

CANADA / JUDGMENT

Burnett v. Moir

2011 BCSC 1469

COURT

Supreme Court of British Columbia

DECIDED

1 November 2011

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2011 BCSC 1469 Burnett v. Moir

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Burnett v. Moir,

2011 BCSC 1469

Date: 20111101

Docket: S088358

Registry: Vancouver

Between:

Garrett Burnett

Plaintiff

And

Scott Moir, Garry Todoruk, George Holmes, Sunny Jara, Jeremy Wocknitz, Tyler Wocknitz, Paul Uppal, Lorne Pike, Jim Cessford, The Corporation of Delta, John Does 1 to 10 and Employees 1 to 10

Defendants

Before: The Honourable Mr. Justice Cullen

Reasons for Judgment

Counsel for the Plaintiff:

J. Vilvang, Q.C.

T.G. Lewis

Counsel for the Defendants Corporation of Delta, Paul Uppal, Lorne Pike and Jim Cessford:

J.M. Poole

J.A. Dowler

M. Chorlton

Place and Date of Trial:

Vancouver, B.C.

April 4 - 8; 11 - 15

18 - 21; 26, 28;

May 2 - 6; 9 - 12;

16 - 18, 2011

Place and Date of Judgment:

Vancouver, B.C.

November 1, 2011

Contents

A. INTRODUCTION. 3

i. The Action. 3

ii. The Plaintiff 4

B. LIABILITY - THE PLAINTIFF'S CASE. 6

i. The Pleadings. 6

ii. The Evidence. 7

(1) Statistics of Service Calls to NDI 7

(2) The Anselmo Letter 8

(3) The Liquor Inspector 9

(4) The Licensed Premises Agreement 11

(5) Discovery of the Delta Defendants. 13

(6) The Evidence of the Plaintiff 15

C. LIABILITY - THE DEFENDANT'S EVIDENCE. 17

i. Expert Report of Dr. John McNeill 17

ii. The Evidence of Dr. James Kennedy. 20

iii. The Evidence of Jeremy Wocknitz. 22

iv. The Evidence of Tyler Wocknitz. 29

v. The Evidence of Cory Philpot 31

D. POLICE WITNESSES. 32

i. Constable Uppal 32

ii. Constable Formby. 37

iii. Constable Bentley. 41

iv. Sergeant Ryan Hall 42

v. Inspector Pike. 45

vi. Constable Al West 50

vii. Inspector Charna. 55

viii. Chief Constable Jim Cessford. 59

ix. Sergeant Walter Argent 67

x. Police Occurrence Reports Relating to Cheers 2005/06. 70

E. THE POSITION OF THE PARTIES - LIABILITY. 71

i. The Plaintiff's Position. 71

ii. The Delta Defendants' Position. 76

F. DISCUSSION AND CONCLUSION - LIABILITY. 78

i. The Law. 78

ii. Application of the Law to the Facts. 98

(1) Pre-Assault 98

(2) Post-Assault 102

A. INTRODUCTION

i. The Action

[1] This case raises a number of legal and factual issues, but the foremost question is, in what circumstances will police officers be subject to a private law duty of care for acts or omissions committed in the exercise of their public responsibility to preserve the peace and prevent the commission of offences?

- [2] The plaintiff, Garrett Burnett, was brutally assaulted early in the morning of December 26, 2006 while he was a patron of Cheers Nightclub, located in the North Delta Inn ("NDI"), in the Municipality of Delta. The assault occurred as Mr. Burnett and other patrons were being pushed from the pub out through a door into an adjacent sidewalk and roadway. The assault was captured on video-tape from a surveillance camera which showed an assailant striking the plaintiff on the head with a bar stool taken from the premises after he apparently stumbled and fell to the ground as he and the others were being ejected. The video recording is not sufficiently clear to allow an identification of the assailant and the subsequent police investigation did not determine who he was.
- [3] As a result of the assault, the plaintiff has suffered a moderately severe traumatic brain injury which has had a significant impact on the course of his life over the past four and a half years and which will significantly compromise his future.
- [4] The plaintiff brought a law suit against the owner of the Cheers pub, Three Jay Holdings Ltd., doing business as the North Delta Inn and the Cheers pub, and John Doe 1 and John Doe 2 under action number S073004. Mr. Burnett subsequently commenced a second lawsuit against the owners, the management and certain employees of Cheers as well as against Chief Constable Jim Cessford ("Cessford"), Inspector Lorne Pike ("Pike"), Constable Paul Uppal ("Uppal") of the Delta Police Department ("DPD"), the Corporation of Delta, John Does 1 to 10 and employees 1 - 10. For ease of reference, where appropriate I shall refer to the members of the DPD and the Corporation of Delta as the "Delta Defendants". The Delta Defendants filed a Third Party Notice against Three Jay Holdings. The two actions were ordered to be tried together, but before the commencement of the trial, the plaintiff settled his claim against the owners, the management and the various employees of the NDI and Cheers pub and filed a Notice of Discontinuance against those parties.
- [5] In the result, this action proceeded only as against the Delta Defendants, alleging liability in negligence. The Delta Defendants do not dispute that the plaintiff has suffered significant loss and damage, but they take the primary position that the plaintiff has not established one or more of the elements essential to affixing them with liability in negligence.
- [6] The defendants' alternative position is that the plaintiff's own conduct contributed significantly to his injuries and he should be found contributorily negligent for the events leading to his loss.
- [7] For the reasons that follow, I conclude that the defendants are not liable to the plaintiff for negligence.

ii. The Plaintiff

- [8] The plaintiff at the time of trial was 35 years old. He grew up in the lower mainland area of British Columbia, with his mother, Vicci Burnett, his father, Bob Burnett, and his younger sister Andrea Burnett. He was married for a relatively short time, but divorced in 2004.

- [9] His sister, Andrea, presently lives with her fiancé, Justin Lieberich. Mr. Burnett's parents and sister live in New Westminster where he presently resides as well.
- [10] Both Mr. Burnett Sr. and Mrs. Burnett retired in 2006 from long-term careers with their respective employers.
- [11] At the time of his injury, the plaintiff was in a relationship with a woman by the name of Carla Gutierrez. He had recently returned to Vancouver, on December 23, 2006 and was living with her in her family's home in North Vancouver.
- [12] Growing up, the plaintiff was very active in sports including hockey, soccer, lacrosse, baseball, swimming, rugby and football, but as he got into high school, he concentrated on hockey and lacrosse as his primary sports.
- [13] He first left home at age 18 in 1993 to play hockey in a number of small towns in the interior of British Columbia. The following year he went to Ontario and played with two junior teams in the Ontario Hockey League. His aspiration was to play in the National Hockey League.
- [14] After starting the next year with a junior team, he ended up playing in the professional or semi-professional leagues, including the new IHL, CHL and ECHL. He played in the ECHL from 1995/96 to 1997/98 when he graduated to the AHL, initially with the Philadelphia Phantoms. He played in the AHL until the end of the 2002/2003 season except for a number of stints in the IHL.
- [15] In 2003/04 he realized his aspirations by signing with the Anaheim Mighty Ducks of the NHL and playing 39 games with that team. He scored one goal, made two assists and served 184 minutes in penalties. His primary role throughout his professional career was as an enforcer; a fact which is reflected in his statistics, showing relatively high penalty minutes and low point totals throughout the years which he played.
- [16] In 2004/05 the NHL underwent a lockout. For part of that year, the plaintiff played with the Danbury Thrashers of the new IHL. The following year, 2005/06, he signed a contract with the Dallas Stars of the NHL, but was with Dallas only for the pre-season when he suffered a hand injury. He went on to play ten games with the Iowa Stars of the AHL and finished the season with Phoenix Road Runners of the ECHL, playing 29 games there.
- [17] The following year, he worked out in Vancouver with a number of NHL players including Trevor Linden, who testified as to his fitness and dedication, but he was unable to secure a contract with an NHL team or otherwise. Later on in 2006 he signed a contract with the St. Jean Summum Chiefs in the LNAH, a league based in Quebec that features fighting as a prime attraction.
- [18] He was suspended from the league after playing four games with the Chiefs. The original suspension was for three games, but it was increased by the league to 36 games. The team did not appeal the suspension as Mr. Burnett's injury, at the heart of this action, prevents him from playing any further hockey, makes such an appeal moot.

- [19] After his suspension which occurred on December 17, 2006, Mr. Burnett flew to Dallas where his vehicle was, and drove home to Vancouver from Dallas, arriving on December 23, 2006.

B. LIABILITY - THE PLAINTIFF'S CASE

i. The Pleadings

- [20] The plaintiff's claim against the Delta Defendants rests on assertions of negligence both before and after the assault. It is not alleged that the Delta Defendants had any direct involvement in the specific events leading up to or comprising the attack on the plaintiff. Rather, it is alleged that the Delta Defendants, specifically, Cessford, Pike and Uppal, failed to properly identify Cheers as a nuisance to the public, a trap for the unwary, and to take pre-emptive steps to abate the danger it represented to potential patrons.
- [21] It is also alleged that in the wake of the attack upon the plaintiff, the Delta Defendants, specifically the defendants Uppal and Pike, were negligent in the way they responded, initially in seeking "first responder assistance for the plaintiff" and subsequently in investigating the assault, resulting in a failure to capture potential evidence of the identity of the assailant or assailants responsible for the attack, and in the loss of a surveillance video containing a depiction of the events at issue.
- [22] More specifically, the allegations are that the defendants Cessford, Pike and Uppal failed to warn of the dangers of entering Cheers; that the defendants Cessford, Pike, Uppal and the Corporation of Delta were negligent in allowing Cheers to continue to operate, thereby creating a nuisance to the public and a trap for the unwary; that the defendants Cessford, Uppal and Pike failed to report incidents of violence at Cheers to the Corporation of Delta for by-law enforcement purposes or to the Liquor Control and Licensing Branch ("LCLB") of the Government of British Columbia; that the defendant Uppal failed to call for First Responder assistance for the plaintiff; that the defendant Uppal failed to conduct a full and thorough investigation of the witnesses to the assault, and failed to keep any adequate record of such an investigation; and that the defendant Pike lost or destroyed a hard drive and/or video surveillance video depicting the events at issue.

ii. The Evidence

(1) Statistics of Service Calls to NDI

- [23] A significant part of the foundation for the plaintiff's action against the Delta Defendants comes from a letter directed to the plaintiff's mother, Ms. Vicci Burnett, dated April 2, 2007 from the DPD in response to her request for information concerning "police statistics pertaining to the business 'Cheers' located at 11920 - 70th Avenue, Delta, B.C."

[24] The letter set out information gathered from "police statistics from all [their] records and databases beginning from January 1st, 1998 to March 21st, 2007." According to the letter, there were a total of 2,410 police service calls to Cheers during that period, 231 of which were for assaults, 9 of which were for uttering threats, 10 of which were obstructing a peace officer, 138 for suspicious person/vehicle occurrences, 200 of which were for creating a disturbance, 217 for "unspecified assistance" and 1,605 of which were for "other".

[25] In the period for which such statistics were available, from February 2005 forward, there were a total of 38 arrests and charges forwarded to Crown Counsel, including 7 in 2005, 28 in 2006, and 3 to the end of March 2007. The yearly number of service calls were set out as follows:

- 1998 - 292
- 1999 - 267
- 2000 - 267
- 2001 - 242
- 2002 - 331
- 2003 - 274
- 2004 - 243
- 2005 - 199
- 2006 - 258
- 2007 - 37

(2) The Anselmo Letter

[26] There were additional documents evidencing the history of occurrences at Cheers. Council for the Municipality of Delta received a letter dated October 24, 2006 concerning an assault at Cheers, and complaining about the police response (the "Anselmo Letter"). Council referred the letter to Cessford for a review and report "including a review of the history of complaints relating to this property" for a future executive meeting. On November 20, 2006, Cessford reported orally at a council meeting that the specific matters raised in the letter had been dealt with and resolved to the satisfaction of the writer and no further action was required. According to the Minutes, he advised council that 392 complaints over the past 22 months had been registered, not all attributable to management of the bar and the management of the bar had cooperated with the department through the installation of security cameras, improved lighting and sound attenuation.

[27] Council moved to have "staff report back regarding the specific nature of the police complaints related to the activities at the NDI and [the] potential success of show cause hearing." The report from staff was scheduled to be given at a meeting on December 18, 2006, but that meeting was cancelled by council.

(3) The Liquor Inspector

[28] The plaintiff called Kane Scott, an inspector with the LCLB since 1998. His area of responsibility includes White Rock, Delta and New Westminster. He swore an affidavit dated November 26, 2009 to which a number of documents were exhibited. The documents were admitted as authentic by the defendants. Mr. Scott's evidence was that Cheers pub was part of the NDI which had several different liquor licenses, including two liquor primary licenses for Cheers, another liquor primary license for a separate premises called "All Stars", one food primary license and one license for a cold beer and wine store.

[29] Mr. Scott conducted random inspections of the liquor licensed premises in his jurisdiction, primarily to inspect for over-crowding, intoxication and service to minors. He detailed the means of ensuring compliance, including discussions, correspondence and issuance of contravention notices which could lead to enforcement actions. He identified a schedule of penalties applicable to various contraventions including license suspensions and financial penalties for "riotous conduct". He is the person responsible for initiating procedures against offending premises and would get the necessary information from his inspections, from complaints from members of the public, from information from other agencies, or information from police through the issuance of licensed premises checks ("LPCs"). The LPCs were issued on pre-printed forms provided to the police, copies of which were to be sent to the LCLB. He identified several issued LPCs and accompanying police reports issued in October of 1999 and September of 2001 relating to events at Cheers, indicating that the matters at issue were resolved without enforcement actions being taken.

[30] In May of 2005, Mr. Scott received a report of "riotous conduct" at Cheers, but decided not to pursue further action.

[31] In August 2005 in an inspection visit, he found evidence of minors being served at Cheers and of a fight which events were resolved by a monetary penalty being imposed after an enforcement action was taken. His last visit to the bar before the assault on the plaintiff was on November 25th, 2006. On that occasion he prepared a Compliance and Enforcement Contravention Notice relating to service of a minor.

