

Queen Street West in the city of Toronto. The dinner was intended to celebrate the 73th birthday of Gerald Musselman.

[2] Toward the end of the meal, Gloria Musselman left the table to attend the ladies washroom. Washrooms were located at the basement level one floor below the dining room. To gain access to the washroom, Ms. Musselman was required to descend a series of steps comprised of eight risers. She then had to turn ninety degrees to her right and descend two further risers to reach the basement floor. She apparently did so without event. The evidence is clear that after using the washroom, she then began to ascend the stairs to return to the dining room. At some point in ascending the upper series of steps (comprised of eight risers) she lost her balance and fell backwards, coming to rest on the landing, which was as noted above, located two risers above the basement floor.

[3] Her family and a waiter on duty were alerted to her fall by a yell or a scream which accompanied her fall. I shall deal in further detail below with the mechanism of her fall and what caused her to lose her balance.

[4] Her son Mark was the first to reach her side. It was apparent that she was very badly injured. Mark eased his mother onto the basement floor and began to apply mouth to mouth resuscitation. 911 was called and shortly thereafter paramedics arrived. They took her immediately to St. Michaels Hospital where she began to receive intensive medical care. Her most serious injury was a fracture of the second cervical vertebra (the C-2) which has rendered her a quadriplegic.

[5] She was transferred the next day to the Toronto Western Hospital where she continued to receive care until May 4, 2004. On that date she was transferred to the Toronto Rehabilitation

Institute (Lyndhurst) where her care continued until her discharge on December 16, 2004. On that date she returned to her family home in Cambridge, where she lives today. I will deal in greater detail with her injuries below but would note at this point that she still requires constant care from family members and professional health care providers.

[6] It is the plaintiff's position that Gloria Musselman fell and was severely injured as a result of the construction and condition of the stairs leading to the basement in the Cities Bistro. The plaintiff claims negligence on the part of the city of Toronto for failing to ensure that the stairs were constructed in a manner that would provide for safe use for patrons of the Cities Bistro and specifically by Gloria Musselman. The plaintiff's also claim against Cities Bistro (875667 Ontario Inc.) Brian Heasman, Ida Dominelli and Fred Dominelli as "occupiers" of the Cities Bistro pursuant to the terms of *The Occupiers Liability Act* R.S.O. The plaintiffs Karey Musselman, Carolyn Musselman, Mark Musselman, Leanna Wigboldus and Lucas Musselman pursue derivative claims pursuant to the *Family Law Act*.

[7] Ida Dominelli and Fred Dominelli have actively defended the claims against them, have cross claimed for contribution and indemnity against Brian Heasman and have counter claimed against Gerald Mussleman and Mark Musselman for any negligence on their part that may have contributed to Gloria Musselman's fall. Suffice to say, their cross claims and counter claims are dependent on a finding of liability on their part with respect to damages to which the plaintiffs may be entitled.

The Parties

[8] It may be noted that after the Statement of Claim was filed, the defendant Brian Heasman filed in bankruptcy. Thus BDO Dunwoody Limited was added to the claim as his Trustee in

Bankruptcy. On October 26, 2009, the Bankruptcy Court directed that the automatic Stay of Proceedings against Brian Heasman be lifted. Thus he became liable again for exposure to damages in his personal capacity. It may be noted as well that Minas Tzortzis and Stella Tzortzis were previous title holders to the subject property. In fact, Stella Tzortzis passed away on January 17, 2001. All claims against Minas Tzortzis and Stella Tzortzis have been abandoned. I will therefore briefly touch upon the remaining parties.

[9] The principal plaintiff Gloria Musselman was born on August 21, 1932. She was 71 years old at the time of her fall. She met her husband Gerald when they were children at Sunday school. They married on the July 13, 1957. Since 1962 they have lived at 156 Salisbury Avenue in Cambridge. The Musclemans have three children, a daughter Karey who was 45 at the time of their mother's accident, Carolyn who was 43, and Mark, who was 37 when his mother suffered her injury. Karey and Carolyn are both married, and Carolyn has a daughter, Leanna, who was 11 when her grandmother suffered her injuries. Ms. Musselman's son Mark has four children. Lucas, who was born on June 12, 2004, Ruby, born on the June 10, 2007, and twin daughters who were born during the trial.

[10] Gloria Musselman's husband Gerald is an architect (retired since Gloria's fall). Her son Mark and her daughter Carolyn are lawyers. Her daughter Karey lives with her husband in San Juan Puerto Rico.

[11] Gloria Musselman attended Stratford Teacher's College, graduating at 19. She then taught in Kitchener for five years prior to her marriage. She then taught in North York until her first child was born and she made the decision to be a "stay at home" mom until her children graduated from university. Though not working full time, she was a volunteer at the Cambridge

YWCA and then at the Fairview Mennonite Home, a residence for seniors. This subsequently led to full time employment. She was vice-president of the Cambridge Christian Women and a charter member and volunteer at the Rockway Mennonite Church. She has served as vice president, president and past president of the Mennonite Christian Women's Council of Canada. When she assumed full time employment at the Fairview Mennonite Home, she became the Coordinator of Volunteers for all of the complex (an eight story apartment complex, 12 "Villas" and two three story apartment buildings). She recruited and trained volunteers, supervising some 350 adult volunteers as well as students from local high schools and some university student placements. She assumed responsibility for many special events, such as banquets. She retired as a full time employee of the Fairview Mennonite Home on August 20, 2002, on her 70th birthday. Compulsory retirement was supposedly at age 65, but she received an annual extension until age 70. After her retirement, she continued as a volunteer, working perhaps 20 hours over three days per week. She was also the editor of the "Fairview News", an in house publication, published four times per year. While at Fairview, she also supervised an exercise group for senior residents, which involved in large part, climbing stairs. She also participated in a hiking group for some two years prior to her fall, which hikes occurred on weekend mornings.

[12] By reasonable observation, at the time of her fall on the stairs at the Cities Bistro, she was a vibrant, active 71 year old woman. She had suffered several falls in the few years preceding her tragic fall on February 10, 2004, which falls will be discussed in some detail when I consider the issue of causation.

[13] Gloria's husband, Gerald Musselman, turned 73 years of age on the day they attended at the Cities Bistro. He is a graduate of the University of Toronto and has been an architect since 1957. He is a senior partner in the architectural firm of Mark and Musselman, with offices in

Brantford, Ontario. As of 2005, the firm employed ten professional architects with ten other supporting staff. Prior to Gloria's accident on February 10, 2004, he testified he had no intention to retire. He described architecture as "an old man's game". Relied on for his seniority and expertise, he did intend to spend more time with Gloria to travel and enjoy their family. However, he retired fully in December of 2005. He did not feel he could fully contribute to his firm and he wanted to, in effect, care for Gloria full time. As I will detail below, the strain of Gloria's accident and caring for her has taken its toll on his health.

[14] Karey Musselman is Gloria and Gerald's eldest child. She is married and lives with her husband in San Juan Puerto Rico. At the time of Gloria's fall, she was employed on a full time basis as a concierge at the Ritz Carleton Hotel in San Juan, earning (with gratuities) approximately \$35,000 annually. After her mother's accident, she took a leave of absence and travelled to Canada to provide assistance, companionship and comfort to her mother and to her father. She remained with them for a year, and received no income during that period. As a result of her lengthy absence, she lost her employment in July 2004. Karey ultimately returned to San Juan in January of 2005. While in Canada, she took five brief trips; two to Miami, two to New York, and one to Chicago. These trips were arranged to meet with her husband to maintain their marriage. Prior to her mother Gloria's fall, Karey was in the habit of visiting her parents in Cambridge twice a year, in the summer and at Christmas, for at least two weeks on each occasion. Gloria and Gerald also visited Karey and her husband in San Juan every three years. The couples also vacationed together over the years in Chicago, New York, Las Vegas, and San Diego.

