); episodic verbal memory (average to high average); effortful learning and non-contextual verbal memory (average); visual spatial memory (average to high average); language and verbal conceptualization (average to high average); visual spatial ability (average to high average); processing speed (average); bilateral manual dexterity and motor speed (average) and in all areas of executive processes evaluated, including reasoning, cognitive flexibility, response inhibition, planning and organization strategy and verbal and visual fluency (average to superior).

[261] Zoe was able to combine her academic life in Waterloo with a variety of part time or temporary employment positions, several of which provided her with supervisory experience. According to Dr. Hamilton, she has been described by her roommates as the most sociable person in their residence. Later, she moved back to Bracebridge where she has now obtained employment consistent with her field of studies.

[262] The experts agree that Zoe's PTSD is largely in remission. I note that following her initial 9-week treatment regimen at the Kane clinic, Ms. Kane's notes indicate that Zoe quickly reached "adaptive resolution" and thereafter she had only required treatment on an as-needed basis, usually in response to anxiety-inducing stressors such as her upcoming trial.

[263] With respect to Zoe's prognosis, there is some difference of opinion among the experts. However, they generally agree with Ms. Kane that complete resolution of the symptoms is unlikely, and that Zoe could have occasional relapses in response to certain stressors.

[264] In conclusion, Zoe has progressed significantly in overcoming her PTSD issues. However, she remains at some risk of recurring symptoms from time to time. Had I found the defendant liable, I would have assessed Zoe's nonpecuniary damages in the sum of $85,000.

2. Economic losses

[265] The Plaintiffs retained Ian Wollach, a forensic accountant to prepare an estimate of Zoe's economic losses following the shock incident and to testify at the trial. These losses are categorized into claims which I deal with separately below.

(a) Past Income Loss (delay in graduating from university and entering the workforce)

Facts and Assumptions

[266] The Plaintiffs submit that Zoe was delayed in entering the work force by two years. Mr. Wollach calculates that the income losses resulting therefrom comprise $41,430, assuming both part time and full-time employment, and $83,916 assuming full-time employment during these two years. The claim for past income is therefore submitted as falling in a range of $41,430 to $83,916.

[267] Mr. Wollach states in his report of November 3, 2016 that he was asked to base his calculations on the following assumptions which are set out on pages 4 and 5 of his report.

- Zoe was born on March 14, 1994 and at the time of the shock incident on August 15, 2012, she was approximately 18.4 years of age.
- Pre-incident Zoe had intended to enter a three-year university program at age 19, commencing September 2013.
- Because of her injuries, she took a reduced course load that delayed the completion of her university education. As a result, she would not complete her program until May 2017, when she was 23 years old.
- Zoe's income losses should commence in May 27, 2017 at age 23, on the assumption that, absent the incident, she would have secured employment commensurate with her education by this date.
- As a result of the incident, she has been delayed in completing her university education, and will now enter the workforce in 2019 at age 25. Zoe's entry into a full-time career was therefore delayed by two years (March 14, 2017 - May 13, 2019).
- Zoe is partially and permanently disabled from gainful employment in a competitive employment environment.
- On May 6, 2019, Zoe commenced working as a Summer Events Ambassador at Muskoka Brewery, earning $700 a week.

[268] The evidence reveals that Zoe did not complete her degree or graduate in the spring of 2017 as anticipated in the data provided to Mr. Wollach. Rather, she graduated in June of 2018. In coming to this conclusion I rely on the following.

[269] First, Zoe's transcripts reveal that she was granted an LOP (letter of permission) to enroll in a course at Athabasca University for the Fall/Winter term 2017. (Athabasca University is

a university which educates through on-line courses). On page four of the transcript, there is a further notation that the credit for the Athabasca University course was subsequently applied to Zoe's 3-year program at Waterloo.

[270] Ms. Kane reports that during her psychotherapy session on March 26, 2018, Zoe reported that she was in the midst of her final exams and during her April 9, 2018 session, she reported that she had written her final exam. During her June 11, 2018 visit she informed Ms. Kane that she would be graduating the following week.

[271] Zoe's University of Waterloo degree is dated June 13, 2018–5 academic years after she commenced her three-year program, and only 11 months before the date she commenced her employment with Muskoka Brewery.

Analysis and Decision (Past Income Loss)

Damages for Delay in Graduation (Spring 2016 - Spring 2018)

[272] For the following reasons, I reject Zoe's claim for losses resulting from the delay in her graduation from University.