[32] Mr. Scott was not aware of the number or nature of service calls to Cheers between 1998 and the end of March 2007 as set out in the summary sent to Ms. Burnett. He was only advised of the assault upon the plaintiff through media reports, but he testified there was no expectation that the police would advise the LCLB one way or the other of incidents related to premises. He had meetings with Cheers management about matters subject to regulation by the LCLB. Mr. Scott made numerous visits to Cheers where no enforcement action was taken as a result. He noted that Cheers had two separate areas, each subject to a separate

liquor licence. His jurisdiction did not extend outside of the licensed bar areas or into the parking lot, and so he would not need to know what went on in the parking lot unless the police thought there was something he needed to know. The use of LPCs was discretionary by the police and that was only one of several ways for Mr. Scott and other liquor inspectors to determine what was going on at bars within their jurisdiction. He noted Cheers had staff at the front door, did "pat downs" for patrons, had security staff monitoring the conduct of patrons, used head sets to communicate, and wore identifiable clothing. The Cheers approach to patron control was consistent with other similar bars.

- [33] Mr. Scott conducted approximately 32 inspections in all over the years from 1998 to 2006. He noted that altercations including pushing and shoving were occurrences at every bar and what occurred at Cheers was not unique to Cheers. He was aware bar staff would call the police when necessary and cooperate with the police when they attended. Those circumstances would factor into whether an enforcement action would be taken or not. If matters went to a hearing, the penalty he recommended would not always be imposed. In the case of serving the minor in 2005 he recommended a two day suspension, but the adjudicator imposed a \$3,000 fine instead.
- [34] The more contraventions by a premise, the higher the penalty and serial contraventions could ultimately lead to closure. He was aware of other bars where that had happened but it was a last resort and there were many other enforcement steps to be taken before that ultimate one.
- [35] Mr. Scott had imposed a 24-hour suspension on one of the other premises at the NDI - All Stars - but not at Cheers.
- [36] He was never aware of any other occasion at Cheers where there was an assault as extreme as that on Mr. Burnett. He noted that the service calls to the NDI encompassed all the areas of the complex, not just Cheers. It would encompass the NDI, the cold beer and wine store, All Stars, and the Cheers pub.
- [37] He agreed that if fights began in the bar and spilled out onto the street or parking lot, that would be of interest to him and he would have the authority to deal with it and could investigate with a view to possible enforcement action.
- [38] Mr. Scott would not expect an LPC for each "little incident" at NDI - it was not something he could follow up on.

(4) The Licensed Premises Agreement

- [39] On July 2, 2002, Cheers entered into a Licensed Premises Agreement through its owners with the Corporation of Delta. The agreement provided in part, as follows:
 - 3. The Owners undertake to work with Delta Police Department to reduce calls for Police attendance related to the operation of the North Delta Inn and to attend meetings upon request by Delta Police Department;

4. The following measures will be implemented by the Owners:

...

3. There will be complete support for, and cooperation with, the Delta Police Department Licenced Premises Walk-Throughs;

4. When incidents occur which require police involvement, all North Delta Inn staff will cooperate with police members and will not impede or obstruct the investigation in any way;

...

7. Security cameras, linked to video recording equipment, will be maintained on the interior as well as on the outside of the building on 70th Avenue, at the entrance to Cheers, at the south exits to Cheers and in the parking lot east of the building. Any videos that are so required will be surrendered immediately to the Delta Police Department for investigative or evidentiary purposes;

...

10. The Owners will employ security staff, who will be dressed in a clearly identifiable manner, to patrol the premises and to monitor the activity of the patrons immediately outside the North Delta Inn, particularly at closing time to ensure orderly dispersal.

[40] The agreement also provided as follows:

THE Corporation of Delta and The Owners recognize that participation in this Agreement is voluntary. Further, there is recognition that the Liquor Control and Licencing Act, the Policies of the Liquor Control and Licencing Board, City Bylaws, and other Statutes and Legislation shall at all times take precedence over this Agreement.

The Owners have voluntarily entered into the Agreement. The Corporation of Delta would like to commend the North Delta Inn, its owners and principals, for their recognition of their civic responsibilities and their commitment to fostering a good working relationship with The Corporation of Delta and its neighbours.

The Owners recognize that the Business Licence shall be subject to cancellation, after consideration by Council, if there has been violation of any conditions of this agreement or the proprietor has failed to maintain law and order on the premises, as stipulated in the Agreement.

The Corporation of Delta is committed to the vitality of the 120th Street commercial core and welcomes the owners of the North Delta Inn as active partners in this process.

[41] On an earlier occasion, on March 5, 1996, the regional manager of the LCLB wrote to Cessford. The letter concerned the then named "Delta Scottsdale Inn Hotel - Liquor Specials at Cheers Pub - complaint of Councillor Krista Engelland". The letter referred to a meeting between DPD members and branch members and read in part, as follows:

Our meeting explored the complaint of Councillor Engelland regarding constant requirement of police presence at the Delta Scottsdale to deal with drinking and fighting, particularly on cheap drink nights. We were advised by Insp. Rankin at that time that most problems occurred in the parking lot outside the licensed premises. Insp. Rankin also advised that Delta Police no longer write Licensed Premise Check Slips (LPC's) except when a violation of the Liquor Act or it's Regulations are observed.

This office has received no LPC's for any licensed premises from your Department for about 3 years. Can we assume that no LPC's were written or that perhaps you no longer forward LPC's to this office for enforcement action?

In light of the Attorney General's indication that there will be increased monitoring of the licensed establishment to ensure compliance with the law, we are requesting an updated report on the current situation.

In the interim, I wish to re-iterate that our Liquor Inspectors are prepared to work closely with your Department to monitor compliance in all licensed establishments in Delta Municipality including Scottsdale Inn Hotel.

(5) Discovery of the Delta Defendants

[42] The plaintiff also read in and relied on portions of Cessford's examination for discovery in support of the contention that his conduct was negligent.

[43] Cessford has been the chief of the DPD since February of 1995 and as such, was in charge of "structuring the intentions and directions of the police force" and agreed it is better to be "proactive rather than reactive".

[44] Chief Cessford noted in his discovery that the total number of service calls for DPD in 2006 was 30,341 and the total number of service calls to Cheers for the same period was 258.

[45] He agreed that after the October 24, 2006 letter of complaint concerning the assault at Cheers, municipality staff were asked to prepare a report on the possibility of a show cause for Cheers, arising out of the number of police service calls to that location. He said that initiative would come not from the police, but from the municipality's staff through the municipality's legal department.

[46] Cessford was aware of the requirement for pubs like Cheers to be licensed by the LCLB to be operated as a liquor selling establishment. There is no policy that a Delta police officer must report "each and every response to a service call to a liquor selling establishment, but they were instructed to advise the LCLB if they have problems and there are issues occurring at a particular bar."

[47] He noted that the DPD put out monthly bulletins on its website, in part to alert the public to areas of criminal activity. The DPD did not provide any statistics of service calls to Cheers to LCLB representatives.

- [48] There is no record of any response to the LCLB general manager's letter of March 5, 1996. He only recalled a meeting between his staff and management of Cheers to discuss assaults on one occasion when a shooting took place at a hotdog stand in the parking lot.
- [49] There was no meeting with the owners and management of Cheers over the assault on the plaintiff and no report was ever filed with Crown Counsel seeking approval of charges.
- [50] The only licensed premises checks which were kept by the DPD in relation to Cheers were those contained in the documents provided to the plaintiff by the DPD marked as Exhibit 9 at the Examination for Discovery of Cessford.
- [51] The plaintiff also relied on read-ins of Uppal's Examination for Discovery. Uppal acknowledged knowing some of the management at Cheers. He had never been asked to compile or record his attendance at Cheers prior to the assault on the plaintiff. He had never completed any LPCs in respect of Cheers or otherwise.
- [52] Portions of Pike's Examination for Discovery were also read in by the plaintiff. Pike had been with the DPD since 1986. He testified he could not clarify the bar as "rough" in the sense of a likelihood on a weekly basis of an assault taking place, but he would not "take his wife there for a drink". Pike testified there were no statistics kept on Cheers by the DPD and he was not aware of any warnings, suspensions, or citations issued to Cheers. He believed the compilation of LPCs was part of DPD's officers' duties to report to the LCLB to keep it informed of occurrences at licensed premises. He did not believe any LPCs were written with respect to the assault on the plaintiff.
- (6) The Evidence of the Plaintiff
- [53] In his evidence, Mr. Burnett was unable to cast much light on the specific events leading up to and comprising the assault on him because of the nature and extent of his head injury and accompanying memory loss.
- [54] He recalled being at his sister's apartment in New Westminster on Christmas morning. The previous evening (Christmas Eve) he had been with his girlfriend and her family in North Vancouver. He was at his sister's with his girlfriend, Carla, his sister, her fiancé Justin Lieberich, and for a period, his parents. He and Carla then returned to her parents' place. The plaintiff made a number of telephone calls and ended up talking to Greg Allan, a friend or acquaintance from Vancouver. He arranged to meet with Greg later for dinner downtown. He did not recall if he had anything to drink. They then went looking for some place where people were "up-beat and celebrating". They went to several places and then Greg suggested they go to Cheers in Delta. He did not recall going to Cheers or how he got there. The surveillance video showed him, Greg Allan and Greg Allan's girlfriend Sharon Catanghal, but he did not independently remember whether Sharon was with them or not.
- [55] Mr. Burnett's next memory was being in the hospital, with his parents, sister and his sister's fiancé present.

- [56] Mr. Burnett testified he was not the sort of person to get involved in fights off the ice and had not before. He would tend to try and calm things down. Mr. Burnett testified he barely drank alcohol because of his training regime and need to eat properly. Even in the off-season he would train hard. He denied ever using anabolic steroids, but said he used supplements that would parallel the kind of benefit he would get from steroids, but "without breaking the law". He would get the supplements from supplement stores in the U.S. and Canada.
- [57] Mr. Burnett saw a Dr. Lee in California, where he was prescribed several medications including testosterone, but testified it had to do with his own sexual health, not to counteract the effects of steroids. He never failed any tests for the use of steroids or other drugs during his hockey career. Mr. Burnett acknowledged having used cocaine before. He testified it was "very minimally". He "never actually purchased it" himself and used it "only a handful of times" if something was going on or at a gathering and he was "pressured into it". He used it in the off-season at parties. Mr. Burnett did not believe he used cocaine in the summer of 2006 while he was training in Vancouver and playing lacrosse, or in the fall before he went to play in Quebec, or while playing in Quebec. He did not use any cocaine after leaving Quebec and returning to Vancouver on December 23, 2006.
- [58] It was pointed out to Mr. Burnett that some blood test results in Vancouver taken after the assault showed an amount of cocaine in his blood. He said he did not remember taking any cocaine, but if there was some in his blood, he "could see a possibility someone had some and [he] did a bit."
- [59] In cross-examination, Mr. Burnett was probed about the use of "enhancements" for his hockey career. Although he maintained that he only used supplements that mimic the effects of anabolic steroids and his use of testosterone and other drugs had nothing to do with off-setting the effects of actual steroid use, I am satisfied on all the evidence including his examination for discovery on the balance of probabilities that the plaintiff did indeed use steroids to enhance his performance as a professional athlete. Indeed, in argument, his counsel fairly conceded that likelihood and attributed the plaintiff's reticence to admit it to the effect of his head injury and accompanying diminished judgment.
- [60] The plaintiff acknowledged being in bars when fights or altercations broke out. He agreed one of the bars he went to both before and after his injury was the Roxy on Granville Street in downtown Vancouver. He was aware of altercations there and aware staff would sometimes eject would-be combatants. He had seen fights on the streets outside many bars. He made sure he was "not involved in that kind of stuff".
- [61] Mr. Burnett had not lived in Delta since he was five years old, did not read the local papers, and had never read the DPD website before the assault upon him.
- [62] The plaintiff did not call Greg Allan as a witness. Mr. Burnett's mother testified that attempts to locate him and his girlfriend Sharon Catanghal were unsuccessful.

C. LIABILITY - THE DEFENDANT'S EVIDENCE

[63] At the close of the plaintiff's case, the defendants brought a no evidence motion seeking to have the action dismissed on the basis that there was no evidence to support at least one essential element relating to each cause of action that makes up the plaintiff's case. I dismissed the application holding that there was some evidence to consider in respect of each of the essential elements of negligence which was in substance, the basis of the plaintiff's claim against the Delta Defendants. As a result, the defendants called a body of evidence that addressed both the issue of liability, and, in the alternative, damages.

[64] It was the defendant's ultimate submission that taken as a whole, the evidence fails to establish, to the required degree, the essential elements of negligence. In particular, the defendants in argument focussed on the alleged deficiencies in the evidence cogent to establishing a duty of care, and also on the absence of sufficient evidence relevant to the issue of a standard of care or that the acts or omissions of the defendants amounted to a breach of such a standard.

i. Expert Report of Dr. John McNeill

[65] The defendants rely on the report of Dr. John McNeill, a Professor and Dean Emeritus, in the Faculty of Pharmacological Sciences at the University of British Columbia to provide expert opinion evidence on two questions that potentially relate to the issue of liability:

1. what effect, if any, would the alcohol and cocaine present in Mr. Burnett's system likely have had on his physical condition, mental state and behaviour on the evening and early morning of December 25/26, 2006?
2. assuming Mr. Burnett used steroids in 1998 - 2004 and in November and December 2006, what effect, if any, would this use have had on his physical condition, mental state and behaviour on the evening and early morning of December 25/26, 2006.

[66] The assumptions on which Dr. McNeill based his opinion or set out in his report as follows:

For the purpose of providing my opinion, I have been asked to assume the following:

1. Garrett Burnett was born on September 23, 1975.
2. Garrett Burnett began using steroids after a major knee injury sustained during the 1998/1999 season of the American Hockey League. Following that, he continued to use a variety of nutritional supplements and steroids, including anabolic steroids that he injected, to assist with his training for professional hockey throughout most of his career. He continued to use steroids in order to remain competitive with other players, improve his endurance and to assist him in bouncing back from his injury.
3. Between the end of summer 2004 and mid-November 2006, Garrett Burnett continued to take caffeine and ephedrine but did not use anabolic steroids because the NHL began drug testing and he did not want to be caught using illegal supplements.