[15] Carolyn is Gloria's second child. Born on the March 28, 1960, she was 43 at the time of her mother's fall. She is married and has a daughter, Leanna, who was 11 years old when her

grandmother suffered her injuries. A graduate of Wilfrid Laurier University, she spent a year in Sweden as a Rotary Exchange Student and spent time in China as well. In 1989 she began her studies as a law student at the University of Western Ontario. She graduated in 1992 when her daughter Leanna was born. She articulated for a large law firm in Toronto, during which time her mother Gloria provided the principle care for Leanna. She and her husband Orlando have been very close to Gloria and Gerald. They have travelled together as a family on many occasions and were in the process of planning a two week trip to Guatemala (as noted above) at the time of Gloria's tragic fall. I will have more to say about Carolyn and indeed all the plaintiffs when I address the issue of damages (which damages of course will be dependent upon a finding of liability).

[16] Mark Musselman is Gloria and Gerald's third child, born on March 9, 1966. He was 37 at the time of Gloria's injuries. He is married to Yael Zaretsky. Mark and Yael were married in 2002, and together they have four children. Lucas, born June 12, 2004, Clare Ruby, born June 10, 2006, and twins Sloane and Kate, born September 29, 2009. Mark graduated from the University of Western Ontario with his law degree in 1991 and then articulated in Toronto. He practised in Toronto until 1997 and from 1997 to 1999 he practised law in Vancouver. Though living some distance from his parents, he saw them frequently. In 1999, he left private practice and now serves as in-house counsel to a corporation in the city of Toronto. Since his professional activities have brought him to Toronto, he has seen his mother and father on an even more frequent basis.

[17] Leanna Wigboldus is Carolyn's daughter. Grandmother and granddaughter have always been very close, and have participated in many activities together.

[18] Lucas Musselman is Mark's son, born June 12, 2004, following his grandmother's fall at the Cities Bistro. He too brings a claim pursuant to the *Family Law Act*. His entitlement remains to be determined.

[19] Turning to the defendants, 875667 Ontario Inc. is an incorporated entity pursuant to the *Ontario Business Corporations Act*. The company carried on business as the Cities Bistro, the restaurant at 859 Queen Street West. 875667 Ontario Inc (Cities Bistro) was clearly an occupier of the premises at the time of Gloria's fall.

[20] Brian Heasman is the sole owner and principal of 875667 Ontario Inc. and the proprietor of Cities Bistro. He testified that he incorporated 875667 Ontario Inc. together with a friend, Eugene Shewchuk, on January 3, 1990, in order to operate the restaurant. The evidence is somewhat vague but, Mr. Heasman and Mr. Shewchuk may have originally began their involvement with 859 Queen Street West by subletting a lease from a previous tenant of the Dominelli's, a Mr. Ashley Perry, who also operated a restaurant on the premises. Mr. Heasman testified that he was in effect the "front man" in the operation. Mr. Shewchuk was to be the chef. Having acquired the lease, Mr. Heasman and Mr. Shewchuk began renovations of the premises in the spring of 1990. Substantial renovations were affected, amounting to some \$50,000, which renovations included the construction of a new staircase from the main floor to the basement. Mr. Heasman made all the arrangements for the renovations including applying for building permits. The evidence seems clear that Mr. Dominelli, the landlord, attended on no more than a very few occasions while renovations were underway, apparently largely as a matter of curiosity to see how they were going. Renovations completed, Cities Bistro opened for business on August 22, 1990. Mr. Dominelli as lessor and Mr. Heasman as lessee, entered into a new lease, on December 22, 1994. That lease having run its course, they entered into a new lease as

“landlord” and “tenant” on December 30, 1999. It was that lease that defined their relationship (at least in part) on February 10, 2004, when Gloria Musselman’s fall occurred.

[21] At some point in the years following the opening of the restaurant, the relationship between Mr. Heasman and Mr. Shewchuk ended. In 2004, Mr. Heasman was the sole owner of 8765667 Ontario Inc. and the sole proprietor of Cities Bistro. It is clear he was an occupier of the premises on the relevant date.

[22] Following the commencement of this action, Brian Heasman declared bankruptcy. As a result, BDO Dunwoody Limited was added to the action as his Trustee in Bankruptcy. During the course of the trial on October 26, 2009 the bankruptcy court directed that the action would continue against him, stating “the stay of proceedings as against the bankrupt, Brian Keith Heasman, is hereby lifted, nunc pro tunc, to permit the moving parties to continue with their proceedings bearing court file No. C-24-05 commenced against the bankrupt. Enforcement of any judgment obtained against the bankrupt may not proceed without further leave of this court except that collection against any existing insurance policy may be enforced.”

[23] The Corporation of the City of Toronto is responsible for the regime that controls and approves building and construction in the city of Toronto. This includes the approval of plans for construction or renovation, the granting of permits, the inspection of construction or renovation, together with final approval, and the granting of a certificate of occupancy. Thus the City was directly involved in the renovations that took place in 1990 at 859 Queen Street West. The plaintiffs maintain that the City of Toronto was negligent in approval of the plans for construction of the staircase, in inspecting such construction, and in effect approving the staircase as safe for use by patrons of the restaurant.

[24] Fred and Ida Dominelli are the owners of 859 Queen Street West. On October 19, 1979, Fred Dominelli signed an agreement of purchase and sale to acquire 859 Queen Street West for the sum of \$60,500. The purchase was to close on November 19, 1979. When the transaction closed, title to the property was put in the name of "Ida Dominelli in Trust". The evidence of Fred Dominelli was clear (presented by way of "read-ins" from his examination for discovery) that title was put in the name of "Ida Dominelli in Trust" simply on his lawyer's advice. Ida Dominelli testified that she was made aware by her husband in or about 1979 that the property was in her name in trust, but it was clear from both Fred and Ida Dominelli that they were both owners of the property in every real sense.

[25] Fred Dominelli is a mechanic by trade and owned, at least at the relevant time, a service station and motor vehicle repair business ten doors east of 859 Queen Street West. Mr. Dominelli's evidence was that apart from attending on a monthly basis to collect the rent, he had nothing to do with, and took no responsibility for, 859 Queen Street West. He visited all responsibility for the premises on his tenant or tenants. His best recollection was that the prior tenant to Mr. Heasman was one Ashley Perry who operated a restaurant on the premises for perhaps three years. As noted above, he entered into new leases with Brian Heasman, with Fred Dominelli as "lessor" and then as "landlord" on December 22, 1994 and December 30, 1999. His evidence was that he knew nothing about Gloria Musselman's fall until he was served with a statement of claim in early 2005. His evidence (consistent with that of Mr. Heasman) was that Mr. Heasman "abandoned" the premises in June 2004. Mr. Dominelli was then required to enter upon and "clean up the mess" left Mr. Mr. Heasman. He paid a significant sum to W.C. Graham Construction to affect such cleanup and then relet the premises.

[26] Ida Dominelli testified briefly at trial. She advised the court quite simply that while she was aware her name was on title to 859 Queen Street West, she had nothing to do with the premises, and in fact had never even visited the premises until after Brian Heasman abandoned them.

[27] It should be noted that prior to trial the City of Toronto entered into a "Pierringer" agreement with the plaintiffs. The court advised the parties that it did not wish to know any of the financial details of the agreement. However the agreement with such details removed, was filed on consent as exhibit 90 at trial. Pursuant to the principles which guide the court in its consideration, (or lack of consideration) of a Pierringer agreement, the plaintiffs amended the statement of claim to reveal the essential details of the agreement. Paragraphs 23 to 25 of the Amended Amended Statement of Claim read as follows:

23. The Plaintiffs, having settled the within action against the City of Toronto, have agreed with the City of Toronto (herein "the Settling Defendant") that they shall limit their claims against the remaining defendants (herein "the Non-Settling" Defendants), to claims for damages, costs and interest attributable only to the Non-Settling Defendants' several share of liability to the Plaintiffs and joint liability to one another, if any, such that the Plaintiffs' claims shall be limited to recovering the damages, interest, fees, disbursements and GST attributable to the Non-Settling Defendants' several share of liability proven against each of them at trial or by other final disposition by the Court.

24. For greater certainty, the Plaintiff's shall have no claim directly or indirectly against the Settling Defendants, and the Plaintiffs shall limit their claims against the Non-Settling Defendants so as to exclude any cross-claim made against or which could be made against the Settling Defendant arising from the issues in the is action.