[273] First, Zoe has demonstrated by her actions that when it comes to completing an academic program, she is flexible and is not bound by conventional academic timelines. She has other interests and priorities which take precedence over any desire to complete a program within a stated period.

[274] For example, one would have thought that on completing her four years of high school, Zoe would have been excited and impatient to leave Bracebridge, move to another city and commence a university program along with her peers. However, she chose to return to high school for a fifth year, primarily so she could play one more season of high school basketball. This choice delayed her graduation from University by a whole year.

[275] Also, and as noted above, after completing four years of courses at the University of Waterloo in the spring of 2017, Zoe still required one additional credit in order to graduate from a three-year program. Her university records indicate that she enrolled in three courses during the winter 2017 term and only 2 courses in the spring 2017 term. In my view, were it important for Zoe to complete her degree within four years, she would have scheduled her courses accordingly, for example, by enrolling in three courses during the spring 2017 term or taking a summer course in 2017. Instead, she chose to enrol in her final course during the fall/winter term of 2017, thereby delaying her graduation until June of 2018, a decision which resulted in an additional delay of an entire academic year.

[276] The evidence is that Zoe engaged in much more than academic pursuits during the six years she lived in Waterloo. As noted, she was socially engaged, popular with her roommates, travelled, and participated in intramural sports. She also held numerous part-time employment positions. During her final two years in Waterloo, she was variously employed as a show ambassador for Grand River Shows in Kitchener/Waterloo, a server/bartender at State and

Main restaurant in Kitchener, Front House manager at State and Main, a server-bartender at Rebel Creek Golf Club, Petersburg, Ontario, and a junior events manager at Rebel Creek Golf Club and Sugo Restaurant in Guelph, Ontario.

[277] To be clear, I am not critical of Zoe's decision to engage in life outside of the university and to spread her courses over 5 years. I expect that her extra-curricular experiences have enriched her life in ways that a university education alone is unable to do. I also expect that the work and life experiences Zoe gained by being involved outside the classroom made her more desirable to an employer than she would have been had she confined her time to the four corners of the university campus. For example, the skills and knowledge she developed by working in the hospitality and food and beverage industry were directly transferable to her present position at Muskoka Brewery.

[278] Second, I find that there is a dearth of medical evidence which directly supports the Plaintiffs' allegations that Zoe's PTSD was responsible for her decision to reduce her course load.

[279] Zoe testified that she chose to reduce her course load after speaking to her academic advisor, who suggested that she reduce her course load so she could maintain a 70% average. Dr. Hamilton testified that her notes indicate that Zoe informed her that she reduced her course load of her own volition.

[280] Although there is a suggestion in the medical evidence that Zoe likely had some cognitive effects from the shock incident, these effects were noted to be temporary and not serious. As noted, Zoe performed well in her high school courses after the shock incident and Dr. Bradbury's tests also indicate that Zoe had the ability to perform well academically.

[281] In conclusion, on the basis of my finding that Zoe herself was not committed to completing her program within three years, together with the absence of any direct medical evidence that her PTSD made it necessary for her to spread out her courses over more than three years, I am unable to find that Zoe's failure to complete her program in three years was the result of her PTSD. Accordingly, had I found the defendant liable for Zoe's injuries, I would have dismissed Zoe's claim for damages for any delay in her graduation from university.

(b) Damages for Delay in commencing full-time employment

[282] I am not convinced that the Town of Whitby should be held responsible for the alleged employment losses attributable to the 11 months between Zoe's graduation date and the date she commenced employment with Muskoka Brewery. My reasons include the following.

[283] First, Ms. Kane writes in her clinical notes of March 14, 2018 that Zoe informed her that she was feeling positive about her decision to stay in Waterloo for the summer, sharing what it was like to have to explain her decision to her sister. Zoe informed her that she felt supported at work and optimistic about travel to Florida with her parents in the spring. In my

view, these are not the comments of someone who is intent on returning to her hometown and commencing a career immediately after graduation.

[284] Second, full-time employment positions in one's chosen field are not usually available immediately upon graduation. It is well-known that today's graduates often spend several years applying for positions in their field before they are hired. An 11-month delay in obtaining such employment is not unusual or unreasonable.

[285] In conclusion, I see no connection between Zoe's disability and the fact that it took her 11 months to secure full-time employment at the Brewery. There are numerous reasons why she may not have wanted to return to Bracebridge and settle into permanent position until May 2019.