4. As of mid-November 2006, Garrett Burnett used oil-based steroids to assist with his training in preparation for playing in the Ligue Nord-Americaine de Hockey (LNAH), a semi-professional league which does not test players for steroids.
 5. In early December 2006, Burnett began playing professional hockey for the St. Jean Chiefs of the Ligue Nord-Americaine de Hockey (LNAH).
 6. On the night of the incident, December 25, 2006, Garrett Burnett was approximately 6'3" tall and weighed approximately 240 pounds.
 7. On the night of the incident, Burnett had consumed a quantity of alcohol and a quantity of cocaine.
 8. From 2004 to 2006, Garrett Burnett was prescribed medications and/or supplements to enhance his testosterone levels.
 9. Following the incident, Garrett Burnett continued to take medications and/or supplements to enhance his testosterone.
- [67] Dr. McNeill noted, that in his review of Mr. Burnett's medical records "there are numerous references to a drug and alcohol problem". He also noted that while Mr. Burnett was at G.F. Strong Rehabilitation Centre, both as an in-patient and out-patient following the assault, he was seen by a drug and alcohol counsellor.
- [68] So far as the alcohol present in Mr. Burnett's system was concerned, Dr. McNeill reasoned that if at the time of testing he had 123 mg per 100 ml of blood (what the plasma alcohol reading of 29.8 mm ultimately amounts to) he would have had between .133 to .153 mg per 100 ml of blood at the time of the assault. He noted that at that level, "individuals are impaired and are more likely to engage in arguments and physical confrontations."
- [69] Insofar as the presence of cocaine in Mr. Burnett's system is concerned, Dr. McNeill noted that "it is a stimulant drug". It "can produce arousal, alertness, wakefulness and euphoria with an increased sense of energy, alertness and hyper-vigilance." Dr. McNeill cited an article that stated "that both cocaine and alcohol increase violence and decrease impulse control" and when given together, "their effects are at least additive". Dr. McNeill noted:

In the case of Mr. Burnett, there is the possibility of the drugs acting together in this manner. However, we do not know the quantity of cocaine taken by Mr. Burnett or when it was taken.

- [70] In terms of the plaintiff's steroid use and its effect upon him, Dr. McNeill noted that "anabolic steroids are drugs that mimic the effects of the male sex hormone testosterone". He referenced a review which states that "aggression and violence, mania psychosis and suicide have been associated with anabolic steroid abuse". He concluded that "steroids taken in November and December of 2006 could certainly have influenced Mr. Burnett's mental state and affected his behaviour on December 26, 2006 at the time of the incident." He noted "anabolic steroid use from 1998 to 2004 would most likely not affect his mental state in 2006."

[71] He noted, based on his review of Mr. Burnett's medical records, that Mr. Burnett was receiving treatments for adverse effects of steroid use in 2008 and 2009. The effects noted by Dr. Dahl, an endocrinologist who was treating Mr. Burnett in 2008 and 2009 for the effects of steroid use, according to Dr. McNeill "indicate either a long term adverse effect of anabolic steroids or the continued use of those drugs". He noted "long-term effects on the personality including hypomania aggression and depression have been found in some individuals".

[72] Dr. McNeill concluded:

In summary, Mr. Burnett had consumed three types of drugs, all of which are known to increase aggressiveness prior to the incident of December 26, 2006. The amount of alcohol consumed was calculated and found to be in a range that produces decreased inhibitions and increased aggression. The amount of anabolic steroids consumed was significant since side effects of their use were noted. The amount of cocaine consumed is not known and it may or may not have contributed to Mr. Burnett's behaviour on that date.

ii. The Evidence of Dr. James Kennedy

[73] Dr. James Kennedy is an expert in internal medicine and clinical pharmacology and toxicology and was able to give opinion evidence on the effects of the use of alcohol, cocaine and anabolic steroids. He was retained by the Delta Defendants to proffer an opinion on the effects of the use of those substances on the plaintiff on the night in question.

[74] By an agreed statement of facts, it was established that analysis of a blood sample and a urine sample from the plaintiff after the assault at 2:40 a.m. on December 26, 2006 revealed the presence of alcohol and cocaine. Dr. Kennedy estimated Mr. Burnett's blood alcohol reading at the time of the assault to be approximately .139 - .146 mg/100 ml of blood. The urine test for cocaine was not quantitative but the positive test indicated a quantity of at least 300 nanograms of cocaine per millilitre. Dr. Kennedy noted that with the presence of alcohol, cocaine has a life of two to two and a half hours, which allowed him to conclude at the time of the assault at about 1:40 a.m., Mr. Burnett was under the influence of cocaine. Dr. Kennedy testified cocaine increases a person's level of energy, self-confidence, and gregariousness. It can make a person feel self-confident, powerful and sometimes stimulate aggression. It produces adrenaline which is part of the "flight or fight" mechanism. In circumstances of a confrontation with others, a person having ingested cocaine is more likely to be aggressive and more violent than if he had not ingested it. Taking alcohol with cocaine will prolong the effects of the cocaine. Alcohol is a disinhibitor and will break down day to day control mechanisms. The combination of alcohol and cocaine would have an additive effect and would render a subject more likely to be aggressive and prone to violence.

- [75] As far as steroids are concerned, the effect is very variable, and dependent on amounts in the time frame over which it was used. It can lead to feelings of power, inner strength and lack of judgment depending on the circumstances. It can lead to impairment of impulse control.
- [76] If a person had been taking steroids within the last two months, used cocaine within the last two hours and had alcohol measurements of .37 to .146, he would "be asking for trouble". The combination of drugs would amplify violent or combative tendencies.
- [77] Dr. Kennedy reviewed the clinical records of Dr. Lester Lee who prescribed various medications to the plaintiff in California. In his report of January 10, 2011, Dr. Kennedy detailed his review of Dr. Lee's notes as follows:

Opinion: Anabolic steroid use has many and varied long term toxic effects. The likelihood of both short and long term toxic effects is greatly increased with the use of multiple steroid drugs at the same time in various patterns. A common pattern is 1 to 3 times weekly injections, in 4 to 12 week cycles. Dr. Lester Lee's notes from January 2004 to June 2006 describe such a coincident multiplicity of steroid drug use by Mr. Burnett over this time. He already has toxic effects of previous anabolic steroid use when he sees Dr. Lee in January, 2004: hypogonadism (long term effect), low HDL cholesterol (increased cardiac risk), and mild liver damage (short term effect). Over this time, Dr. Lee further prescribes both oil-based and injectible steroids, and other oral agents. These drugs include human Growth Hormone (GH) for muscle bulk and strength, human Chorionic Gonadotropin (hCG) and Clomid to stimulate testosterone production, and Tamoxifen to block the effects of steroid-induced estrogen (gynecomastia). He has this tender breast enlargement toxic effect of steroid use during the time that he saw Dr. Lee. Also during this time he had a thigh abscess, secondary to oil-based steroid injection, another acute side effect. Dr. Lee also prescribed Zoloft, an anti depressant, implying that Dr. Lee has diagnosed a mood disorder.

- [78] Dr. Kennedy agreed with the proposition put to him in cross-examination that the circumstances in which a person consumes alcohol produced greater changes than the alcohol itself. He agreed that if the circumstances are happy and tranquil as opposed to threatening, that will have a significant influence on the effect of the alcohol, and that is the same with cocaine. He agreed it is the existing state of mind that is exaggerated. If the person affected by alcohol and cocaine went into a bar with fights going on, he might react in an exaggerated way. If confronted by violence, he would be more likely to react in an exaggerated way. He agreed that at the plaintiff's level of alcohol ingestion, he would be moderately intoxicated. He also agreed that cocaine stays in the body for a longer period than it has a psychological effect for and there is nothing to permit him to say that the plaintiff was under the influence of cocaine at the time of the assault as the psychological effects of cocaine will disappear after one and a half to two hours.
- [79] As far as steroids are concerned, the psychological effects vary. As with alcohol, the effect of steroids could vary in reaction to the circumstances and rage has to be triggered by some external event.

iii. The Evidence of Jeremy Wocknitz

- [80] Jeremy Wocknitz was employed by Cheers as part of the security team for about two and a half years prior to the incident. He was one of the individual defendants in the settled action against Cheers. He was, at the relevant time, the head of security. He was responsible for scheduling security personnel, the overall supervision and reporting of security and of reporting to management. Decisions on how to deal with security issues in the bar were ultimately his.
- [81] The Cheers bar was a split level with two separate spaces. The total capacity was about 600 people. It was open Thursday to Saturday and on long weekends from 9:00 p.m. to 2:00 a.m. There was music and a dance floor and on special occasions the bar had live bands. The clientele was diverse, but mostly under 25. It was only suspected, not confirmed, that gang members attended but the wearing of gang colours was strictly prohibited.
- [82] The security staff were usually positioned two at the front door, two in the entrance past the coat check area, one in the smoking room, one at the washrooms, one at the rear exit and one on the stairs between the two levels. The job of security staff was to observe the behaviour of patrons and prevent anything from happening.
- [83] The security staff and management had two way radios with ear pieces. There were codes to identify the levels of response required for an incident or occurrence. The bar itself was broken down into eight sections. The objective was to calm people down or get them to leave if they remained too agitated to calm down. The term "Code Red" required an immediate response to an ongoing physical altercation. The term "Code Yellow" was used to identify an argument or potential problem. Code Yellows would happen three to five times a night. Code Red sometimes none, sometimes two. Police would be called if any injury occurred or the fighting carried on or broke out outside the bar. The management of Cheers would make the call and police would respond quickly, within two to three minutes.
- [84] Repeat offenders would be barred from the pub. If they offended a second time, they would be barred a week. If they offended a third time, they would be barred indefinitely. He had barred 12 - 13 people in the course of his time at Cheers.
- [85] Occasionally it would be necessary to call police to deal with those who were being refused entry to Cheers.
- [86] Police would make regular nightly checks and sometimes do walk-throughs of the bar and check the identification of the patrons. At closing time, police would make their presence known and would routinely patrol the parking lot, and monitor the park located across the street. The police presence both inside and outside the bar was supported by the management and staff.

- [87] Liquor inspectors would also come by for checks. Mr. Wocknitz estimated at least one time a month a liquor inspector would come and do a walk through the bar and conduct surveillance of anything considered necessary.
- [88] He was present on the evening that Mr. Burnett was assaulted and injured. The regular security staff were present. He was at the front door and heard a "Code Yellow" being called over the radio near the exit doors of the upper area of the bar. He closed the front doors and went to the area of the exit doors in the upper bar area. When he got there, he saw the door staff trying to intervene in what appeared to be an argument that had started. There appeared to be two groups: one Caucasian, the other East Indian. Nothing physical had happened at that point. He tried to intervene to calm the parties down. He spoke to Mr. Burnett and told him the night was over, it was not worth it, and they should go their separate ways. Another security staffer, Grant Hart, was already dealing with the East Indian group. He described Mr. Burnett as agitated and not responsive to his comments. There appeared to be a couple of other people with him. Mr. Burnett reached over to a nearby table and picked up and threw a highball glass at the other group. The two groups then converged and it became a physical confrontation. The immediate response of the security staff was to eject everyone involved. They could not separate, so they surrounded and pushed all the combatants out the door. The security staff were identifiable by their clothes. They wore black pants, white shirts and some had black arm bands.
- [89] As the staff pushed the group out the door, punches were being thrown between the two groups. The plaintiff stumbled and fell onto his hands and knees. This occurred about 30 seconds after he threw the glass. After that, Mr. Wocknitz saw the flash of a stool being swung outside but then lost sight of it while still removing other combatants. He did not see anyone actually being hit. He went outside briefly.
- [90] He had watched the video from the surveillance camera and identified Grant Hart as the first security person out through the doorway. He noted the plaintiff on the ground, injured, but did not see who had swung the stool. He originally told the police he thought it was someone named Ricky Guy who he saw outside in the area. He testified he just assumed it was Ricky Guy although he had not known him to be in any previous altercations.
- [91] He was aware that in 2005, there were two incidents at Cheers involving stabbings. That resulted in an increase in security at the front door and physical searches or "pat downs" at the coat check area. In 2006 there was another stabbing injury which led to having a female staff member to search women as well. He wasn't aware of any incidents involving the use of bar stools as weapons and he regarded significant injuries as being uncommon.
- [92] In cross-examination, he noted after the incident he went to the front doors to let patrons out. He agreed he was at the front door when the plaintiff came in, but could recall no issues with the plaintiff and he did not see him again until the confrontation upstairs. The police arrived because of the assault and injury to the plaintiff. He assumed that much of the crowd had dispersed by the time the police arrived.

- [93] He estimated that there were around 12 - 20 involved in the two groups. Code Yellow meant it was an argument that could escalate. He attended, and his brother Tyler Wocknitz was present too.
- [94] When the police arrived, he did not speak with them or tell them what happened. He made a brief note, but did not talk to the police until two years later. When he did talk to the police, he told them he thought the plaintiff was in the bar with some bikers; although he did not arrive with bikers.
- [95] After the assault he and Sunny Jara, one of the bar managers, returned three bar stools from outside to the inside of the bar. He said he did not approach the police because he was taking care of the premises which still had many patrons in it. He denied his failure to talk to police was because of outstanding warrants for his arrest at the time. He agreed he was in custody when the police finally approached him for a statement in December 2008. He was aware they were on the scene, but never approached them, despite what he saw and believed to have happened.
- [96] There was a meeting of the staff afterward to discuss the incident, but he could not recall speaking to Grant Hart about what he saw. He viewed some of the surveillance video and identified his brother as having ejected a patron at about 1:32 a.m., seven or eight minutes before the assault.
- [97] He was then shown a segment of the video, apparently depicting another incident after the assault but could not recall it. He could not recall picking up the stool he brought inside, but he recalled Sunny Jara taking two stools inside.
- [98] He was cross-examined on his examination for discovery at question number 222 where he testified as follows:

Q And you saw someone that you knew to be Ricky Guy with a stool?

A Yes.

[99] He was asked if the answer was true, and he said he never actually saw the stool connect, but that's who he believed hit the plaintiff. The following questions and answers were put to him:

Q Do you remember telling Mr. - Constable West that you saw Mr. Guy hit Mr. Burnett with a stool?

A I remember the conversation.

Q And you remember telling him what I just read to you, don't you?

A No.

Q You went on to tell Constable West that then the police were called, and they showed up. And then you say:

They showed up and started dispersing the fight.

A little further down you say:

No one questioned us. We were told to go back to our job and that was the end of that.

Now, on the night of - the early morning hours of the 26th after this incident did you talk to any police officers at all about this incident?

A We explained the incident. We didn't give a formal statement.

Q Well, when you say "we", did you talk to a police officer?