25. The Plaintiffs admit that the Court at the trial of this matter has and shall have full authority to adjudicate upon the apportionment of liability, if any, between the Settling and Non-settling Defendants, and the non-Settling Defendants are only liable for their direct liability with the Plaintiffs.

[28] Arguably the principle difference between a Pierringer agreement and a “Mary Carter” agreement is that the settling defendant (in this case the City of Toronto) plays no further role in the trial. That was the situation in this case. I can fairly say that the non-participation of the City (the settling defendant) in the trial constituted no prejudice to the “non-settling defendants”; specifically no prejudice to Fred and Ida Dominelli. The “paper record” of the City and the participation of City personnel during the inspection and approval process was effectively admitted on consent. Thus, the court will determine the issue of liability and the proportion thereof (if any) without being affected by an awareness that there has been a settlement agreement entered into between the City of Toronto and the Plaintiffs.

[29] Having outlined briefly the parties to this litigation, and having summarized the roles they played leading up to February 10, 2004, I will now turn to a direct consideration of the evidence. The court is mindful that essentially there are three issues for resolution. First the court must determine if the staircase, which is alleged to be the cause of Gloria Musselman’s fall, is in fact unsafe. The court must then consider if the staircase was unsafe whether such condition caused or contributed to Ms. Musselman’s fall or whether there was another factor or factors that caused or contributed to such fall. The court must then determine if the staircase was unsafe and if the staircase caused or contributed to Gloria Musselman’s fall, who bears responsibility and in what proportion for the condition of the staircase. Bearing in mind the principles of negligence and the provision of the *Occupier’s Liability Act*, I turn first to the evidence directly related to the staircase.

The Staircase

[30] Much evidence was called at trial with respect to the structure of the staircase. Numerous photographs were introduced of the staircase, all taken after Gloria Musselman's fall. Expert witnesses were called who provided opinion evidence as to whether the staircase complied with building code requirements and acceptable building practices. A number of expert witnesses also proffered opinions as to whether the staircase caused or contributed to Ms. Musselman's fall. I can say without reservation that all of these expert witnesses were eminently qualified to give their evidence. To the extent that there is a conflict between some of those opinions, the court must carefully consider the premise of such opinions and the information upon which such opinions were based. Ultimately the court must weigh the relative probative value of the evidence of each of the experts.

[31] Mr. Steven Blaney was called as an expert witness by the plaintiffs. Mr. Blaney is a structural engineer with considerable expertise in the area of acceptable building practices, building codes, and standards of the industry. His impressive Curriculum Vitae may be found at exhibit ten, tab one. His report is found at exhibit ten, tab two with follow up reports found at tabs three and four. Mr. Blaney provided a detailed description of the stairs as a result of visits by him and his staff on May 24, 2004 and May 22, 2005. His report also included (at appendix E) detailed drawings of the staircase in question. There was no issue taken with respect to the accuracy of his drawing or the measurements set out therein.

[32] Mr. Blaney testified with respect to the regime for approval of renovation or new construction in the City of Toronto. At the time these stairs were constructed, the 1986 Ontario Building Code was in effect. This Building Code sets out minimum standards for virtually all

aspects of staircase construction, including minimum standards for the rise and run of the steps, details with respect to handrails or guards, ceiling heights, etc. By the *Building Code Act* the province has effectively transferred responsibility for enforcement of these minimum standards to city councils. City council must appoint a chief building inspector. Enforcement is then effected through a building permit and inspection process ultimately resulting, in an appropriate case, for approval by the city for occupancy of the premises. The *Building Code Act* also requires municipalities to have by-laws in effect with respect to public safety in buildings.

[33] Mr. Blaney took the court through the “paper trail” provided by the City of Toronto, with respect to the history of the staircase at 859 Queen Street West. While the paper trail is interesting, staircase construction and approval prior to 1990 are not directly relevant to the issues to be decided by the court. It is clear on the evidence that in the spring of 1990 Brian Heasman, as the new lessee, and with the intention of operating a restaurant on the premises, arranged for significant renovations, including the construction of a completely new staircase on the premises from the main floor to the basement level to give access to the washrooms.

[34] Mr. Heasman testified that the staircase that existed when he became the lessee of the premises consisted of a straight flight down to the basement floor. He felt that staircase was unsafe and therefore arranged for a completely new staircase to be built.

[35] Mr. Blaney testified that the drawings that were submitted for the building permit given by the City were “very amateurish” and should not have been accepted by the City. He added that the several visits by the City’s building inspectors should have made it obvious that the staircase was non-compliant with building code and safe building standards, and should not have been approved.

[36] Mr. Blaney's evidence as to non-compliance with the Ontario Building Code (1986 Edition) may be summarized by reference to pages four – seven of his report. His concerns include the lack of uniformity or rise and run of the stairs, the failure to comply with maximum rise and minimum run of the steps, the head room provided in the staircase, the size of the landings, and the construction of the handrail. With respect to the handrail, I note in particular, the lack of appropriate handrail-wall clearance. I note as well, the failure of the staircase to comply with code in that the west side of the staircase (below the upper level) was completely unprotected. The Ontario Building Code requires that a staircase such as this must be enclosed by walls or protected by guards. In this case there was no wall, there were no guards, and there was no handrail on the west side of the staircase. The stairs were completely open to the basement floor.

[37] Mr. Blaney also testified as to the non compliance of this staircase with By-Law number 9868 of the City of Toronto and By-Law number 300-68 of the Property Standards By-Law. In a great many respects, this staircase was woefully non-compliant with these by-laws as well. Specifics include minimum standards for rises and runs, and for the provisions of appropriate handrails. Mr. Blaney's conclusions are found at pages 30 and 31 of his report (exhibit ten tab two) and are worthy of repetition at this time:

6.1 The stair to the basement of the Cities Bistro does not comply with the 1986 Ontario Building Code. Specifically, stair dimensions (rise, tread depth, and width), landing dimensions, headroom, guard requirements, lighting, stair stringer construction, handrail dimensions, (height, continuity, clearance from the wall, size, termination, and extension) did not comply with the O.B.C. criteria.

6.2 Renovations to the stairs were included in the 1990 building permit issued by the City of Toronto for interior alterations. The stairs are therefore required to comply with the 1986 of the Ontario Building Code.

6.3 There was insufficient information provided on the approved building permit drawings to assess code compliance of the proposed work on the stairs. The City of Toronto Building Department should have requested clarification and resubmission of the drawings. Lacking this, they could only rely upon the City of Toronto building inspectors to verify that what was being constructed would meet the Ontario Building code.

6.4 Our examination of the stair identified numerous items (construction defects) in the subject stair that were not in compliance with the building code. The deficiencies noted created a number of unsafe conditions that likely contributed to Mrs. Mussleman's fall since all of the deficiencies are known to create the hazard of a fall and injury on stairs whether ascending or descending the stairs.

6.5 The dimensions of the individual steps are a construction defect and hazard. Specifically the excessive height of the risers, and insufficient tread depth created a very steep stairway, which would be difficult to negotiate. The risers are, at a minimum, one inch above the maximum specified value. This creates a trip hazard, as such a riser height is unexpected.

6.6 The lower landing was not in compliance with the 1986 Ontario Building Code. The length and the width of the landing were below the minimum width criteria of the O.B.C. The landing was not long enough (from the nosing to the south wall) to accommodate an O.B.C. width compliant stairway.

6.7 The low headroom over the lower landing is a construction defect and a hazard with the meaning 6.5 above. The low headroom will cause the stair user to unnecessarily divert attention from the steps to ensure they do not hit their head on the ceiling. As such, focusing attention elsewhere would increase the chance of tripping on the excessive risers of the subject stairway.

6.8 The handrail did not comply with the criteria of the Ontario Building Code. It is a construction defect and hazard within the meaning of 6.5 above. Specifically, the handrail did not meet the minimum height criteria. The handrail height was inconsistent throughout the stairway, and was only 23 inches above the nosing of the top landing. When travelling up the stairs, the handrail height gradually decreases. The user must crouch to maintain a handhold decreasing balance and stability. If the person is unable to crouch sufficiently then they must let go of the handrail to traverse the stair.