[286] In the event I had found in favour of the Plaintiffs on the issue of liability, I would have dismissed the claim for past income loss.

(c) Loss of Athletic Scholarship

[287] Zoe claims that her August 15, 2012 injuries deprived her of a sports scholarship. Sports scholarships in Ontario are capped at $4000 per year.

[288] For the following reasons, I find it unlikely that Zoe would have received an athletic scholarship at the University of Waterloo or any other university in Ontario.

[289] First, the court heard from Gordon Grace, the executive director of University Athletics Ontario (UAO). UAO is the governing body of university athletics in the province of Ontario. Mr. Grace testified that one of the requirements for obtaining an athletic scholarship in Ontario is that the recipient have an 80% academic average. He stated unequivocally that the universities do not have discretion to waive this requirement.

[290] Zoe was a good student but did not have an 80 % average. As such, I find that she did not have the necessary requirement which would make her eligible for a scholarship.

[291] Second, Zoe admitted that she had never received any offers or inquiries from university athletic scouts in relation to her participation in either soccer or basketball. I would have expected that at age 18 Zoe would have received some signal from a university athletic department, Canadian or American, if her athletic talent was of such calibre that she qualified for a scholarship.

[292] Third, Zoe admitted that she did not apply for a sports scholarship at any of the universities to which she applied.

[293] In summary, I find that as of fall 2012 and spring 2013, Zoe was aware that she would not qualify for the scholarship, presumably because she did not have an 80% average, and she chose not to apply for one.

[294] For the above reasons, I would have dismissed this claim for economic loss had I found the Town liable for Zoe's injuries.

(d) Future Care Costs

[295] The Plaintiffs submit that Zoe will require some continued care in the form of counselling therapy after the conclusion of her case. They estimate that she will require such therapy at the rate of 17 to 26 sessions per year for the rest of her life.

[296] Zoe is presently 25 years old and her life expectancy is 84 years. According to the Plaintiffs she will require counselling for a total of 59 years which at the above rate adds up to 1003 to 1534 sessions over the course of her lifetime. At Ms. Kane's present hourly rate of $185 per hour, plus HST, Zoe's future therapy needs will cost between $185,555.00 + HST and $320,682.70 + HST.

[297] I agree that Zoe will need to engage in some continued counselling and if I had found the Town liable, the Town would have been responsible for the costs thereof. However, in my view the evidence does not support the Plaintiffs' position that Zoe will require as many as 17 to 26 therapy sessions per year, or one session every two or three weeks for the rest of her life.

[298] My reasons include the following.

[299] First, a counselling session every two or three weeks is inconsistent with the number of counselling sessions Zoe has received in the past, a period that I would consider to be critical in terms of her recovery. Ms. Kane's records indicate that Zoe attended counselling annually as follows:

- March 13, 2014 to December 31, 2014 ...9 sessions
- January 1, 2015 to December 31, 2015 … 5 sessions
- January 1, 2016 to December 31, 2016 … 1 session
- January 1, 2017 to December 31, 2017… 12 sessions
- January 1, 2018 to December 31, 2018 … 14 sessions
- January 1, 2019 to March 28, 2019 ……. 4 sessions

Total ……**45 sessions**

[300] This evidence confirms that Zoe has received counselling at an average rate of 9 sessions per year. This is considerably less than the 17 to 26 sessions for which damages are sought. The invoices and receipts that were filed indicate that the total cost of treatments by Ms. Kane to date (over a 5-year period) is $10,797.43. If I prorate this amount over Zoe's expected life, I arrive at a total of $127,416.00–substantially less than the amount which Zoe claims.

[301] Second, after scheduling only one session with Ms. Kane in 2016, Zoe increased her sessions significantly over the next several years. A review of Ms. Kane's notes indicates that from 2017 to now, a majority of the sessions focused on assisting Zoe with the stress and anxiety of her legal process. In her report of April 11, 2017, Ms. Kane writes: "I suspect that the length of time it has taken to resolve this legal case is a strong factor in Zoe not being able to progress and being blocked in her processing efforts".

[302] The stress of an upcoming trial has now been removed and with the removal of this trigger, it is probable that Zoe will require fewer therapy sessions.

[303] Third, the experts agree that Zoe has progressed significantly towards recovery and that she will continue to progress. In her clinical notes of February 11, 2019, Ms. Kane writes:

> It may be that the triggers will remain unresolvable until the legal process ends. This therapist anticipates adaptive resolution of core targets within one year of ending the legal process. The evidence of on-going dreams and nightmares that awaken her and her arousal at night in an alert state indicates that the brain still does not believe that she is now safe.