A Yes.

Q Did you explain to the police officer what had happened?

A Yes.

Q You said to Constable West, "No one questioned us."

A We didn't give a formal statement, no.

Q That's what you meant when you say that?

A Yes.

[100] He testified he couldn't recall if he had a conversation with the police at the scene.

[101] He testified he believed he saw the glint of the stool when it was in Ricky Guy's hands, but "never saw it 100% all the way through".

[102] He was also cross-examined on a statement he gave to Constable Al West ("West") of the DPD on December 16, 2008. There he asserted the plaintiff came in with a group of known bikers and he assumed that the plaintiff was a biker. He agreed that there could be one fight a week "some more, some less". People sometimes got injured and required medical attention. He said ambulances were fairly regular occurrences "it would be no surprise to see ambulances one time a week in that complex". He said one reason for ambulance attendance was over service, another was due to injury from fights. He agreed the liquor inspector would show up for inspections fairly early in the evening when the bar was not very full and relatively quiet. He did not agree there were three to four small fights and one big one every week.

[103] In his statement to West, he told him the plaintiff was throwing "highball glasses". He also said in the statement as follows:

A We didn't get involved. They said that it was - you know, it was kind of settled. The other gang was predominantly East Indian and Asian. The next thing we know someone threw a glass from one side of the bar to the other, striking - striking the East Indians.

A fight broke out inside the bar. Mister - Mr. Burnett was basically the first one in there throwing glassware. He was throwing highball glasses at them, trying to get at them.

[104] He said he could not recall saying that or what it meant.

[105] In his statement to West, he also said as follows:

A The fight was taking place in the rear corner doors. There was fighting back and forth. Basically, we pushed the entire fight outside -

Q Okay.

A - to, you know, get it out that way from the bar, away from the patrons. Several bartenders and porters and bussers came to help us with the fight because it was a fairly large fight. And when we got outside, Mr. Burnett fell and tripped over the curb. After he tripped over the curb - what's his name? I think his name is Ricky. Ricky Guy.

Q Ricky what, sorry?

A Ricky Guy.

Q Guy?

A I believe that's the name.

Q Okay.

A Had a stool.

Q Okay.

A We went to get the stool from him. He brought the stool down on top of Mr. Burnett's head. He went - Mr. Burnett went down. Collapsed. One of his friends that he was with which was, you know, a group white guys -

Q Right.

A - knocked out Mr. Guy. He was on the ground unconscious as well. At this point, we continued to deal with the rest of the fights because there was glassware. There was everything else. Basically two guys on the ground is less guys that we have to deal with.

So the Delta PD was called. I don't know who called them, but I know that they were called. They showed up. They showed up and started dispersing the fight. The only people that we let back into the bar were - were staff, and everybody else was kind of questioned at that point and that was it.

No one questioned us. We were told to go back to our job and that was the end of that.

- [106] He testified he could not recall telling West that. He recalled a guy being hit and going down. He then referred to Greg Allan as the person he referred to as Guy being hit and going down. He agreed he did not tell the police when they arrived on the scene that Ricky Guy was involved in the assault.
- [107] He said there were some incidents that occurred at All Stars and about once a month he would be called to deal with a situation there. He agreed he didn't tell the police at the time of the incidents that he saw Mr. Burnett being hit, that he took a stool from Ricky Guy; that he saw Mr. Burnett throw a glass or that Mr. Burnett was part of some biker gang. He agreed he did say all of those things when he was interviewed at the Surrey Pre-Trial on December 16, 2008.
- [108] He was not shown any video by the police. He disagreed that the call before the assault was a Code Red and he disagreed with the suggestion that he never said anything to Garrett Burnett. He denied the fight was on when he arrived and that he just pushed the protagonists outside.
- [109] He testified he expected the police would investigate and take a statement from him while he still worked there, but that did not happen. He said he never saw anyone apart from the plaintiff actually throw a glass, but he did hear glasses breaking so he assumed others had as well.

iv. The Evidence of Tyler Wocknitz

- [110] Tyler Wocknitz is Jeremy Wocknitz's brother. He was employed as security staff at Cheers the night the plaintiff was assaulted. He had worked at Cheers for less than a year at that time. He estimated that there were two to three Code Yellows a night and maybe one Code Red per weekend. The management and staff at Cheers were in favour of calling the police whenever necessary.
- [111] On the evening of the assault, a few minutes before it occurred, he removed a patron, but he couldn't recall why, perhaps it was to do with fighting.
- [112] It was not unusual to see the police around outside the bar and they would come inside and do walk-throughs two to three times a month. Police vehicles were often in the parking lot around closing time.
- [113] He recalled the incident as starting with a Code Yellow. He went to the area and saw two large groups having a verbal confrontation. He said his brother Jeremy was talking to them, trying to defuse the situation but it escalated when the plaintiff threw a highball glass. It went into the crowd. He described Mr. Burnett as being in an aggressive mood and after the glass was thrown, people started throwing punches. Grant Hart and his brother got out of the middle of the confrontation; other staff members assisted them by surrounding the group and pushing it into the outside area.

- [114] He was one of the last people out and saw the plaintiff on the ground. There were people with bottles and stools. He took one stool away - he was not aware that Mr. Burnett had been hit with a stool. He assumed that the person holding the stool had struck Mr. Burnett, but did not see it. He described the person he took the stool from as an East Indian male. He said they waited for the crowd to disperse and then went inside. He did not recall where he left the stool.
- [115] He said people were grabbing stools as they were being pushed outside the door. Mr. Burnett was throwing punches as were others. He said nobody was looking for a way out of the confrontation. Mr. Burnett was not looking for a way out of the confrontation or playing a peacemaker's role. The fight broke out when he threw a glass.
- [116] He first spoke to the police in February 2007.
- [117] He could not recall seeing his brother approach anyone and take a stool away. When he got outside, he saw a stool in someone's hand and he took it so it could not be used as a weapon. It was not Ricky Guy he took the stool from and he never saw anyone hit Garrett Burnett with a stool.
- [118] When he was interviewed by West on February 1, 2007 he did not mention that his brother was present; he did not mention that a glass was thrown or how the fight started. He agreed he said, and it was true, that "there was usually a big fight every weekend; at least one - we get small ones all the time - probably one-half dozen a weekend".
- [119] He never saw anyone strike the plaintiff with a stool and his brother never told him Ricky Guy struck the plaintiff with a stool. He did not recall if he told his brother Ricky Guy did not hit the plaintiff with a stool. He testified he believed Ricky Guy was there at the scene and was pushed out the door with the others, but he did not recall seeing him outside.
- [120] He said by small fights he meant verbal confrontations; big ones were not necessarily related to the number of participants. Anything that came to blows did not always result in an injury.

v. The Evidence of Cory Philpot

- [121] Cory Philpot is a former football player who was employed as a manager at Cheers between 1995 and 2005 and was involved in security issues at the establishment. After leaving Cheers around Christmas of 2005, he continued to do some promotions for Monday night football at All Stars, the adjacent bar, and he visited Cheers two to three nights a week. He was present on the evening of December 25th and 26th, 2006. He was in the lower bar of Cheers with some friends. He saw a large man come into the bar some time after midnight and walk into the crowd and bump into people without apologizing. He described the male as having dark hair, a dark shirt and jeans. He described his attitude as not caring, just pushing his way through. He saw him go to the upper bar after having a drink. He became aware of the assault the next day. In cross-examination he said he had no dealings in his capacity of manager of Cheers with Cessford of the DPD, but did have dealings with Inspector Charna.

He had a conversation with DPD about cheap drink nights. He said the police thought it was a problem and mentioned that to the management and that they would not support it. He said while he was there, security did not use numerical or colour codes. They kept a list of banned people at the front door.

- [122] He was working with the new ownership of the NDI/Cheers. He took over when George Holmes was let go. The bar went in a different direction to appeal to different people after it was sold in 2007. He did not think there were frequent fights or police calls to Cheers; some calls went to All Stars. He agreed there were fights in the parking lot and there were two stabbings in 2005. He agreed that under the old regime, people did not feel safe.

D. POLICE WITNESSES

i. Constable Uppal

- [123] Uppal began his police career with training on the job in May 2004. In December 2006 he was assigned to general duties with the DPD. His role was to respond to calls as they came in and perform general traffic duties. He was familiar with Cheers and the NDI. He would attend at Cheers in response to general calls from time to time and sometimes would go to the Cheers location to be "proactive". The calls which he responded to would depend on the days he was working. Some days were quieter than others.
- [124] He sometimes would go at closing time to the general area to monitor and ensure patrons would leave in an orderly fashion and he would stand by and keep the peace. He saw a few altercations or fights in the parking lot and would walk over to break them up. He said that a police presence was often enough to disperse groups who might be inclined to fight. He experienced no difficulties in dealing with the staff or management of Cheers. Occasionally he would be asked to park his police vehicle in the parking lot to establish a police presence or to check identifications at the entrance. That occurred in August and September of 2005.
- [125] The subject of Cheers would occasionally come up at briefings if there was a particular promotion or special event going on. The police would check on issues of over-service, over-crowding or any problematic people attending at the bar.
- [126] He was on shift overnight December 25/26, 2006. He heard the dispatch to Cheers and because he was close, he let dispatch know and attended to the scene. He identified a transcript of the dispatch as depicting the communication. The dispatch indicated that the call to police was initiated by Emergency Health Services, which meant that they were either already at the scene or had been called to attend and were proceeding there.
- [127] He arrived within a few moments. According to the surveillance video taken from surveillance cameras at the Cheers pub, his arrival was at 1:43 a.m. He had already been told by dispatch that "EHS is en route" before he got there. After he got there, he requested that dispatch "send him EHS Code 3". Code 3 meant he requested EHS get there as quickly as possible. He made that request within the first minute or so of his arrival on the scene. On his arrival, he saw the plaintiff on the ground unconscious being tended to by what turned

out to be an off duty fire fighter named Steve Brewer, who had placed the plaintiff in a recovery position. It was at that time that he called for EHS to arrive promptly.

[128] He noted the plaintiff's friend Greg Allan in the company of a female person. Allan had a ripped shirt and blood on his face. Uppal determined he was with the plaintiff - he learned that both from Greg Allan and from people standing at the door. According to Uppal, Greg Allan told him that the assailants were "long gone" and indeed he reported that back to dispatch.

[129] He described Allan himself as "quite agitated, worked up, angry, very uncooperative". He did not provide Uppal with "the information he needed in a timely manner". Uppal's synopsis which he inputted into his computer at 2:44 a.m. read as follows:

Fight at Cheers. Upon police arrival, observed BURNETT lying in a small pool of blood and his friend ALLAN and CATANGHAL standing near by. ALLAN was also involved in the fight and sustained several cuts to his face. ALLAN was hostile and uncooperative. ALLAN initiatly [sic] declined to be checked by EHS. BURNETT transported to RCH and ALLAN transported to SMH. No witness available that were able to recall what had transpired. ALLAN would only say that they were possibly hit by a chair and physically assaulted by a group of Caucasians [sic] males who had fled the scene prior to police arrival. ALLAN unwilling to provide identification. Identification obtained by girlfriend CATANGHAL.

[130] He said that is what Allan had told him about the events.

[131] Subsequently, Uppal completed a longer report at the end of his shift. In it he recounted a further discussion he had with Allan, later by cell phone. He summarized that conversation in his report as follows:

Cst P UPPAL spoke with Greg by cell phone requesting further details of the incident. Greg indicated that he had brushed up against some u/k male inside Cheers and that the other male's drink had spilled, which lead [sic] to a physical fight between them and Greg and Garrett. All parties were kicked out of the club. As soon as they exited, the other group was already waiting outside. Greg indicated one or two of the males had in their possession chairs that they used to assault Greg and Garrett.

Cst P UPPAL requests day shift member to attend Cheers in an effort to obtain surveillance footage of the incident.

[132] Allan gave no further description of the assailants.

[133] Uppal requested "day shift members" to attend Cheers to obtain surveillance tapes. He also indicated in his report that Constable Formby ("Formby") and Steve Bentley ("Bentley") arrived on the scene and assisted in trying to locate any witnesses. After Uppal left the scene, he went to the Royal Columbian Hospital. He checked with the Head Nurse and contacted the plaintiff's family. He arranged to have the plaintiff's clothing seized for possible forensic evidence. He himself did not look at the video surveillance from the

cameras.

[134] He had a conversation with an employee of Cheers while at the scene, but his handwritten notes do not reflect that conversation. He had attended Cheers before, possibly for fights, but could not recall having seen ambulances there.

[135] No one in DPD had identified Cheers to him as a "hot spot" of frequent illegal activity. He may have had a licensed premises check booklet with pre-printed LCP forms in his duty bag that evening. He did not utilize one that night and never had before. He did not find it necessary.

[136] He was the lead investigator by virtue of being the first to attend. He agreed that of the later two officers to arrive, one was just a trainee, that is, Steve Bentley. Uppal was in charge and had the ability to direct the investigation.

[137] He agreed with the following timeline on the basis of the time set out in the video:

- the blow with the bar stool 1:39:31
- the off duty firefighter coming to the aid of the plaintiff 1:42:47
- Constable Uppal's arrival 1:43:44
- second vehicle arrives 14:44:30
- ambulance arrives 1:52:16
- ambulance leaves 2:04
- third police vehicle arrives 2:04:55

and leaves at 2:06

- Constable Uppal leaves 2:07

[138] Uppal agreed it was important to get as much information as possible in an investigation and one way to get that information was to talk to people involved. He agreed Greg Allan seemed agitated, uncooperative and intoxicated and he "wasn't giving information he could have". He agreed that at some point he talked to a bouncer at the pub. He agreed he advised the plaintiff's family that the people involved had left the scene, based on what Greg Allan and the bouncer had said. He agreed everyone else said they had not seen anything. He stayed near the injured plaintiff at the scene. The only information he had about the assailants at that point was from Greg Allan and the bouncer. There were people standing around the front door. He remembered asking people what they saw, but how close he got when he was speaking to them he could not recall.