6.9 In addition the handrail did not have adequate clearance from the wall throughout its run to provide a continuous, safe hand hold. The hand rail had only one half inch wall clearance above the third step. This clearance is insufficient to maintain a continuous hold on the hand rail. The hand rail is also below the minimum clearance criteria where it terminates at the top of the stairs and where at the confection with the horizontal hand rail over the lower landing. For patron using the hand rail for balance and stabilization, a break in the hand hold would result in the loss of the two.

6.10 The reduced head room at the top of the stair adjacent to the top landing is a construction defect and a hazard within the meaning of 6.5 above. A tall person will hit their head on the ceiling when walking up the stairs. This could injure someone using the stair or at minimum divert their attention either which could result in a fall.

6.11 The handrail at the top of the stairway did not comply with the Ontario Building Code. The hand rail was secured directly to the post at the top of the stairs. There was no space between the handrail and the post, resulting in a loss of hand hold. Also, the hand rail terminated at the top of the stairs, and did not continue past the end of the stair. This is a requirement of the O.B.C., to provide the user with a handrail until entirely off the stair.

6.12 A guard is required is required to be constructed in the opening on the west side of the stairway. The Ontario Building Code requires both sides of a stairway having more than two risers to be protected. This protection can be achieved by a wall or by constructing guards. Also, had there been guards in place, the guards could have been grabbed by a user in an attempt to stabilize them self, or to stop a fall.

6.13 The renovations of the stairs to the basement and to the second floor were such that the stairs failed to conform to safe building standards.

6.14 The basement stairs to the public washrooms did not fully comply with the requirements of chapter 629-19, Property Standards of the Toronto Municipal Code.

6.15 The City of Toronto building inspectors failed to identify the unsafe conditions in the subject stairs while completing their various inspections under the multiple permits. They failed to order the stairs repaired to comply with applicable Ontario Building code requirements and the City of Toronto property Standards. As confirmed by Mr. Eli Yunger in his examination, the Building Inspection Department will notify the By-Law Enforcement Department of unsafe conditions.

6.16 During the building permit approval process in 1990, the City of Toronto failed to require that the stairs be renovated and constructed to meet the requirements of the Building Code, or the building permits should not have been issued allowing the work to proceed.

6.17 The City of Toronto through Mr. Eli Yunger confirmed that they completed inspections during the renovations for Cities Bistro. The inspector failed to identify the many obvious deficiencies exhibited by this stairway and failed to have issued an order to rebuild the stairway in such a manner that it fully complied with the 1986 Ontario Building Code.

[38] During the course of his testimony, Mr. Blaney stated that merely by visual inspection the stairs were unsafe and contributed to the plaintiff's fall. Whether these stairs contributed to the plaintiff's fall will be of course for determination by the court. However I might note that apart from the many photographs, sketches and witnesses descriptions of the subject stairs, the court also had the advantage of exhibit 32. With the consent of opposing counsel and the approval of the court, plaintiff's counsel arranged to have erected in the courtroom a reproduction or replica of the subject stairs as they existed in February of 2004. The stair structure had been pre-fabricated and was erected during the luncheon recess during on the first day of trial. As a result it was available for reference by many witnesses and for direct examination by the court. No issue is taken that it was anything other than an accurate reproduction of the stairs at 859 Queen Street West, with the exception that there was no ceiling constructed above the stairs. In the court's consideration of this exhibit I remain mindful that there is a certain "artificiality" to a "staircase to nowhere" erected in the large expanse of a courtroom. However I might say that the stairs were of considerable evidentiary assistance to counsel, to witnesses and to the court during the trial.

[39] Mr. Richard Weldon was called as an expert witness by the defendants. His curriculum vitae is found at exhibit 81. As a professional engineer, he was, as was Mr. Blaney, well qualified to express opinion evidence with respect to the structure of the stair and whether they could have or should have been approved by the City of Toronto as being compliant with the Ontario Building Code. Mr. Weldon focused on section 11.2 and 11.3 of the Ontario Building Code, which provides for "compliant alternatives" with respect to renovations. The relevant provisions state as follows:

11.2.3.1. (1) A compliance alternative to a requirement contained in part three, four, or six, showing tables 11.2.3.A,B,C,D/E or F, may be substituted for the requirement where the chief official is satisfied that compliance with the requirement is impracticable because:

- (a) of structural or construction difficulties, or
- (b) it is detrimental to the preservation of a heritage building.

(2) A compliance alternative to a requirement contained in part nine shown in tables 11.2.3.C, D/E or F, may be substituted for the requirement without satisfying the chief official that the requirement is impracticable.

11.2.4.1. (1) An alternative measure to,

- (a) a requirement of part three, four, six or nine of the code, or
- (b) a compliance alternative, may be substituted for the requirement or the compliance alternative, as the case may be, and where the chief official is satisfied that compliance with the requirement or the compliance alternative, as the case may be, is impracticable because
- (c) of structural or construction difficulty or
- (d) it is detrimental to the preservation of a heritage building

11.3.1.1 The performance level of a building after construction shall not be less than the performance level of the building prior to construction.

[40] Mr. Weldon also noted table 11.2.3.D/E which forms part of article 11.2.3.1, providing for compliance alternatives. Alternative DE89 as an alternative to the requirements for existing stair systems set out in part nine of the Ontario Building Code provides as follows:

Replacement or extension of existing stair systems shall be exempt from the provisions of this section, except that they shall have:

- (a) A minimum width between wall faces of seven hundred millimetres, and
- (b) A minimum clear height over tread nosing of 1,800 millimetres

[41] This staircase was compliant with the “minimum width between wall faces” provision. 700 millimetres is 29.5 inches, and the width between wall faces of the subject staircase exceeded that dimension. However, 1,800 millimetres is five feet eleven inches. Though the headroom varied the length of the staircase, at the edge of the top landing, headroom was only five feet five inches and at the lower landing, the headroom was only five feet eight and one half inches. Thus even if other aspects of the staircase, which in Mr. Blaney’s view were unsafe, could have been approved by the city as “compliance alternatives” the staircase should not have been approved as a result of its failure to meet the minimum height requirements, for which no compliance alternative was possible. Mr. Weldon testified that even if the staircase did not comply with the minimum height requirements of the Ontario Building Code, this could not have been a factor in Ms. Musselman’s fall, as her height was only five feet one inch. However, while the low headroom is not a significant factor in my consideration of the evidence, I do appreciate Mr. Blaney’s opinion that a low headroom may cause the stair user to “unnecessarily divert attention from the steps to ensure they do not hit their head on the ceiling. As such, focusing attention elsewhere would increase the chance of tripping on the excessive risers of the subject stairway.”

[42] Mr. Weldon’s focus on part 11 of the Ontario Building Code as opposed to part 9 of Ontario Building Code, and his opinion that “compliance alternatives” might well have permitted the City of Toronto to approve the subject staircase, was in part based upon his initial belief that this staircase was simply a “renovation” of the existing staircase. During the course of his cross-examination he conceded however, that the staircase that existed at the time of Gloria Musselman’s fall was in fact a complete replacement of the previously existing staircase which was comprised of a single run from the main floor to the basement floor. This acceptance did

not alter his view that the staircase was in substantial compliance with part 11 of the Ontario Building code, and therefore could have been approved.

[43] Mr. Weldon, it may be noted, did not have the opportunity to visit the actual staircase, as did Mr. Blaney. That should not detract from the weight his evidence is otherwise entitled to based upon his examination of Mr. Blaney's drawings of the staircase (with which he took no issue) and the record of the City, involving plans, permits and approval of the staircase. I might note that if in fact the staircase at 859 Queen Street West was given City of Toronto approval as a result of "compliance alternative" in accordance with Part 11 of the code, one would have expected some note in the City's record indicating approval of such "compliance alternative" by the chief building inspector, or someone else in the building department. There is no evidence that the City of Toronto ever took into consideration Part 11 of the code in approving this staircase.