[304] I note that both Drs. Waisman and Van Reekum suggest that Zoe will progress further if she receives psychopharmacological treatment and cognitive behavioural therapy. Dr. Waisman sees no reason why Zoe will not continue her recovery and rehabilitation trajectory. He notes that her to-date progress has been excellent, and he is hopeful that with time she will achieve full remission of her symptoms.

[305] It is likely that as her recovery progresses, Zoe will require fewer therapy sessions.

[306] Fourth, I note that the counselling sessions with Ms. Kane are focused on teaching Zoe learning skills and copying mechanisms to deal with stressors. I would think that over time, Zoe will be able to utilize many of these skills independently and will not require as much reinforcement from a therapist.

[307] In conclusion, I find that had I held the Town liable, an award of $50,000 for future therapy sessions would have been reasonable. This is based on 59 years of therapy at the rate of 4 hourly sessions per year at Ms. Kane's hourly rate of $209.05 (inclusive of HST). I expect that there will be some years that Zoe will require more than 4 sessions, and some years that she will not require any therapy. This will depend on the nature and number of the triggers to which she is exposed and the degree to which she has learned to use her coping skills independently.

(e) Residual Earnings Loss

[308] Zoe claims a loss of future earnings in the range of $345,620.00 to $1,820,783.00. This loss is based on actuarial calculations provided by Mr. Wollach.

[309] To arrive at his calculations, Mr. Wollach employed an approach which historically has been referred to as the Hals/Pals approach. The approach uses statistics obtained from surveys of how Canadians with disabilities are restricted by those disabilities in their everyday lives. The restrictions were assimilated into different categories of disability: vision, mobility, and the reduction in earning capacity was measured in terms of whether the disability was classified as mild, moderate or severe. The HALS statistics are from Statistics Canada's 1991 *Health and Activity Limitation Survey* and the PALS statistics are from the 2001 *Participation and Activity Limitation Survey*.

[310] In this case, Mr. Wollach based his calculations on the more recent *Canadian Survey of Disability* ("CSD") statistics but he uses essentially the same approach.

[311] Mr. Wollach employed four sets of statistical scenarios. Scenarios 1 and 5 use a reduction of 13.8% in earning capacity based on the impact of a "mild" disability on earnings per Statistics Canada data. Scenarios 2 and 6 apply a 28.5% reduction in the impact of earning capacity on partial disability on earnings per Statistics Canada data. Scenarios 3 and 7 reflect the inflation-adjusted average earning of all workers in Ontario, working full and part-time and scenarios 4 and 8 are Zoe's inflation adjusted annualized current earnings at $700.00 per week that Zoe is earning at her current job with Muskoka Brewery.

[312] The Town submits that Zoe will not incur future economic losses. Its expert, Dr. Douglas E. Hyatt, has provided calculations based on three scenarios that assume a 0%, 5% and 10% loss of competitive advantage. He calculates future loss of income to retirement age of 63 respectively to be nil, $99,951 and $199,901.

[313] In *Sherman v Guckelsberger*, 2008 CanLII 68165 (Ont. S.C.) ("*Sherman"*) Milanetti J. rejected the use of the CSD's predecessor (HALS/PALS) data which Mr. Wollach had used in that case on the basis that the survey results on their own did not assist in calculating the *actual* losses sustained by the Plaintiff. She criticized counsel for not having any medical experts relate the Plaintiff's *actual* disability to a specific category of impairment within the survey results.

[314] In this case, I am faced with the same issue. No medical evidence was tendered which relates Zoe's actual disability to a specific category of impairment. It would have been helpful to have evidence before the court in the form of a vocational assessment which could have assisted the court in determining both the percentage of the disability (if any) and the appropriate category in which to place Zoe. No such evidence was tendered by either of the parties.

[315] I note that various actuarial experts have urged caution in the application of CSD statistics to the assessment of future income loss in personal injury cases. They warn that the data contained in the surveys is too remote to the specific circumstances of a Plaintiff to provide useful and reliable guidance.

[316] In his 1998 study, *Labour Market Activity of Disabled Persons in Canada* (Statistics Canada, 1988), on behalf of Statistics Canada, David Gower writes:

> It is important to understand that the definition of disability used in this study is based on activities of daily living and may or may not reflect difficulty in performing a particular job.
>
> When disability is defined in this way, its relationship to the ability to perform a job depends in part on the type of work involved. For example, being confined to a wheelchair is undoubtedly a serious impediment to performing most construction jobs but may not be so for operating a computer.