- [139] He agreed the employees of the pub might be a source of information. They were likely to be sober and might tend to be reliable. He did not talk to any other employee at Cheers apart from the bouncer. He explained his focus was on the plaintiff and ensuring that when EHS arrived, he could give them an indication of his condition or any changes.
- [140] He agreed he could probably have stayed and conducted further inquiries of employees and remaining patrons at the pub. He testified because the Cheers employees were known, it would be possible to go back and do follow-up interviews the following day or later on. He did not ask for a list of employees who were present at that time. He agreed he considered it might be possible to identify the assailant from the video tape but he did not ask to see the video tape at that time as the staff were busy at Cheers and he knew they could get it another time.
- [141] The information he had from Greg Allan was that the assailants were long gone.
- [142] He only talked to Formby about looking for witnesses, not to Bentley, who was the trainee. He believed the other officers told him they were not successful in obtaining further information. He agreed he believed the chance of altercations occurring at places where alcohol was served, was increased. He agreed with the following questions and answers from his examination for discovery:

Q I'm assuming that - perhaps more than what I said there and I don't want to mislead you. This paragraph alleges that if Cheers pub was a place of violence, that fact was known to Mr. Burnett before he went there. Now, my question is very specific. Do you have any information or facts which would support Mr. Burnett knowing that this bar was a place of violence before he went there?

A So let me just paraphrase that back to you so I understand it. You're asking me if I know of any prior knowledge that Mr. Burnett would have had that this was a place of violence.

Q Yes.

A I don't know of any specific information that would have lead me to believe that he would know that there was a specific - that this was a violent place. It would just - it would be my understanding that if you're attending a nightclub where alcohol is served that any person in their right mind would know that this is a - being that alcohol is served and it's a crowded establishment - that there could be altercations as happens many times in many different places where alcohol is served.

...

Q Yeah.

A I just think - just personally - is that if you're going into a liquor establishment where liquor is being served, a night club - it doesn't matter if it's Cheers or clubs in Vancouver - fights break out all the time. And if you don't want to go into a hostile situation like that or a volatile situation like that, then it's best to avoid it.

Q And is every establishment in your mind and in your opinion that serves liquor a hostile and violent situation?

A Adding liquor to an establishment can create that environment. Doesn't mean everyone is - every environment is, no. But situations can arise and incidents can happen. And from that perspective, like I said, it's no different - Cheers would be - as far as I'm concerned, Cheers would be no different than any other liquor establishment. It just depends on totality of circumstances.

Q Like the Four Seasons restaurant in the City of Vancouver?

A No, not that.

[143] Uppal was not under the impression that there were gangs involved in the assault. He thought there were two groups. He saw Greg Allan as the best potential witness. He was aware Allan's girlfriend said she did not see anything. He wanted to contain the scene and protect the victim until the ambulance took him away.

[144] In this case, further investigation was required and he passed on his report to the Sergeant on the next shift. He believed this investigation would be a longer term one.

ii. Constable Formby

[145] Formby has been an officer with the DPD since 2002. He was on duty overnight of December 25th and 26th, 2006 and on patrol with a trainee by the name of Bentley.

[146] He was familiar with the NDI and Cheers. He had responded to calls there in the past involving intoxicated people, theft, fights, impaired drivers and other similar issues. He sometimes would patrol in the vicinity of Cheers and its parking lot without being called. From time to time he would conduct walk-through patrols of the Cheers pub.

[147] Closing time at Cheers was 2:00 a.m. and he had previously attended at closing time to check and monitor departing patrons. In particular, police would attend on specific occasions, such as long weekends or on "FUBAR" nights or when the pub was featuring live bands. The police would patrol both inside and outside on occasions such as that; to establish a police presence and attempt to maintain order.

[148] There were some occasions when the DPD would establish a mobile command post near Cheers on special event nights to show a police presence. He never issued any LPCs for Cheers.

- [149] He sometimes was called on to break up fights. The fights involved only minimal injuries. He had to assess whether the fights were consensual or not and he said it was hard to make that assessment in many cases. He never went inside to deal with fights. The staff had the ability to deal with things occurring inside the bar.
- [150] Formby identified a police report he authored relating to an incident at Cheers on March 4, 2006 involving a man arrested in the Cheers parking lot, intoxicated, belligerent and resisting arrest. He said that sort of thing would happen quite commonly and there could be arrests, depending on the level of intoxication and the behaviour of the subject. The arrests would be for being in a state of intoxication in a public place.
- [151] Another report dated December 2, 2006 noted a fight in the parking lot involving about ten Indo-Canadian males who dispersed when police arrived.
- [152] He was also referred to a call he responded to on December 26, 2006 at 1:09 a.m. in which a man and his wife claim to have been assaulted by a bouncer at Cheers. It was determined by the investigation that there was no assault, but that the man and his wife were "escorted out of Cheers by the bouncer after getting caught in the middle of a physical altercation in the bar." They had both been drinking.
- [153] Formby didn't recall how long he dealt with those people in the parking lot that evening, but when the dispatch for the assault on the plaintiff came, he came from somewhere else and saw Uppal already on the scene and a gathering of people at the front entrance to Cheers.
- [154] He spoke to Greg Allan who was in a state of rage at the scene and not being helpful in providing information. He and Bentley tried to gather information from those in the area. He spoke with some people at the scene. He also spoke with the off duty firefighter, Steve Brewer and his friend Richard Mulenar and some people at the door, but it did not lead to anyone who had seen the actual assault.
- [155] He submitted a report that reflected his involvement. He summarized speaking with the off duty firefighter at the scene and his dealings with Greg Allan, both at the scene and subsequently at Royal Columbian Hospital. In his report, he summarized Allan's statement to him at the hospital as follows:
- he was walking thru the nightclub and a drink was spilled, someone hit him
 - a few punches were thrown, him and his buddy (Garrett) got into a fight with 5 or 6 guys
 - the 5 or 6 guys went outside and the bouncers threw them out to them
 - they (5 or 6 guys) hit him and Garrett with some chairs
 - that's the last thing he really remembers and his friend (Garrett) was on the ground
 - it was a bunch of redneck guys, all white guys

- one guy had a white shirt and jeans, one guy had a blue shirt and jeans and one guy had a red shirt and jeans
- he bumped into the guy and the guy spilled his drink on him and then the guy hit him so he hit him back
- Garrett was with him the whole night
- he suffered a swollen left eye, cut under his right eye that needed 4 stitches and bunch of bruises and scrapes
- his buddy (Garrett) and he both got hit with a chair outside the bar
- the fat bouncer at the front door punched him in the head

[156] He described Allan as reluctant to engage in the interview which lasted only a few minutes.

[157] He had never before responded to an assault with a bar stool at Cheers. He had responded to fight calls at other drinking establishments, but Cheers is larger and holds many more patrons.

[158] In cross-examination, he estimated he was involved in setting up a command post at Cheers about a half a dozen times at special events. He agreed that "FUBAR" was an acronym for "fucked up beyond all reason" and Cheers held such events usually the night before a holiday. The reason for a command post at Cheers was to show a visible police presence to avoid large crowds getting out of control. There were fights which broke out which Cheers staff were able to control within the bar and police would intervene in the parking lot if fights broke out or people were being too boisterous.

[159] He agreed that there was a nearby Denny's Restaurant which was affected by confrontations among Cheers patrons after closing and police recommended that Denny's close for the period around the Cheers closing time, around 1:00 - 3:00 a.m.

[160] He could not recall submitting an LPC which covered various violations of the Liquor Control and Licensing Act including rowdiness and fighting and over-service of alcohol. He agreed that such information would be of interest to the LCLB authorities. He agreed he may have been on scene at the time of the first assault call, longer than for the assault on the plaintiff.

[161] Most of the assault calls he responded to at the NDI address were in relation to Cheers and not the other locations. Formby explained that any call or incident resulted in a report being logged onto the computer, and each report would be reviewed by a supervisor.

[162] Despite being involved in investigations involving intoxicated and assaulted parties at or outside of Cheers, Formby did not submit LPCs.

[163] He did not review video surveillance during his time at the scene of the assault on the plaintiff, but he knew it would be viewed the next day by other investigators. Uppal did not ask him to interview staff, but he approached the people standing at the door outside the Cheers pub to canvass with them about whether they saw the assault and he wasn't sure whether they were patrons or staff or both. Uppal told them they needed to locate witnesses. He and Bentley spoke to the fireman, Mr. Brewer and his friend, Mr. Mulenar, but neither of them had seen what happened.

[164] He agreed no forensic assistance was called to the scene; no photographs were taken and the scene was not taped or roped off to preserve it for further investigation. He agreed that no "licensed premises check form" was completed or submitted, at least by him, and he left the scene at 2:09 a.m. He agreed that Uppal did not direct him to stay behind to interview staff and he felt that in his experience, there would be opportunities in the ensuing days to get full statements from staff members.

[165] He later went to the hospital and spoke with Greg Allan after he spoke to the duty sergeant.

iii. Constable Bentley

[166] The evidence of Bentley was similar to that of Formby. He was a trainee at the time of the assault. He recounted the first attendance at Cheers in relation to the complaint by the couple, that they had been assaulted by being ejected from Cheers. He described the dealings he had with Greg Allan after attending to Cheers in response to the dispatch arising from the assault on the plaintiff. He described Allan as agitated and uncooperative.

[167] He spoke with the friend of the off-duty fireman who was attending to Mr. Burnett who reported that he had not witnessed the assault.

[168] He confirmed that he and Formby later attended Royal Columbian Hospital where they spoke again with Greg Allan and Allan gave more detail to them about the incident. He agreed no pictures were taken of the scene and no tape to keep it free of bystanders. He did not recall Uppal asking him to do anything in particular, although he understood that he and Formby were looking for witnesses while staying close to the victim until the ambulance arrived.

[169] He did not talk to any of the security staff but agreed they would be the best potential source of information. Neither he nor Formby took possession of any stools. They did not ask who the head of security was at Cheers or try to find him. He agreed they could have stayed at the scene after the ambulance left to follow up with staff, but he had no recollection of being asked or directed to do so.

iv. Sergeant Ryan Hall

[170] Sergeant Hall ("Hall") joined the DPD in 1995. He spent some time on patrol and in investigation divisions of the department. He was promoted to the position of Sergeant in 2005 and has fulfilled both a supervisory and investigative role. He was familiar with Cheers

along with various other pubs that he patrolled and checked for compliance. The DPD initiated a tactical management team to analyze information and to provide directions to patrol officers to prevent criminal activity. Cheers was a place that was identified from time to time as requiring checking on or a police presence at.

- [171] The police would generate a file any time there was an incident that they were called to involve themselves in. The file would be reviewed by a supervisor who would direct further investigation as necessary.
- [172] He identified several reports arising from incidents at Cheers that he had had some involvement with. He identified one case where there was an alleged assault, but where the suspect was never identified and no charges were laid. He identified another case involving the arrest of a person in a state of intoxication in a public place.
- [173] He testified Cheers was the largest drinking establishment in Delta with about 600 seats for patrons and it was the busiest. The police service calls included reports of assaults, potential impaired driving charges, damage to vehicles and other similar incidents to deal with. He did not, however, see any fights when he went through Cheers in walk-throughs. He was familiar with licensed premises checks which would be issued for non-compliance with the Liquor Control Act and Regulations. He testified that generally, misconduct outside the establishment would not result in licensed premise checks being prepared or issued.
- [174] He was on night shift starting at 6:00 p.m. on December 26, 2006 and was assigned to investigate the assault on Mr. Burnett. He went to Cheers that evening to obtain video surveillance tapes of the incident. After a discussion with George Holmes, the manager, he returned to the office, prepared an Information to Obtain, and obtained a search warrant on December 27, 2006 which he used to seize the DVR to download all the video taken from the various surveillance cameras at Cheers. He then interviewed George Holmes, Sunny Jara and a person of interest that they indicated, named Kevin Williams. He also did a background check on Mr. Burnett and Greg Allan, the victims of the assault.
- [175] He contacted Allan by telephone. Mr. Allan expressed reluctance to speak to the police, but Hall eventually located and interviewed him between about 9:00 - 9:15 p.m. on December 27th, 2006.

- [176] In a report which he submitted, he summarized Allan's interview as follows:

On December 26th, 2006 from approximately 21:00 hours to 21:17 hours A/Sgt. Hall interviewed ALLEN a second time to clarify some of the details from the assault the night before. The interview was recorded without ALLEN's knowledge as A./Sgt. Hall had the audio recorder on in his pocket. ALLEN stated in part:

- a) He was afraid to put himself and BURNETT in jeopardy by talking to the police;
- b) He did not know who "the guys" were from the night before or he would be dealing with things himself;

- c) He and "Garrett" (BURNETT) were walking through a group of "guys" and spilled some liquor on them, they swore at each other and a fight ensued;
- d) The bouncers walked he and BURNETT outside;
- e) He wanted back in and he pushed one of the bouncers and the bouncer hit him back;
- f) The police were there while the people who assaulted him were at the front door;
- g) He was enticing the other people while the police were there;
- h) He received a black eye and some stitches, possibly with an orbital fracture;
- i) When the bouncers grabbed them, the other "guys" began hitting them with the chairs;
- j) One of the guys was bald, 5'10, 190 pounds, white, clean shaven and wore a white collared shirt with jeans, ALLEN did not see any further details on the shirt;
- k) The bouncers threw six of the twelve "guys" out before he and BURNETT were thrown out;
- l) One of the guys may have been a "bigger" east Indian male with a brown collared shirt;
- m) ALLEN said he would not pick anyone out of the video if he had the opportunity, and indicated he did not want to cooperate with the investigation;
- n) The "guys" who were fighting with them kept yelling "Bring them outside?" to the bouncers as he and BURNETT were being escorted outside;
- o) Some of the clothes DPD seized the night before may have some of the suspects blood on them;
- p) Three of the suspects were "Laid out on the floor" or "Knocked the hell out?" and may have been hurt at some time;
- q) He said BURNETT may not cooperate with the investigation when he wakes up;
- r) ALLEN did not see what happened to BURNETT and did not see if he was hit with a stool, but thinks BURNETT may have been hit with a stool as he had been;
- s) ALLEN was hit with the stool outside after being thrown out.

[177] He testified that his impression of Allan at the time was that he was not cooperative.

[178] He had to get a warrant to obtain the hard drive of the computer that stored the video surveillance and he also downloaded the disk that had earlier been seized of portions of the video surveillance. That disk was downloaded onto the DPD computer hard drive and it was saved there.

[179] He initially viewed Kevin Williams as a "person of interest" based on statements from George Holmes and Sunny Jara, but he ruled him out after interviewing him and viewing the video tapes.