[44] There was a difference of opinion expressed by Mr. Weldon and Mr. Blaney with respect to the "performance level" of the replacement staircase. Mr. Weldon testified that if the "performance level" of the replacement stairs met the "performance level" of the previous stairs that the replacement staircase could be approved in accordance with Part 11. Mr. Blaney testified that it would be illogical to permit an unsafe staircase to be built as long as it replaced a previous unsafe staircase. Mr. Blaney testified in effect that an unsafe staircase should be replaced by a safe staircase as long as the replacement by a safe staircase was practicable or feasible. It clearly was in this case. Apparently the new tenant, who took over after Mr. Heasman left the property, did in fact construct a safe staircase. While there is no specific evidence of such, the construction of a safe staircase may have involved a greater financial investment in order to reconfigure the staircase. However cost is of no consequence (as long as it

is not unreasonable) where safety is concerned. I prefer Mr. Blaney's logic to Mr. Weldon's narrow application of Part 11 of the Ontario Building Code.

[45] Even though Mr. Weldon maintained the position that the "Heasman staircase" could have been approved by the City of Toronto pursuant to Part 11 of the Ontario Building Code, during his testimony he did express some reservations with respect to the construction. He conceded that the headroom in the staircase did not comply with Part 11 of the Ontario Building Code, that a "compliance alternative" should not have been permitted. He conceded as well that the staircase was "steep and difficult to manoeuvre". His evidence was less than clear with respect to his opinion as to the lack of safety posed by the open west side of the staircase below the upper floor. As a matter of common sense, I would conclude the lack of wall, guards or hand rail clearly constituted a potential safety hazard. I do not require an expert opinion to arrive at such conclusion. He also expressed some concern with respect to the top riser height just below the upper landing (11 5/8 inches). He testified that if he had inspected the staircase, he would have recommended "evening out" the variants of the various risers over all the steps in order to reduce the clearly excessive height of the top riser to at least eliminate the discrepancy between that riser and others on the staircase. It would then have been necessary to increase the height of the other eight risers, thereby rendering them even more non-compliant with Part 9 of the Ontario Building code.

[46] The different opinions expressed by Mr. Blaney and Mr. Weldon perhaps highlight one important principle which must guide the court in its determination of the issues in this case. The mere fact that a staircase may be compliant with a building code, a building by-law or evidence as to industry standards, does not determine the question as to whether the staircase was unsafe. That is a determination for the court on all the evidence. Building codes, building

by-laws and evidence as to industry standards may all inform the court however, in coming to this determination. Building codes and building by-laws are there for a reason; to ensure that a particular structure will be safe for use. What is safe and what is reasonable may well depend on the circumstances. The "staircases" on a naval ship (sometimes referred to as "ladders") given space restrictions, would not comply with a building by-law that relates to a public building or even a private residence. That is understood. 859 Queen Street West however, was not a naval ship; it was a restaurant open to the public, to be used within reason, by all members of the public. It would be expected that a patron of the restaurant might want to use the washrooms on the basement level. It was therefore incumbent upon an occupier of the premises and anyone else responsible for construction or approval of the staircase to ensure that it was safe for reasonable use by members of the public. In this case, I conclude without reservation that the staircase that existed at 859 Queen Street West, on the February 10, 2004, was not a safe staircase. Indeed I am disposed to concur with Mr. Blaney's opinion expressed during his testimony the "merely by visual inspection the stairs were unsafe". To the extent that he went further and expressed his opinion that the stairs contributed to Gloria Musselman's fall there are other significant factors and there is a host of other evidence that the court must consider before arriving at the latter conclusion.

[47] Much evidence was presented during the trial with respect to numerous aspects of this staircase that clearly present a safety risk. These include the measurement of the steps themselves, the ceiling height, the open west side of the staircase below the upper floor, the condition and design of the handrail on the east side of the staircase and the extension of the stringer on the west side of the stairs onto the lower landing (which clearly could constitute a potential tripping hazard). Depending upon where the court concludes, (if it is able to do so)

Gloria Musselman's fall occurred, some of these code deficiencies may not have caused or contributed to Ms. Musselman's fall. However the structure and condition overall of the staircase is relevant when the court considers whether the conduct of the City of Toronto, through its agents, was negligent in approving the plans for the staircase, in the inspection of the staircase and in final approval of the staircase. This is not simply a case where one riser slightly exceeded the maximum permitted height set out on the Ontario Building Code or where the handrail was one inch lower than the required height at one end or the other or where the ceiling height at the landing or the top of the stairs was one inch lower than that permitted by the building code. This staircase overall was grossly noncompliant with the Ontario Building Code, with respect to the 1962 Toronto Building By-Law and with respect to the City of Toronto Property Standards By-Law. The City of Toronto should never have approved the plans as they were apparently presented for the building permit. The several inspections by Mr. Yunger, the building inspector, and for that matter, other inspectors, who attended to focus on different aspects of the renovation, should have revealed the structural deficiencies and resulted in orders to comply. Most certainly, final approval should not have been given by the City of Toronto for the staircase. It was, in my view, "an accident waiting to happen". The fact that it took 14 years for such accident to happen is of little consequence, particularly given the tragic consequences of Gloria Musleman's fall. It is true that there was no evidence before the court of any prior accident, or no clear evidence, that there never had been a mishap on the stairs. One may have occurred that did not result in a complaint. As a matter of common sense, I would be surprised if on occasion a patron of little more than average height had not bumped his head on the ceiling above the lower landing or at the top of the stairs. I note in passing as well, that while the width of the staircase may be barely code compliant, it still is a relatively narrow staircase. The open

west side of the staircase, below the upper floor, should have put any responsible person on notice that something was required to safeguard patrons of the restaurant. I appreciate that Gloria Musselman did not fall off the staircase through the open west side and land on the basement floor. However as a matter of common sense it would be easy to anticipate a "nasty accident" if two patrons, one ascending and one descending, happened to bump each other on the lower portion of the staircase. In sum it is the overall unsafe condition of the staircase that assists the court in determining negligence on the part of the City of Toronto, and for that matter, on the part of any occupier of the premises.

[48] The court must still determine whether the unsafe condition of the staircase caused or contributed to Gloria Musselman's fall. In doing so I must carefully consider the evidence as to the mechanism of that fall.

The Evidence of the Fall

[49] Two expert witnesses were called in an attempt to reconstruct Ms. Musselman's fall. The plaintiffs called Mr. Gordon M. Jenish. Mr. Jenish's curriculum vitae is found at exhibit 10, tab 5. His report is found at exhibit 10 tab 6. Mr. Jenish is clearly an expert in the area of accident reconstruction, though under cross-examination he testified he could only recall two prior occasions on which he investigated a fall on stairs. In his careful analysis of the circumstances of the fall, he reviewed Mr. Blaney's stair assessment report, many of the colour photographs taken of the stairs shortly after the fall, the medical records from St. Michael's Hospital with respect to Ms. Musselman's injuries and as well portions of the examination for discovery of Gerald Musselman and Mark Musselman. His conclusions were based in part on the consistent evidence of eyewitnesses that Gloria Musselman's position after her fall was lying on her left

side propped partially against the south wall of the landing. Her head was to the right as one was facing down the stairway and her legs were on the left side of the landing. He considered her injuries, the small abrasion just lateral to the left eye, the laceration over and the fracture of her right second metacarpal head, the cervical spine (C2), linear fracture of the odontoid without dislocation, and the left shoulder dislocation. He noted that there were no other findings of trauma to Ms. Musselman's body, specifically no indication of external or internal trauma.

[50] His conclusions were consistent in some degree with the evidence of other witnesses: specifically that Ms. Musselman had fallen backwards while ascending the stairs. That as she fell, her body rotated partially in a counter-clockwise direction so that she landed with considerable force on the landing and against the south wall. He further expressed the opinion, shared by Mr. Blaney (and by this court) that this staircase was very steep and unsafe presenting tripping hazards.