[317] Following their study on "The Impact of Disability on Earnings; Results of the Health and Activity Limitation Survey" in *Economica: The Expert Witness* (Spring, 2000), authors Christopher Bruce, Derek Aldridge and Kris Aksomitis write of the usefulness of HALS/PALS data that:

> [A]lthough the data presented here may be of some interest to personal injury litigants, the level of aggregation is so great that it seems unlikely that these data will be able to provide more than background information to the litigation process.

[318] The same point is emphasized in a later study, "Using the HALS/PALS Data Sets to Estimate a Loss of Income*"* in *The Expert Witness* (Spring 2007), by Derek Aldridge:

> In these cases, however, like all others, we must remain willing to discard the HALS averages if we have better information about how the Plaintiff's income will be affected. It is not satisfactory to say that because the loss of income is difficult to determine, HALS will yield our best estimate. In most cases we can do better, because we are not predicting the income of a randomly selected disabled individual. Instead we are predicting the income (and loss) of a specific individual about whom we know a great deal. The fact that we have a HALS model at our disposal does not mean that we should ignore the facts of our specific Plaintiff.

[319] In conclusion, I find that I am unable to apply the CSD data to the circumstances of Zoe's claim, for the same reasons that Milanetti J. was unable to use the HALS/PALS data in *Sherman*. No medical evidence was tendered which relates Zoe's actual disability to a specific category or impairment referred to by Mr. Wollach and a relationship between any alleged ongoing limitations and a particular vocation for which Zoe is qualified have not been established. In the circumstances, I find that Mr. Wollach's approach unreliable.

[320] The disability percentages on which the Town bases its scenarios are equally arbitrary and I find no basis on which to rely on these either.

[321] One additional concern which makes it particularly difficult for me to determine the degree of Zoe's disability in the circumstances of this case is that all the experts agree that Zoe will recover further and that her recovery will be significant following the completion of this case.

[322] Finally, I note that to date Zoe has performed very well in various work environments since her shock. Some of her jobs have been physically demanding, and some, like her bartending work, have required a high degree of concentration and an ability to multitask. Zoe performed very well on all tests administered to her by Dr. Bradbury. Zoe is resilient, intelligent and hardworking and has the support of a strong family unit. In my view, there are good reasons to believe that she will not have any future diminution in earnings.

[323] In conclusion, I find that although there is evidence that Zoe will likely continue to suffer some PTSD symptoms, I am unable to establish a link between such symptoms and her performance in the workplace. In the result, had I found the defendant liable, I would have dismissed the claim for a loss of future earnings.

3. Family law claims

[324] Zoe's parents, Richard and Sallie Onley, have been loving and supportive to her following the shock incident. I note that they accompanied her to medical appointments and to the Amen Clinic in Atlanta, Georgia. I also note that one or both were present every day of the trial. Although Zoe has lived independently in Waterloo for all but one of the last 7 years, I expect that Richard and Sallie remained in close communication with her through regular visits and by telephone and that they provided her with ongoing support and encouragement during these years. I would have awarded them $15,000.00 each had the Town been found liable.

4. Out of pocket expenses

[325] The Plaintiffs claim out of pocket expenses in the amount of $18,195.75. The Town agreed that were it found liable, it was prepared to compensate them for this amount. Accordingly, I would have awarded the Plaintiffs $18,195.75 had I found the Town legally responsible for Zoe's injuries.

E. Disposition

[326] For these reasons, I dismiss this case against the Town of Whitby. If counsel cannot agree on costs, written submissions are to be forwarded to me within 14 days of the release of this decision. Reply submissions are to follow within 10 days of the receipt of the submissions. These submissions are not to exceed 5 pages, not including schedules and attachments.

Original signed and on file
Mr. Justice Edward J. Koke

Released: January 2, 2020

Onley v. Town of Whitby, 2020 ONSC 20

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Zoe Onley, Sallie Onley and Richard Onley

Plaintiffs

– and –

Corporation of the Town of Whitby, Whitby Iroquois Soccer Club Inc, Whitby Hydro Electric Corporation and Electrical Safety Authority

Defendants

REASONS FOR JUDGMENT

E.J. KOKE

Released: January 2, 2020