- [180] On December 28, 2006, the police obtained a bar stool, said to be the one used in the assault from George Holmes. Hall sent it to forensic services for testing for blood samples and fingerprinting.
- [181] In cross-examination, he agreed he was familiar with entertainment district night clubs from his work with the anti-gang task force initiative. He was asked about other bars that had been closed or suspended. He was aware of actions taken in relation to other bars but had no direct involvement in those events.
- [182] There was no record kept of walk-throughs at Cheers, only of service calls in response to incidents or apparent incidents. Minor things would not be recorded if no action was called for. He never issued an LPC form. He agreed the LCLB authorities would want to know about infraction of the Act and Regulations. He agreed there were various incidents which required police involvement at Cheers that may be of interest to the LCLB but which were not reported by LPC forms. He agreed that Greg Allan spoke to the police two times, but he regarded him as being evasive as he had to track him down and he appeared reluctant to talk.

v. Inspector Pike

- [183] Pike had been with the DPD since 1986. He had been in general patrol at various times and at the time of the assault, in 2006, he was the Sergeant in the Criminal Investigation Branch. He is now an Inspector.
- [184] His patrol experience familiarized him with the NDI and Cheers. Cheers required attention from police patrols around closing time on Friday and Saturday nights. He also conducted walk-throughs of Cheers. He described Cheers as catering to a younger crowd. He was aware of fights and altercations both inside and outside the bar. His experience with Cheers pre-dated 1999 while he was still on patrol duties.
- [185] He said there was a shooting at Cheers in 2003 or 2004 which he became involved in the investigation of. There was an arrest and charges arising from that incident. He also became involved in several of the bar watch programs with other police officers and liquor inspectors, where they would walk through some of the rowdier bars and establish a presence. He did one walk-through of Cheers in September or October of 2006 with a reporter for the local paper, the Delta Optimist and other officers and liquor inspectors. The reporter was there as a ride-along to cover and report on the initiative. In the same night they also visited bars in Langley, Surrey and Maple Ridge. Some of the bars appeared to have a gang presence, but he did not notice that at Cheers. He identified an article written about the bar watch program and the events of that evening in the Delta Optimist by the ride-along reporter.

- [186] He was also assigned to deal with special events by Inspector Charna ("Charna") of the DPD. He was the field commander. In those situations, the police would establish a field command post and use video cameras as part of the process of monitoring the behaviour of the patrons at Cheers. There was some interaction with Cheers management in such circumstances as the management tended to be cooperative.
- [187] He was also a member of the department's tactical management committee which he described as a group formed to look at the department's operation and identify specific ongoing issues to deal with. He identified a number of reports detailing occurrences at Cheers and the NDI generally over the years. In particular, he referred to a report of a stabbing incident outside of Cheers in 2005 where there was no or insufficient evidence for charges to proceed. He also referred to minutes of a tactical management meeting on October 18, 2005 referring to information concerning a vehicle being searched for the presence of a gun, where none was found. That vehicle was in the Cheers parking lot.
- [188] He became involved in the investigation of the assault upon the plaintiff. He said there was no advance warning of any intended assault at Cheers.
- [189] On the 26th he was the Staff Sergeant in charge of the criminal investigation branch of the department, but he was filling in for the Staff Sergeant for patrol. He was informed of the events, he reviewed the file as it was submitted and he assessed the case as a serious one. He directed Hall to get a search warrant for the hard drive of the video camera or the computer storing the video from the video surveillance cameras. He was aware of the need to try and get a description of the suspect in the assault.
- [190] Because of the severity of the injuries to the plaintiff, the criminal investigation branch took on the file. In a case such as this, the expectations of the patrol officer on scene was initially to protect the life of the victim, to gather evidence, if possible, to identify the suspect and effect an arrest. There was an initial indication that the suspect or suspects were Caucasian, but it then changed to an indication that it was an Indo-Canadian. Based on his review of the file, he did not regard the witness Allan as being cooperative with the investigation. He noted that Allan's background showed some association with a criminal gang, and he indicated that would change the way of conducting the investigation. As a result, he assigned the file to experienced investigators. He noted that there were other serious investigations going on as well at the time and it was necessary to prioritize the investigations.
- [191] One of the things done to attempt to get information was to solicit an anonymous tip through the Crimestoppers program by drafting a description of the event for publication and seeking assistance from members of the public who may have seen the event. No tips were received as a result of that process.

- [192] Pike identified the timeline of the investigation from the police report. His role was to coordinate the flow of information and direct the investigation. He noted that the investigators became aware of Jeremy Wocknitz as a potential interest, but had some difficulty in locating him. He was eventually interviewed in pre-trial custody on December 16, 2008.
- [193] He testified there was never enough evidence gathered to forward a report to Crown Counsel seeking charges against any particular individual. He did not feel the investigation was hampered by a failure to rope off the crime scene or talk to Cheers staff the evening of the assault. He said the file was open still and it was not uncommon for files such as that one to remain open for some time.
- [194] In cross-examination he agreed patrol officers play an important role in the investigative process and he as the principal investigator would rely on information acquired and provided by the patrol officer, particularly where they were first responders.
- [195] When he assumed conduct of the investigation on December 27th, 2006, he had the occurrence report prepared by Uppal at the end of his shift. He did not have the attending officer's notes and had only a "snippet" of video which he did not review at the time, but instead directed a search warrant to get the full surveillance camera videos from the hard drive and to have it mirrored, that is, replicated. He first viewed the video in early January. Pike was cross-examined about whether there was a camera in the upper bar not working and whether anyone checked on that. He was unable to say, but referred to the fact that the hard drive comprising the captured video surveillance was seized and mirrored. He could not say whether a camera in the upper bar was connected to the system or not.
- [196] He agreed Uppal would not have known Mr. Burnett's condition or whether it was life threatening until after he left the scene.
- [197] He thought some of the security staff were identified and interviewed. He said there was a list of those working that day and they were interviewed. He agreed Hart was interviewed on October 29, 2009. Hart said he did not see who had hit the plaintiff. One of the staff members who was not working the night of the assault said in an interview on October 31, 2007 that he heard rumours that it was a staff member who hit the plaintiff over the head with a stool.
- [198] He agreed that Greg Allan was interviewed on the 26th and again on the 27th of December; George Holmes was interviewed on the 27th of December, 2006, Kevin Williams was interviewed on January 3, 2007; Danielle Tardiff, a security staff member, was interviewed on March 1, 2007; Kyla Johnson, a staff member, was interviewed on March 30, 2007; Mr. Burnett was interviewed on June 5, 2007.

- [199] He agreed Jeremy Wocknitz was not interviewed until nearly two years later and at that time identified the person by the name of Ricky Guy as the assailant with the bar stool. He noted that Wocknitz also said at that time that Ricky Guy was then hit and knocked out by one of the plaintiff's friends.
- [200] He agreed that if that information had come sooner, it would have been useful, but he noted that Wocknitz had left the employ of the bar and it took some time to track him down to interview him.
- [201] He agreed that Jeremy Wocknitz was not formally interviewed the night of the assault and no information was taken from him. He agreed that Jeremy Wocknitz definitely identified Ricky Guy but then changed his mind several days later and phoned the investigator to say he was not the person who hit Mr. Burnett with the stool.
- [202] The investigators concluded that Guy was not a viable suspect one or two months later, after some re-interviews, using photos from the surveillance. There was no other credible evidence that he was involved in the assault.
- [203] Pike agreed the article in the Delta Optimist which he had referred to, referenced closures and/or suspension at bars in jurisdictions other than Delta. He thought there was one suspension in Delta before the article was written. He agreed there was evidence of late service and underage service at Cheers the night the bar watch initiative took place and he said the question of sanction was for the liquor inspector who was present at the time.

vi. Constable Al West

- [204] West was the principal investigator assigned by Pike. He has been with the DPD since 2001. He served his first four years in patrol, then was with the drug section for a period and in the last three to four years has been a major crime investigator.
- [205] While on patrol, he was aware of Cheers and would drive through the parking lot on the busier nights. He also did periodic walk-throughs of the bar to check for underage drinking and other Liquor Act infractions. The idea behind that was to establish a police presence to enforce compliance.
- [206] During that period, he never saw anything get out of control. He had not previously been involved in an investigation featuring Cheers. He became involved in the case in January 2007. He reviewed the video, the patrol reports and any other reports concerning the assault. He prepared a synopsis and a time line for the investigation which he added to as the investigation evolved and developed.
- [207] The synopsis he prepared reads as follows:

On December 26, 2006 at approximately 0140 hours an altercation took place in the upstairs bar area of the Cheers Nightclub. The altercation involved two large groups of males. Several Cheers doormen attended the fight scene and corralled the two groups of approximately 30 patrons outside of an emergency exit. Once outside of the emergency exit Garrett BURNETT ('BURNETT') was hit over the head by an unknown person with a barstool which had been brought outside of the nightclub.

BURNETT was knocked unconscious after being struck by the barstool. Greg ALLEN ('ALLEN') who accompanied BURNETT in the nightclub was also injured in the altercation. DPD and EHS were dispatched to the scene after 911 calls were received by EHS.

BURNETT was transported to Royal Columbian Hospital ('RCH') by EHS, and then moved to Vancouver General Hospital ('VGH') to receive additional treatment for his closed head injury. ALLEN was transported to Surrey Memorial Hospital ('SMH') where he was treated for facial injuries.

On December 27, 2006 a search warrant was executed and a digital video recorder was seized. A review of the seized video recorder showed a large group of approximately 30 people exit the club. Although the video is of poor quality an unknown male can be seen lifting a dark object (believed to be bar stool) above his head and swinging it downwards. BURNETT is then observed lying motionless.

[208] Under the heading "overview of investigation: he wrote as follows:

December 26, 2006

- a) At approximately 0140 hours an altercation took place between two large groups of customers at the Cheers Nightclub.
- b) At 0146 hours DPD dispatch were advised by EHS via ECOMM of an assault which had occurred at the Cheers Nightclub.
- c) At 0148 hours Cst Paul UPPAL (Echo 15) was dispatched to a fight at Cheers in which two males were knocked unconscious. Unit Echo 14 was also dispatched to the call but was advised to stand down by Echo 12 (Cst J. FORNBY and Cst BENTLEY) as they were closer to scene. Patrol Units Echo 11 and Echo 14 were confirmed by dispatch as standing down from the call. Cst J. FORNBY and Cst. BENTLEY arrived at Cheers at approximately 0148 hours.
- d) At 0149 hours Cst UPPAL requested DPD dispatch EHS Code 3.
- e) At 0150 hours Cst UPPAL advised dispatch Subject of Complaint "long gone".
- f) At 0153 hours Cst UPPAL asked dispatch for an ETA of EHS.
- g) At 0157 hours EHS arrived at Cheers.
- h) At 0209 hours EHS transported BURNETT to Royal Columbian Hospital arriving at 0224 hours.

- i) Greg ALLEN (who stated he was BURNETT'S friend) was injured in the altercation and transported to SMH by a second EHS Crew who attended the scene. ALLEN was hostile and uncooperative at the scene.
 - j) Greg ALLEN'S girlfriend Sharon CATANGHAL was standing near ALLEN and BURNETT when police arrived on scene.
 - k) At 0454 hours Cst FORNBY interviewed ALLEN at SMH. Cst BENTLEY seized ALLEN'S white t-shirt, runners and jeans for possible suspect DNA.
 - l) BURNETT'S jeans, black t-shirt, under wear, socks and belt were seized by police.
 - m) At 1330 hours Cst EWING attended the Cheers Nightclub and obtained a Video CD (Video contained CCTV of assault) from Manager George HOLMES. The video was submitted to DPD FISS for enhancement.
 - n) At 2100 hours A/Sgt HALL conducted an interview of ALLEN at his girlfriend's (Sharon CATANGHAL'S) residence (CATANGHAL had accompanied ALLEN at Cheers the night of the assault).
- [209] He then summarized the seizure of the "digital recorder" (which) contained video captured on eight cameras on December 27th at 10:51 p.m. and summarized a review of those recordings. He then listed the date of each witness' interview and summarized the witness' evidence. The interviews that were conducted were as follows:
- George Holmes, manager of Cheers, December 27, 2006 at 23:23 hours;
 - Sunny Jara, manager of Cheers, January 1, 2007;
 - Kevin Williams, witness, January 3, 2007;
 - Tyler Wocknitz, doorman, February 1, 2007;
 - Baljit Mann, taxi driver, February 1, 2007;
 - Rob Fai, bartender, February 2, 2007;
 - Steve Norton, doorman, February 20, 2007;
 - Matt Steinsvik, doorman, March 1, 2007;
 - Danielle Tardiff, doorman, March 1, 2007;
 - Matt McGee, doorman, March 8, 2007;
 - Adam Rosler, doorman, May 30, 2007;
 - Kayla Johnson, Cheers employee, May 30, 2007;
 - Garrett Burnett, complainant, June 5, 2007;
 - Jared Green, doorman, October 31, 2007;

· Jeremy Wocknitz, doorman, December 16, 2008 & December 18, 2008.

[210] West also noted that the bar stool said to have been involved in the assault was seized on December 28, 2006 at 9:40 p.m.

[211] In the course of the investigation after receiving Jeremy Wocknitz's information concerning Ricky Guy, West identified him by the name Sengpeth Thammavong. He detailed his attempts to obtain a statement from Thammavong who advised through his counsel that he had nothing to do with the assault at Cheers and was not willing to provide a statement.

[212] At the conclusion of his report, West identified what he considered to be discrepancies in the description of the assailant as follows:

After interviewing numerous witnesses, the following information was obtained describing a possible suspect in the assault;

- a) It was a bunch of redneck guys all white guys. Caucasian, 5'10" 190 lbs [sic], clean shaven, white shirt and jeans. (Greg ALLEN)
- b) East Indian male approximately 5'11" with a skinny build. (Tyler WOCKNITZ)
- c) A "big guy" grabbed a barstool and hit BURNETT. (George HOLMES).
- d) East Indian male wearing hat and Nike threw a punch which knocked BURNETT to the ground.
- e) Heard a rumor [sic] a doorman may have hit BURNETT with a barstool. (Jared GREEN).
- f) BURNETT was hit with a chair by an Asian male (Jeremy WOCKNITZ).
- g) Heard a rumor [sic] it was people from White Rock that were involved in the altercation (Matt MCGEE).