[51] Mr. Jenish went further however, and expressed his opinion that Ms. Musselman had lost her balance and fallen near the top of the stairs. It was the court's impression that he based this conclusion on his belief that the nature of her injuries were consistent with a high impact fall from considerable height and with his belief that the top of the staircase constituted the greatest tripping or balance hazard. He noted in particular the grossly excessive height of the top riser and its considerable discrepancy in height compared with the other risers as well as the unsafe position and condition of the handrail at the top of the stairs. Mr. Jenish testified specifically that Ms. Musselman "most likely" placed only a portion of her foot on the top landing and therefore lost her balance and fell backward. In Mr. Jenish's opinion, the steepness of the stairs was such that Ms. Musselman could have "plummeted" from the top of the stairs to the landing without striking any portion of her body against any other steps (or for that matter the ceiling).

[52] Mr. Jenish's opinion as to the location where the fall occurred was not shared by an expert witness called by the defendants, Mr. James Surowiak.

[53] Mr. Surowiak's curriculum vitae is found at Exhibit 83 and his report is found at Exhibit 12, Tab 4. He, like Mr. Jenish, is a professional engineer and is eminently qualified to testify in the area of accident reconstruction. It may be noted that his academic background includes a Bachelor of Applied Science in civil engineering and a Master of Science in biomechanics, from the School of Human Biology at the University of Guelph.

[54] As he testified and as noted in his report, his examination of available material was thorough indeed, including medical reports, engineering reports (including that of Mr. Blaney, Mr. Weldon and Mr. Jenish), material related to the building permit application provided by the City of Toronto and portions of the examinations for discovery of Gloria Musselman, Mark Musselman and Gerald Musselman. As will be clear upon an examination of his report, which he adopted when he testified at trial, his analysis of Gloria Musselman's possible fall and the location where it occurred are thorough indeed. To summarize his conclusions, it was his opinion that Ms. Musselman probably fell from one of the first three steps in ascending the staircase, although he conceded under cross examination that a fall from the fourth step was possible as well. He further testified that he couldn't completely discount a fall from the top step, however, he felt it was not probable.

[55] Mr. Surowiak was thoroughly and properly cross examined during his evidence by counsel for the plaintiffs. Much reference was made to a learned text entitled "The Staircase" authored by Dr. John Templer, an acknowledged expert in the area of staircase falls. Mr. Surowiak maintained his opinion that if Ms. Musselman had fallen from higher on the staircase,

she would have “tumbled” down the stairs and suffered other visible or significant injuries to other portions of her anatomy. I find his evidence very persuasive, consistent, as it is, with the physical evidence in the case. The court is also obliged to Mr. Surowiak for his detailed description of the fracture to the odontoid process, and how it is consistent with the fall that he testified most probably occurred. In Mr. Surowiak’s opinion, the fall most probably occurred as Ms. Musselman was mounting the several steps above the lower landing, steps, 2, 3, or possibly 4.

[56] With respect to the location where Ms. Musselman’s fall began, I prefer the evidence of Mr. Surowiak to that of Mr. Jenish, based both on the physical evidence and the evidence (however limited) of eye and ear witnesses. I am persuaded that after leaving the washroom, as she began to mount the stairs, Gloria Musselman lost her balance on the first several stairs above the lower landing. Unable to obtain a solid purchase on the East handrail, flailing with her left arm and hand, and finding no wall, no guard, no handrail to help her regain her balance, she rotated backward and in a counter clockwise direction, falling backward to land on her left side on the landing below. Such a fall, from any of the first several steps above the lower landing, would clearly be of sufficient force to cause the fracture of the C2 odontoid process that resulted in her quadriplegia.

The Medical Evidence

[57] Before I turn to the evidence of the various treating physicians and expert witnesses that testified at trial, I address briefly the history of falls that Gloria Musselman experienced in the years preceding her fall on February 10, 2004.

[58] I begin with an event that occurred in September 1999. While Mrs. Musselman was attending to a flower bed, in her front lawn, while attempting to balance on a loose rock wall, on her evidence, the rocks shifted, and she fell onto her back on the neighbour's lawn. A few weeks earlier, she had suffered a period of faintness, all of which is recorded in the notes of Dr. Lawrie and the report of Dr. Sivakumaran (exhibit 6, tab 7, pp. 4-6).

[59] On April 24, 2000, she was out for a walk with a neighbour. She inadvertently stepped off the sidewalk, tripped, and suffered a fracture of her left ankle. She suffered a hairline crack fracture of the tip of the left lateral malleolus. She was placed in an air cast walking boot.

[60] On March 27, 2001, while out walking, on her evidence, she tripped on a crack and went down twisting her right ankle. Dr. Lawrie diagnosed a sprain and prescribed an air cast.

[61] On October 11, 2001, while attempting to put four quilting frames into her car, she lost her balance and fell, injuring her ankle. She was referred to Dr. Joyce Daly, an orthopaedic surgeon, who diagnosed a fractured right lateral malleolus. For treatment she was to wear an air cast. The consultation with Dr. Daly (who testified at trial) will be further referred to below. Dr. Daly's notes refer to a "bilateral lower extremity neuropathy" and to Ms. Musselman "having sensory neuropathy in her feet". As a result of her injury, she was further referred to Ms. Deborah Taggart for physiotherapy. Ms. Taggart also testified at trial. As noted above, Ms. Musselman's explanation for this fall was that she was trying to get into her car while struggling to hold four quilting frames that she was intending to take home for her next quilting session with friends.

[62] Finally, on the 22nd of November 2003, Ms. Musselman suffered a fall on the cellar steps at her home, while she was attempting to carry a trolley down to the basement. She did not require medical attention as a result of this mishap.

[63] I then turn to the evidence of the various treating physicians and medical experts in my analysis of whether Gloria Musselman may have experienced an episode of syncope or pre-syncope at the time of her fall on the 10th of February 2004 or whether she suffered from a peripheral neuropathy that may have caused or contributed to that fall.

[64] Dr. Bruce Stewart was called as an expert witness by the defendants. Dr. Stewart is an eminently qualified neurologist. His curriculum vitae is found at Exhibit 85 and his report is found at Exhibit 12, Tab 6. His report is based largely upon his examination of Dr. Lawrie's notes, which include the referral opinion from Dr. Sivakumaran on September 23, 1999 and the referral opinion from Dr. Daly, dated November 5, 2001. Dr. Michael Lawrie is Gloria Musselman's family physician. He also considered the notes of Deborah Taggart, the physiotherapist and the report of Dr. Peter Ashby, dated December 22, 2008. At page 5 of his report, Dr. Stewart originally provided this opinion:

This woman had a longstanding peripheral neuropathy in the lower limbs, which would contribute to her falls, including the fall of February 10, 2004. It is not necessary for the neuropathy to be severe in order to contribute to any fall.

I do agree with Dr. Ashby that she did not have features of a severe chronic peripheral neuropathy at the time of her February, 2004 fall. She did, however, have symptoms and signs of a chronic peripheral neuropathy at that time, which would put her at risk of a slip and fall. She also had unexplained syncopal and pre-syncopal episodes over the years before the accident. Their timing was unpredictable. A pre-syncopal episode could have contributed to a slip and fall February 10, 2004. There are therefore two potential causes for a fall February 20, 2004 – a peripheral neuropathy and repeated pre-syncopal symptoms.

[65] When he testified, Dr. Stewart noted that he gave significant importance to Dr. Daly's report to Dr. Lawrie, with Dr. Daly's reference to a significant past history of falls and a peripheral neuropathy. When asked about that opinion expressed by Dr. Daly, Dr. Stewart replied "I don't know where it comes from but I must give it considerable weight as a written report". Under cross examination, Ms. Musselman's explanation for each of the falls was put to Dr. Stewart. When apprised of the possible external or environmental explanation for those falls, Dr. Stewart demonstrated his objectivity as an expert witness and agreed with counsel for the plaintiff that all the falls were reasonably accounted for by factors that were unrelated to neuropathy.

[66] Dr. Stewart was helpful to the court in providing the possible symptoms and signs of a severe bilateral lower extremity neuropathy and a mild bilateral lower extremity neuropathy. None of those signs and symptoms stand out as applying to Gloria Musselman prior to her fall in 2004. His opinion was that prior to her fall on the 10th of February 2004, Gloria Musselman did not suffer from a severe bilateral lower extremity neuropathy. Further, Dr. Stewart testified that he could not say prior to February 10, 2004 that Gloria Musselman suffered from a mild or a severe bilateral lower extremity neuropathy. He added that he would not have restricted her from her normal daily activities.