[213] He concluded as follows:

To date investigators have been unable to obtain sufficient evidence to positively identify a possible suspect. Although Sengpeth Thammavong was identified as a possible suspect by one witness, he has refused to provide a statement and at this time, there are insufficient grounds to make an arrest.

[214] Delta Police have not received any tips as a result of the media coverage and Crimestoppers tips. None of the approximately 30 persons in the altercation or any of the nightclub patrons in the club at the time of the incident have provided any information which would assist the investigation. In the absence of receiving information which would assist investigators, the only investigative avenue left for investigators to obtain evidence is to target Sengpeth Thammavong to ascertain what involvement, if any, he has had in this investigation. West also testified about developing the Crimestoppers tip in furtherance of trying to obtain information from the public about the events of the evening. He also testified about a YouTube video which purported to depict the confrontation inside Cheers,

but he could not locate the person who created the video to verify it.

- [215] In cross-examination he agreed he was familiar with the concept of intelligence-led policing and the idea that preventing crime lessens the need to respond. He agreed that police patrols are effective in preventing offending, but when patrol officers are responding to service calls, they are serving in a preventative role. He agreed Uppal, who was the first to respond to this incident, was in charge of the investigation initially. Generally a crime scene will be cordoned off to allow the collection of evidence, but the importance of it depends on the circumstances of the crime. In this case, it doesn't appear anyone took blood samples or footprints from the crime scene, there were no photos of the scene and no measurements taken. He wasn't aware of Uppal specifying anyone for Fornsby or Bentley to speak to. He agreed it could be useful to get information immediately after an event. In this case, some of the Cheers staff were not interviewed until months later and Jeremy Wocknitz was not interviewed until December 16, 2008. West identified inconsistent descriptions of the assailant as being one of the problems with the case. He agreed the best identification was from Jeremy Wocknitz, who purported to name and know the assailant. He said the reason for the delay in interviewing Wocknitz was that the police had no address for him and their attempts to locate him failed. They entered his name on the police computer information system known as CPIC. He did not know why there was no interview of him before he left Cheers in February 2007. He agreed it was possible that if Wocknitz had provided his evidence sooner and the identified assailant was checked, it might have produced evidence of injury consistent with him having been in a fight.
- [216] West said other people were still describing different suspects and that would not change their descriptions and West "could not speak to" what Jeremy Wocknitz would have said at or near the time of the assault.
- [217] West said what he used to review the events was a mirrored copy of the hard drive. He said the hard drive was never destroyed, only the original of a CD burnt from a portion of the video captured on the hard drive, but the CD had already been saved to the DPD computer network, so nothing was lost. His recollection was that although there was a camera in the upper bar area, it was not working, but he could not recall where he got that information.
- [218] In a letter dated December 4, 2009, counsel for the Delta Defendants sent responses to requests for additional information at the discoveries of Uppal, Pike and Cessford.
- [219] Included in the letter, was the following question and response:

At approximately 1:30 p.m. on December 26, 2006 Constable Sandberg and Constable Ewing attended at the liquor store at the North Delta Inn and met with George Holmes. At that time Mr. Holmes showed them video surveillance footage on the computer in the office and burned a computer disk showing some of the footage from an exterior surveillance camera. Both Constable Ewing and Constable Sandberg saw at that time the video footage that was burned to the computer disk. The computer disk was later provided to Acting Sergeant Ryan Hall. Acting Sergeant Hall viewed the video on the computer disk and also saved it to the computer system of

the Delta Police Department. A copy of this video saved to the Delta Police computer system has previously been delivered to counsel for all parties under cover of a letter dated November 30, 2009. The computer disk obtained from George Holmes on December 26, 2006 and discussed herein is the same as the computer disk that was later inadvertently destroyed.

vii. Inspector Charna

- [220] Charna started with the DPD in 1986. He worked through the ranks to his present position as an inspector. Along the way, he had responsibility for the patrol division and he became familiar with the Cheers pub. He was also involved as a member of the tactical management team. He testified it meets on a weekly basis to go over issues identified relating to crime in the community, such as theft from autos, breakings and entering and various different kinds of crime.
- [221] The NDI used to be known as the Scottsdale Inn. His dealings with Cheers involved ensuring that there were both foot and car patrols in the area to deal with patrons and to maintain a police presence. He himself had done walk-throughs of Cheers and he did not register any concern regarding the staff's internal control of its patrons. There were fights in the parking lot and he was in communication with the management of Cheers over issues such as liquor consumption in the parking lot, and intoxicated patrons outside causing disturbances by fighting and through other means. He regarded management generally as very cooperative over issues of concern to the police. He identified one occasion involving a large fight at the All Stars bar at the NDI which caused him to order it closed for the remainder of the night.
- [222] He referenced a meeting with himself, Scott Moir, one of the owners of the pub, George Holmes, the manager, and Brad Parker, the former Superintendant at DPD.
- [223] That meeting centered on a complaint by Cheers management that he, Charna, was being too hard on them. Their position was that they were doing their best to control activities in the parking lot of Cheers and would even have staff members doing patrols. Charna said he did not change his attitude about continually bringing issues that arose in the parking lot to management's attention and pressuring them to maintain control of their patrons.
- [224] He testified he would from time to time arrange to have a mobile command post set up at or near Cheers to monitor when Cheers was having a special night such as a live band or some other event.
- [225] In relation to issues about gangsters going to bars, there was a police initiative to check bars in the lower mainland by observing identifications of potential patrons at the front door and doing computer checks for gang associates. He viewed that as providing a deterrent to gang members from attending certain bars.
- [226] In the fall of 2006 there was an incident involving a Cheers patron who was injured and taken to the hospital by ambulance. The name of the victim was Anselmo. A complaint was made by his father because he was not interviewed by the police notwithstanding the fact

that he had been injured. Charna was delegated to deal with that issue by Cessford of the DPD. He dealt with the issue to the evident satisfaction of the victim's father and he put a report in which was communicated to municipal council who had received the original complaint. Charna was aware that fights occurred inside Cheers and they were usually handled by the staff, but the police would respond when and if called. He had no reports that the staff was unable to control what went on inside the bar as a general rule.

[227] He testified the majority of people involved in such cases would disperse when the police came, but they would intervene when necessary and remove the would-be combatants from the area. He had shut down other bars for the night because of fights that occurred inside.

[228] There was a Denny's Restaurant open 24 hours, located not far from the Cheers pub. There were problems that developed in the Denny's Restaurant around the time the Cheers pub closed, as patrons would go to Denny's and create difficulties. Charna spoke to the management of Denny's who agreed to close their restaurant between 1:00 a.m. and 3:00 a.m., around the time of the bar closing.

[229] There were some noise and damage complaints from a neighbourhood townhouse development. At a meeting held with the police, the police agreed to increase patrols in order to prevent those sorts of problems from occurring from intoxicated patrons of Cheers.

[230] Charna was aware of several stabbing incidents at Cheers, but he was not himself involved in the response or the ensuing investigation. In cross-examination he agreed he was not involved in the investigation in the assault of the plaintiff.

[231] He agreed that evidence of intoxication or drinking in the Cheers parking lot might provide evidence of a liquor violation inside the Cheers pub. He agreed that the stats between January 1, 1998 and March 1, 2007 obtained from the DPD regarding service calls to Cheers would be accurate. Cheers was open three days a week generally, except on long weekends. He agreed that there were 231 assaults over that time period, some disturbances which involved fighting and also instances of uttering threats.

[232] There were two stabbing incidents at Cheers within a little more than a month - one at the end of August 2005 and the other at the end of September 2005. That was an issue for the tactical management team, but he could not say what was done concerning that. He agreed that there was an entry in the tactical minutes of September 28, 2006 of two males checked at Cheers said to be armed and dangerous and as well of a fight involving ten or more Indo-Canadians with the use of pepper spray deployed by someone. He couldn't say whether those incidents were subjected to any follow-up investigation.

[233] He used to issue lots of LPCs but had not done so over the last ten years or so.

- [234] On April 16, 2006 the tactical management committee minutes reported two arrests for causing a disturbance and an aggravated assault. He could not say if there was any follow-up with Cheers arising out of that reported incident. He would have brought those issues to the attention of the Cheers management.
- [235] He estimated that perhaps 30 of the 600 Cheers patrons constituted a criminal element. He did not agree that the main purpose of the undercover or foot patrols of officers in plain clothes was to gather information regarding criminal activities. The purpose was to go in to monitor liquor-type infractions, to check identifications to see if any warrants were outstanding or if there were any gang members at the bar. He said it was a way of staying on top of gang members going to liquor establishments. He agreed that the DPD did not always report infractions to the LCLB.
- [236] He denied that he regarded Cheers as a "fishing hole" to catch bad guys. He did not agree with the suggestion that Cheers was allowed to operate because it gave police a place to conduct intelligence investigations. He testified that the DPD's focus was in resolving issues before they became a problem. He felt if the number of people behaving criminally was relatively small in comparison with the total number at the bar, shutting down the whole bar is not justified. He was aware that the LCLB could suspend operations of a bar as a result of police complaints and he was aware that council could shut down the bar by revoking permits. He himself did not report Cheers to council.
- [237] He agreed the incident arising out of the complaint to council in 2006 got some follow-up and he wrote a memo dated November 8, 2006. The matter was discussed at a council meeting and staff was asked to consider the possible success of a show cause hearing.
- [238] Charna could not say if that was the only time a show cause hearing was considered. He was aware that reports could be made to the LCLB by LPC forms. He was asked about the number of incidents relating to Cheers in 2005 and 2006 and said if those incidents had been properly collated and brought to his attention, he would have done something about it. He responded that he thought police were doing what should be done by foot and car patrols, by attending around closing time, by engaging and interacting with the patrons and staff, by setting up mobile command posts on special event evenings and by sending plain clothes officers to walk through the pub. He acknowledged there was the option of pursuing suspensions through the LCLB. He agreed people should be able to feel safe, but at liquor establishments, things can be unpredictable and no one is forced to go. He agreed that some level of fighting at Cheers was predictable.
- [239] He testified Denny's was different from Cheers - there was no security staff and Cheers had more security staff than other establishments.
- [240] The suspensions he spoke about at other bars were just temporary, he noted that police can only suspend a bar license for up to 24 hours and can advise the LCLB which has the authority to suspend for longer periods.

viii. Chief Constable Jim Cessford

- [241] Cessford has been chief of DPD since February of 1995 following a 25 year career with the Edmonton Police Service. He has had extensive experience in various areas of policing and has been involved in a wide variety of organizations, programs and initiatives concerned with policing duties.
- [242] He explained that the establishment of the police department comes from the mayor and council, which is required to create a police service, and a police board provides the governance. Governance includes allocating the budget and hiring the chief of police. The police board consists of the mayor and five community representatives. It meets monthly. The DPD consists of four patrol platoons comprised of 76 officers, operational support services comprised of 40 officers, and the criminal investigation branch, comprised of 25 officers. The executive of the DPD consists of 6 officers and the administration consists of 13. There are also 65 civilian staff members. The DPD management team consists of the chief, a deputy chief, the superintendant in charge of operations and the superintendant in charge of administration.
- [243] There is a regular morning meeting involving the management team - the operations Staff Sergeant and representatives from each department. There are reports on occurrences of the last 24 hours and assignments are created where necessary from the morning meeting. There is also a tactical management team which analyzes information concerning service calls and reports to concentrate resources on.
- [244] Cessford first became aware of Cheers in 1995. He went on ride-alongs with his patrol officers and patrolled the various drinking establishments. Cheers was one of them. He was aware that such places can be problematic and he was aware that generally, the service call volume was quite high in relation to drinking establishments concerning liquor act violations, assaults, and assorted general calls.
- [245] From time to time Cheers would come up in discussions at meetings or less formally. By 2006 his assessment was that Cheers was typical of liquor establishments. In Edmonton, in the inner city, they could be very violent with stabbings, robberies, etc. Delta's establishments were calmer than those that Cessford experienced in Edmonton. He testified that he did talk to LCLB inspectors and got a sense of how Cheers compared with other establishments.
- [246] He met with the owner and management of Cheers and talked to police constables and got the sense overall that the management and staff at Cheers were cooperative in most areas.

- [247] Cessford had some recollection of the agreement Cheers management had entered into with the Municipality of Delta in July 2002. At the time, there was concern about noise and the conduct of patrons. Cheers had security staff and they supported police walk-throughs without any kind of obstruction. He knew Cheers had a policy of barring those who had caused trouble before and they had also installed security cameras and lighting as called for in the agreement.
- [248] He noted that there had been a hot dog stand in the parking lot which attracted problems because of the intoxicated patrons and fights broke out, but they got rid of it to abate the problem - even though it was a money maker - at the request of the police.
- [249] He was shown the statistics reflecting service calls to the address which had been compiled over the years. He was not aware of those statistics at the time of the assault upon Mr. Burnett.
- [250] He did not get any feedback from officers that Cheers was hard to police or expressing concerns about the management or security staff. He felt the department took adequate steps to monitor and police the drinking establishments in the jurisdiction by regular patrols, establishing a high visibility including walk-throughs, establishing a presence at closing time and establishing a command post from time to time to check patrons or to take preventative steps on special event nights.
- [251] He testified that all calls for service would be responded to and that research shows more police uncover more crime and encounter more incidents when they are regularly on patrol in particular areas.
- [252] He was aware that LPCs were available to complete if the liquor establishment is not properly managed. He said the DPD did some operations with the LCLB and they had a good relationship and would from time to time come along with police to inspect drinking establishments. He was aware that there were some noise complaints concerning Cheers and he was aware that Cheers had worked with the police to keep their doors closed to abate the noise. He was also aware of the complaint concerning Mr. Anselmo whose son was the subject of an assault, but was not interviewed by the police. He arranged to have Charna review the file and meet with the complainant in October 2006.
- [253] He also met with the mayor and city council concerning that matter. There was a discussion about that complaint and also about the complaint history, which Cessford had asked be produced, involving 392 complaints or calls in 22 months. The number encompassed the "whole foot print" at the address including the parking lot. Cessford said he thought the numbers were not out of line with other establishments as they did some comparisons and did not believe the numbers were "out of the ordinary".