[67] Dr. Stewart went on to say that the individual who suffers from a peripheral neuropathy may not be aware of the condition and that an observer might not note any signs of the neuropathy, for instance, an abnormal gait. He agreed however that as of February 10, 2004, he would have no reason to advise Ms. Musselman not to use stairs or to avoid high heels. Having agreed that there might be an "environmental" explanation for each of her falls, if such were accepted, he advised the court there would then be nothing to suggest a lower extremity

neuropathy. He further stated that the first reference to a neuropathy by Dr. Daly might not have been justified. He noted that Dr. Daly's reference was in notes that were typed approximately two weeks after Gloria's visit and that Dr. Daly therefore could have been "confused".

[68] Dr. Stewart was then taken through Deborah Taggart's notes in detail and noted the progress that Ms. Musselman made during physiotherapy. He stated that the notes would support a conclusion that she was simply recovering from her fracture and the consequent immobility. He added the physiotherapy would have little effect on an improvement in her balance, if the balance problem was in fact due to a neuropathy.

[69] In sum, while Dr. Stewart's fair and objective evidence still leaves the possibility that Ms. Musselman suffered from a bilateral lower extremity neuropathy at the time of her fall, it leaves considerable doubt as to such diagnosis.

[70] Dr. David Molloy was also called by the defendants. He is eminently qualified as a specialist in the field of geriatric medicine. In fact, he is the Chair in Aging at McMaster University. He deals daily with senior citizens and is very familiar with the problems and challenges that arise physically and medically as one grows older. One of his duties is to supervise a memory loss clinic where he testified the average age of his patients is 83 years. He deals on a regular basis with "frail, older adults ... with multiple complex issues". He outlined for the court the many "risk factors" that can increase the risk of a fall. He quoted with approval an article from the website www.uptodate.com entitled "Falls in Older Persons: Risk Factors and Patient Evaluation", authored by Dr. Douglas Kiel. The risk factors first noted by Dr. Molloy were:

1. Past history of a fall

2. Lower extremity weakness
3. Age
4. Female gender
5. Cognitive impairment
6. Balance problems
7. Psychotropic drug use
8. Arthritis
9. History of stroke
10. Orthostatic hypotension
11. Dizziness
12. Anemia

[71] He initially testified that Gloria demonstrated every one of these risk factors (or at least the majority). He stated that she was a “very, very, high risk for falls”. He continued to testify in a more or less general way by stating that “falls are common in older adults”. He noted and explained that there are three reasons why older persons fall; one, intrinsic factors, two environmental factors and three, the behavior of the older person.

[72] Dr. Molloy went on to categorize falls as falling into two groups; one, where there is no loss of consciousness and two, where there is a loss of consciousness. Where there is no loss of consciousness, people try to “grab”. If a fall is due to a loss of consciousness, there is no attempt on the part of the individual to prevent the fall. Usually where there is a loss of consciousness, Dr. Molloy stated that there was probably a cardiac or stroke issue. He went on to describe how a fall may have a cardiac or vascular cause or a cause related to the central nervous system, such as a seizure. He described how there may be a vasovagal attack or a transient ischemic attack

(TIA). Dr. Molloy provided his opinion that the fall in the flower garden was due to an arrhythmia or a vasovagal attack. He went on to describe the impact of certain drugs on the individual and how they might increase the risk for a fall. He referred to the cognitive decline that may increase with increased age and described the effect of the sympathetic system and the parasympathetic system on blood pressure, together with the influence of the vagus nerve.

[73] He concluded his examination in chief by testifying that if Ms. Musselman had fallen from the top of the stairs, he would have expected greater injuries, at the very least, bruises. I agree with this latter opinion. In cross examination, he agreed that there was no reference to a transient ischemic attack in any of the medical notes or reports and agreed with Dr. Dombrower's report that Ms. Musselman's post-quadruplegia syncope is not relevant with respect to her pre-fall condition.

[74] He repeated his opinion with respect to the 1999 "flower bed fall" that Ms. Musselman had fallen as a result of an episode of syncope, although he agreed with plaintiffs' counsel that a viral illness can cause both weakness and dizziness. Dr. Molloy told the court that he had not been apprised of Ms. Musselman's explanation for her fall in the flower garden (that she lost her balance on an unstable rock retaining wall). Dr. Molloy agreed that if that were true, that that would simply be an environmental cause for the fall. He agreed as well that references to autonomic dysreflexia following her fall on the stairs would be from the quadriplegia itself. Dr. Molloy stated his opinion that Ms. Musselman fell on the stairs because she "got dizzy" as a result of a vasovagal attack or an arrhythmia. He stated that she had just eaten a meal and had visited the washroom, which would have increased her risk of a vasovagal attack. He conceded that an echocardiogram conducted after the fall had detected no arrhythmia.

[75] It can fairly be said that Dr. Molloy waivered little in his expressed opinions. However, he considered only the intrinsic factors that might be present based upon his general knowledge and experience with falls among older persons. He did not consider external or environmental factors that might have related to any of her previous falls or to the fall on February 10, 2004. He testified that he had simply been asked to consider what intrinsic factors may have caused or contributed to her fall and was not asked to assess extrinsic or environmental factors. He also advised the court that he considered only internal factors because Gloria Musselman clearly had fallen backward on the stairs. He testified that he had "never heard of anyone falling backward on stairs".

[76] The court appreciates Dr. Molloy's assistance in describing the many risk factors in general that may cause or contribute to falls among older persons. I have carefully considered his evidence but must take into account the general nature of much of it and as well his focus only on intrinsic causes.

[77] Dr. Joyce Daly was called by the defendants. Dr. Daly is an orthopaedic surgeon, with privileges at Cambridge Memorial Hospital. Dr. Daly became, however briefly, Gloria Musselman's treating physician, as a result of Ms. Musselman's fall on October 11, 2001. It will be remembered that Ms. Musselman described how she was attempting to carry four quilting frames and manoeuvre them into her car. It was raining and as she was trying to accomplish this task, she slipped and fell and suffered a fracture to her right lateral malleolus (her ankle). The events that follow, in terms of her treatment, may be of some significance in assessing the probative value of Dr. Daly's testimony and the weight that should be given to the reliance that other witnesses placed upon some of Dr. Daly's initial notes.

[78] Attention should first be given to the ambulatory care record at Cambridge Memorial Hospital, which is found at Exhibit 5, Tab 14. The first page details her attendance at the emergency department on the 11th of October, immediately following her fall. Apparently the attending physician was Dr. Quinlan. He describes the injury and prescribes an air cast, some Percocet and a direction to keep the limb elevated.

[79] One may then turn to page 4, which is a copy of the brief notes made by Dr. Daly, on the occasion of Gloria Musselman's first visit with Dr. Daly at Cambridge Memorial Hospital, at the fracture clinic. This visit occurred on the 15th of October 2001. Dr. Daly's brief note simply details that she slipped at her car while carrying wooden quilt frames in the rain. It then contains the single word "neuropathy".

[80] Turning to page 5, one can read the "Consultation Report" dictated by Dr. Daly with respect to Gloria Musselman's visit more than three weeks earlier. According to the report, it was dictated by Dr. Daly on November 5 and transcribed on November 6. The report includes a brief description of the accident, the diagnosis of her injury and the care she received. The report also contains, however, the following comment:

"Gloria's significant past medical history is that of bilateral lower extremity neuropathy. She therefore has poor position sense when ambulating. She has otherwise not any significant ankle injuries."

[81] Further on in the same report, Dr. Daly states the following under "Impression":

"Gloria Musselman has an undisplaced lateral malleolar fracture in addition to having sensory neuropathy in her feet. The fracture itself at this point is not very significant. However, the neuropathy can compound this significantly because of her inability to protect it by sense of pain... Again, we will be watching for evidence of a Charcot deformity due to her neuropathy."

[82] Dr. Daly's own clinical notes may be found at Exhibit 6, Tab 26. Page 1 is a copy of the notes made by Dr. Quinlan in the emergency department on the 11th of October. Page 2 is a copy of Dr. Daly's own notes made at the time of his examination on the 15th of October, referred to above, containing the single word "neuropathy". Page 3 is his consultation report referred to above.

[83] Gloria Musselman apparently saw Dr. Daly again on the 22nd of November 2001. Her note, found at page 6 of Tab 26, Exhibit 6 is very positive with respect to the healing of her ankle and Dr. Daly's recommendation was that she "progressed to full weight bearing". There was a further visit by Ms. Musselman with Dr. Daly on the 10th of December 2001. Her note with respect to that visit is found at page 8 of Tab 26. Dr. Daly notes that she was not yet "weaned out of cast" and she made a referral for physiotherapy.

[84] Gloria Musselman's final visit with Dr. Daly was on the 28th of January 2002. Dr. Daly, according to her clinical notes, found at page 9 of Tab 26, reveals that though there was still swelling the healing was progressing well and that Ms. Musselman was to "continue excellent progress". Ms. Musselman was discharged from Dr. Daly's care as of that date. She continued the physiotherapy that she had begun on the 13th of December 2001.

[85] It may be noted that Dr. Daly's consultation report apparently dictated the 5th of November 2001 appears as well in Dr. Lawrie's clinical notes, by the date November 5, 2001. Dr. Michael Lawrie was Gloria Musselman's personal and family physician.

[86] The notes or impressions of Dr. Daly contain the only references to a "bilateral lower extremity neuropathy" in Gloria Musselman's history. These notes as part of a "clinical record"

obviously had some impact on some of the expert witnesses who are asked by the parties to provide opinions as to possible causes for her fall. Therefore, in my view, the evidence of Dr. Daly is of considerable importance and must be carefully considered by the court.

[87] Dr. Daly impressed me as an honest witness and a well qualified orthopaedic surgeon. She has had privileges at Cambridge Memorial Hospital since 1998. Indeed, in 2001, she had a very busy practice. She described her normal routine for the court. She attended the fracture clinic at the hospital (where she saw Gloria Musselman) one day per week. She spent one day in surgery. She spent one day on paperwork and the rest of her time was "office time". When a patient was referred, she would normally communicate with the referring physician and see the patient in the fracture clinic. Depending upon the patient's needs, she might order further attention or care such as x-rays, casts or referral to physiotherapy. On October 15, 2001, the day she saw Gloria Musselman, she told the court she saw perhaps 40 patients on that same day. She stated that there were only two orthopods on staff to do the work of four.

[88] Under examination in chief, she advised the court that she had dealt with cases where a patient suffered from peripheral neuropathy prior to Gloria. She stated that a neuropathy can contribute to a fall and can impact as well on treatment because of reduced sensation in the limb.

[89] With respect to her reference in her consultation report to a "bilateral lower extremity neuropathy", Dr. Daly stated she had no recollection of the source of that information. She added that you do not treat a neuropathy in the fracture clinic; that in the normal course she would advise the patient to consult with a family doctor, with respect to a neuropathy. It may be noted that Gloria Musselman testified that Dr. Daly never made reference to a neuropathy when she was with Dr. Daly.

[90] Under cross examination, Dr. Daly testified that a reference to "neuropathy" was not intended to mean a motor neuropathy. She stated that a history of falls "could" indicate a bilateral lower extremity neuropathy, but falls could be due to other causes. She conceded that certainly a person could have four falls without having a neuropathy. A conclusion of neuropathy should not be based on simply the number of falls.

[91] She advised the court that if Dr. Lawrie, as a competent family physician, suspected that Gloria Musselman suffered from a bilateral lower extremity neuropathy he would chart it and perhaps refer the issue for further attention and care. She would certainly expect a competent family physician to caution his patient with respect to her activities, if the doctor suspected a neuropathy.

[92] In the end, the court is left speculating as to why Dr. Daly made reference to a bilateral lower extremity neuropathy in her consultation report or a "neuropathy" in her initial note. When she testified, she was certainly unable to provide any sound medical reason for that reference. Did she, as a cautious and conscientious physician include that reference simply based on Ms. Musselman's history of prior falls? That would be pure speculation. I would simply note the context of the reference in a consultation report dictated more than three weeks after contact with the patient, when such contact was in the course of a very busy day, and when the orthopaedic surgeon's attention would be focused on the fractured lateral malleolus. Suffice to say that reference was accepted at face value by Ms. Deborah Taggart, the physiotherapist, to whom Ms. Musselman was referred and who provided physiotherapy to deal with Ms. Musselman's fractured ankle.

[93] Deborah Taggart impressed me as an honest witness and a competent and conscientious physiotherapist. When called as a healthcare provider by the plaintiffs, she testified that she has provided service as a physiotherapist since 1999. She advised the court that when she first saw Gloria Musselman on the 13th of December 2001, she had a copy of Dr. Daly's consultation report dictated the 5th of November 2001, with the above-noted reference to a "bilateral lower extremity neuropathy". She also had copies of the diagnostic imaging reports (x-rays) found at pages 7 and 9 of Tab 14. Ms. Taggart's own notes with respect to her physiotherapy are found at pages 11, 12 and 13 of the ambulatory care record (Exhibit 5, Tab 14). She advised the court that her habit is to type out her notes shortly after each session. For what it's worth, Ms. Taggart testified that Dr. Daly had once made an error in the consultation report she had received. She telephoned Dr. Daly and Dr. Daly conceded the error and approved a correction.

[94] She testified that during her training as a physiotherapist, she had received information with respect to peripheral neuropathies, but that as a physiotherapist dealing with a fractured ankle, a neuropathy would be a side issue.

[95] Ms. Taggart advised the court that the initial attendance (13 December 2001) would involve a discussion with the patient of her history, her current circumstances and her goals. There would then be a testing. She advised the court that the reference in her notes to a "lower extremity neuropathy" (LE Neuropathy) would have come from Dr. Daly's consultation report. She recalled no detailed conversation with Gloria Musselman with respect to a neuropathy. Counsel spent some time deciphering the acronyms contained in her notes and brief references to her condition at that time. The bottom line was that Ms. Musselman was expected to return after the Christmas holidays. Ms. Taggart prescribed a home exercise program (HEP) and anticipated that physiotherapy would have duration of six weeks.

[96] Ms. Musselman did attend on one further occasion prior to Christmas, on the December 17, 2001. Physiotherapy then continued on the January 8, 2002, and February 5, 2002, at which time Gloria Musselman was discharged from physiotherapy. Essentially, she had made excellent progress and required no further physiotherapy. She was discharged with a "continued streamlined home program". Ms. Taggart testified that her "global impression" was that Gloria Musselman had progressed quickly and progressed well, and that she worked well with the home program. Under cross-examination, Ms. Taggart testified that she remembered Gloria Musselman well, that she was "full of energy...dynamic" and that she expected that Ms. Musselman was an excellent volunteer at the Fairview Mennonite Home. She further testified that she had "no safety concerns as far as her balance was concerned". If she had any concerns she would have continued with physiotherapy and advised the use of a gait aid.

[97] Dr. Howard Dombrower was called as an expert witness by the plaintiffs. Dr. Dombrower is a specialist in the areas of both internal medicine and geriatric medicine. He currently lectures at the division of geriatric medicine in the Faculty of Medicine at the University of Toronto. Amongst the many positions that Dr. Dombrower has held or currently holds I would note that he is the Medical Director of the Baycrest Home for the Aged and the Medical Director of Rehabilitation at Baycrest. Baycrest is a large facility with some 500 residents. Dr. Dombrower also serves as a consultant at a number of other seniors residences. His full curriculum vitae is found at exhibit 10, tab 11, and his report is found at tab 12. It may be noted from his report that his review of available material was extensive indeed, material both pre and post accident. Among the many records and reports which he considered in coming to his opinions with respect to Ms. Musselman, he included the records of Dr. Joyce Daily (exhibit 6, tab 26), the records of Dr. Thevaki Sivakumaran (exhibit 6, tab 25), the pre-injury records