- [254] The mayor and council asked their staff to report on the viability of a show cause hearing in respect of Cheers, arising out of the service calls. The municipality's legal staff worked with the DPD on the report, but it came out around the time Cheers was being sold to new owners and a determination was made to work with the new ownership and the issue of a show cause hearing was not pursued at that time.
- [255] Cessford became aware of the assault on the plaintiff very soon after the incident, but had no involvement with the investigation other than seeking ongoing updates. He was not aware of any incidents similar to that happening at Cheers.
- [256] In cross-examination, he agreed Cheers was an establishment that required police attention. He was a proponent of intelligence-led policing to prevent crime and disorder. He agreed that that is a process where information is gathered and used to identify and deal with crime areas in a preventative way.
- [257] He was asked about the suspension of a club called Brandi's in Vancouver, but said he was not familiar with that.
- [258] He said information on crime areas in Delta is collected and stored on computers and is subject to analysis. He was not aware of the 2,410 services calls to the NDI between 1998 and 2007, but was informed of the 392 service calls for the past 22 months in December 2006. He said it seemed like a high number, but it involved the whole of the complex, not specifically Cheers. The numbers were broken down and given to council in November 2006. DPD did issue crime reports, but they did not include statistics about crimes against the person, except robbery. The 2008 community report did not produce statistics relating to assaults, although it could have. He agreed there were stats available for the nature and number of service calls to Cheers. He also agreed that there were two stabbings within approximately a month at or outside Cheers in 2005. One of the stabbings occurred outside the bar after it had closed, the other inside the bar. He agreed there were other incidents including fights and assaults and some special events generated calls for medical help because of over-drinking, although he wasn't personally aware of those incidents. He himself did not engage with Cheers staff over the issue of "FUBAR" nights or cheap drink nights, but he was aware other members of his department had.
- [259] He was directed to various police reports detailing cases of violent encounters including assaults with weapons or causing injuries and occurrences at or outside of Cheers' bar throughout 2005 and 2006. He said he had no specific knowledge of those cases.
- [260] He agreed such incidents were "on occasion" fairly regular. People would go and become involved in drinking and would occasionally get involved in situations which could result in serious bodily injury. He said the department was aware of goings on at Cheers and was "monitoring the situation". Issues at Cheers were brought up at tactical management meetings from time to time and what was done arising from those issues was to have regular highly visible patrols, meetings with the staff, owner and management of Cheers, working with the LCLB, and bar initiatives, all to establish a good police presence.

- [261] There were no notes or records of the meeting with the liquor board representatives. Cessford made no directions to patrols to fill out LPCs. He agreed that Cheers was a hot spot in that it had lots of calls for service.
- [262] He was referred to an LPC issued May 5, 2006 for allowing disorderly/riotous conduct at Cheers. It made reference to 60 - 70 people outside the bar at the rear exit involving some physical altercation. He was not aware of that particular incident. He was aware officers had the authority to close the establishment for up to 24 hours and the LCLB had a broad range of penalties for enforcement actions. He was aware that Cheers' business licence could be suspended or revoked by council and that's what was being contemplated as a result of the Anselmo complaint.
- [263] He was aware of an initiative in 2009 involving a violence suppression team which would institute bar or restaurant watches to deter known gang members. The initiative would involve identified gang members being asked to leave by police at the behest of management. It would be done through the application of the trespass law. Delta took the program, which initiated in Vancouver, and used it there. Cheers was not, however, a signatory to the initiative, but the team did attend Cheers to seek its participation. Cessford did not recall if information concerning the number of service calls to Cheers ever had been requested before November 2006.
- [264] Cessford was referred to an internal LCLB memo dated November 27, 1995 referring to a meeting that took place November 22, 1995 between representatives of the DPD and the LCLB. He did not recall the meeting referenced in that memo. He was referred to a later letter dated March 5, 1996 from the regional manager of the LCLB to himself, referring to that meeting, noting that no liquor LPC forms had been received from the DPD for 3 years and requesting an updated report on the issue of increased monitoring of the Delta Scottsdale Inn. Cessford acknowledged that he would have received the letter.
- [265] He agreed he was probably aware of the drinking and fighting outside of Cheers referred to in the letter. He had no record of a response to the letter and was not aware of the Attorney General's indication of increased monitoring. He agreed LCLB inspectors "were willing to work closely with the DPD to monitor compliance with all licensed establishments in the Delta Municipality including the Scottsdale Inn Hotel."
- [266] The DPD believed that cheap drink nights were a problem at Cheers and it had recommended to them that they not hold such events. There were a number of people from the police force communicating the message. He is not certain whether the cheap drink nights stopped as a result of police recommendations or not.
- [267] He agreed Cheers was a problem in a number of ways requiring increased attention from the police. There were issues of over-service; of under-age service; the cheap drink nights; the "FUBAR" nights and other special events.

- [268] Those problems continued through to 2006. He agreed that he had some discussions with the legal counsel for the municipality in November and December of 2006 concerning Cheers, arising out of the Anselmo incident and council's request for an opinion on the viability of a show cause hearing. He was referred to some hand-written notes prepared by a lawyer with the municipality's legal department. They were dated December 18, 2006, referred to Cheers and the Anselmo letter, and referred to the 392 service calls which included a wide variety of complaints. In the note, there was a reference to murders. Cessford testified however that there were no murders at Cheers.
- [269] He was aware in December 2006 that previously the Hells Angels had made appearances at Cheers.
- [270] It was ultimately decided that the show cause would not proceed because of the new ownership.
- [271] He was referred to a warning letter from Kane Scott to Cheers dated January 13, 2000 relating to an incident that had occurred in October of 1999. The letter read as follows:

WARNING LETTER

This letter is further to a Licenced [sic] Premise Check issued by Cst. [] of the Delta Police Department, concerning disorderly conduct of patrons within your licensed establishment on October 8, 1999.

Delta Police attended at your premise about 2:10 a.m., to investigate a complaint of an assault that had just occurred. On arrival they learned that your security personnel had ejected about 10 persons from the premise including two victims of the assault incident. Your security personnel had returned the victims to your premise for their safety after having clarified some details of the incident.

The suspects in this incident had left the scene prior to arrival, however, the two victims were transported to Surrey Memorial Hospital for treatment of head and facial injuries.

I have discussed this incident with George Holmes and Scott Moir. Although your premises is generally well controlled both in the licenced [sic] areas and the parking lot areas surrounding the hotel incidents of altercations involving several persons and injury to persons cannot be ignored.

Section 36(2)(a) of the Liquor Control and Licensing Act states:

"A person holding a licence or the person's employee must not authorize or permit in the licensed establishment

- (a) gambling, drunkenness or violent, quarrelsome, riotous or disorderly conduct,"

Licensees and their employees are responsible for ensuring that adequate patron behaviour and order is maintained within the licensed establishment. Furthermore, public safety, health and well-being must not be jeopardized by the service and consumption of alcoholic beverages.

The purpose of this letter is to serve as a warning that should this office continue to receive reports of violations, you could be requested to attend an enforcement hearing.

A copy of the Licenced [sic] Premise Check forwarded to our offices is attached for your reference and attention.

Should you have any questions concerning the contents of this letter, please do not hesitate to contact the undersigned.

[272] The warning letter was based on an LPC issued by a DPD member. Cessford agreed that in that case, the issuance of the LPC had a good result. He was also referred to an LPC issued with respect to an assault with a weapon at Cheers which occurred on September 9, 2001. There was communication between the DPD and Kane Scott concerning the incident and ultimately no further action was taken against the establishment as it was determined the situation was properly handled by security staff who restrained and removed the combatants and called the police. He agreed that sometimes the DPD is reactive by sending officers to respond to calls and at other times proactive by sending bulletins re: hot spots to enable citizens to avoid situations. That, he explained, happens mostly in theft from autos in certain areas of Delta.

[273] Initiatives like Bar Watch and Restaurant Watch to get rid of "bad guys" and to avoid danger in public places are other examples of proactive policing.

[274] As far as the Hells Angels are concerned, he had been informed that they had been at Cheers, but infrequently. He did not recall having a conversation with the lawyer for the Municipality along those lines. The DPD would make sure they were not intimidating or setting up business at Cheers.

ix. Sergeant Walter Argent

[275] Sergeant Argent ("Argent") has been with the Vancouver Police Department ("VPD") for 31 years. He is the Sergeant for the community police office in district #1, which includes the downtown core. He has patrolled and worked in the downtown entertainment district for many years and is familiar with the Roxy nightclub located on Granville Street in Vancouver.

[276] He was referred to a document summarizing calls for service to the Roxy nightclub address between January 1, 2002 and December 31, 2006. The calls totalled 1,316. The Roxy has a seating capacity of 240 and is open 7 nights a week, with the busiest nights being Friday, Saturday and holiday nights. 60% - 70% of the calls were on those nights. Argent's office has responsibility for other clubs as well; some of which are worse for the number of service calls. The service calls included complaints of violent assaults.

- [277] There were many fights inside and outside of the Roxy. The VPD expected the club to handle the inside altercations, unless it was serious enough to call the police in. Ambulances would be called regularly on Friday and Saturday nights to the area of the Roxy and other clubs. If there is a major problem, the police can shut down the bar for up to 24 hours, but he had only done that two times. The police used LPC forms only if something arises in the club, such as over-service, improper service and that sort of thing. LPCs would not be sent to the LCLB in response to fights or violence. The Roxy has 8 - 11 doormen who communicate by radios and headphones. In his experience, it is not possible to eliminate fighting from bars; at best, the authorities can only try and control its nature and extent. The police changed their approach to the entertainment district after 2006. Before then they took a strict enforcement approach and wrote tickets for all infractions, but subsequently changed to what Argent described as a "meet and greet" approach. It was a more flexible, less confrontational approach which he said resulted in a 32% reduction in assaults since that new approach had been adopted.
- [278] In cross-examination, he said the Roxy is a Bar Watch member. It joined the program and adopts the policy. His view is that bars that don't join the program don't want to lose the financial benefits that gang members can bring. He agreed that failing to join might promote gang attendance and he could not think of any good reason not to join.
- [279] There are over 5,000 liquor establishment seats on Granville Street between Robson Street and Pacific Street. Lots of things occur in the streets. Some fights in front of the Roxy may not have anything to do with the Roxy. On hockey nights, more people are out in the street. Drugs are also available, which is another source of bad behaviour, but Argent's view is that the majority of the problems are caused by alcohol. He said that each bar has different clientele; the Roxy is "relatively high end".
- [280] The meet and greet policy would replace the arrest of drunken scufflers with sending them home in a cab and getting them off the mall. He testified that in his experience, LPC forms are seldom used. He put in only 3 in 2010. He said in 2002 - 2006 more were used, for liquor violations, but not for incidents on the sidewalks and in front of the various establishments. He said suspensions are used very rarely and he is only aware of it being used two times since 1999.
- [281] He testified that VPD have a liaison officer who works closely with the LCLB. That officer's sole duty is to report infractions to the LCLB. That liaison came into being in 2000 and that's how the main source of information from the police department to the LCLB was channelled, not through the medium of the LPC forms. He assumes that the reports are done in writing and it provides the inspectors with the basis to decide if some enforcement hearing is necessary. He said the object is not to put the bar out of business, but suspensions can cost money and send messages.

- [282] He said police will complain about cheap drink nights because they can cause problems, but police have no power to prevent such promotions. Argent agreed police "could try" to go to the LCLB with complaints arising from cheap drink nights with a view to provoking a warning or a suspension. It would take "a fair amount of planning and enforcement".
- [283] He agreed allowing gang members into bars can lead to violence and fights. He was aware on two occasions of reports going to city hall to raise the issue of suspending or cancelling a business licence. That is another means of enforcement.
- [284] The VPD also issue warnings to the public on its website about "bad areas of crime". The warnings concerning night clubs involved date rape drugs and Bar Watch warnings. There was only one Bar Watch warning issued that he could recall. He was aware of Brandi's nightclub. He said there was a concern about gang members being involved in the ownership and at one point, its liquor licence was suspended, although he was not involved in that. Generally, dispatches are run according to the address from which they come and the police try and be accurate. Other clubs will have their own call history, all of which are similar to that of the Roxy.
- [285] He testified that council pulled the licence of one cafe which had drugs being sold out of it.
- [286] The VPD website does not have warnings about assaults or fights in the bar area.

x. Police Occurrence Reports Relating to Cheers 2005/06

- [287] Summaries of all police services calls and those police occurrence reports involving assaults or other forms of violent behaviour relating to 11920 - 70th Avenue in Delta - the NDI complex - for 2005 and 2006 were introduced as exhibits in the defendant's case. The police reports were subject to the parties' documents agreement, which reads in part as follows:

Police reports of previous incidents will be admissible only as proof of what the police were told about the incident and what they recorded.

- [288] According to the 2005 summaries, 26 of the service calls related to some form of alleged assault, threatening or obstruction and about 16 to causing a disturbance. According to the 2006 summaries, there were 31 calls related to various alleged forms of assault and a further 35 calls relating to causing a disturbance, many of which involved belligerent behaviour including fighting.
- [289] In one case on June 24, 2006 a patron was stabbed two times in the back, resulting in a punctured lung. No assailant was identified. Another call on July 3, 2006 about 2:20 a.m. related to a person who suffered a major concussion, who was found at an intersection near Cheers. There was evidence the victim had attended Cheers at about 11:30 p.m. the previous evening. There was no evidence of where the assault on him occurred.

- [290] Another call involved a woman who was struck in the face by another woman and received a broken nose on August 18, 2006. The assailant was not identified.
- [291] In 2005, on August 20th, a Cheers patron was stabbed in the stomach after the bar closed. The injuries were not life threatening and no assailant was identified.
- [292] On August 26, 2005 a person was stabbed 8 times in the parking lot at Cheers. His wounds were not life threatening and he was released from hospital after getting stitched up. He refused to cooperate with the police and no assailant was identified.
- [293] On September 30, 2005 a patron was stabbed in the stomach while in the bar. The injury was not life threatening.
- [294] While there were, as noted, other incidents of belligerent behaviour and acts of violence or threatened violence throughout 2005 and 2006, those were the occasions over that two year period when the injuries were relatively or potentially serious.

E. THE POSITION OF THE PARTIES - LIABILITY

i. The Plaintiff's Position

- [295] The plaintiff relies on the Police Act, R.S.B.C. 1996, c. 367, s. 34 as creating a duty on the police to protect the public from those who would commit crimes. The plaintiff submits that this establishes a private law duty of care to the public at large.
- [296] The plaintiff notes that as part of their public mandate, the DPD regularly post crime bulletins on their website, warning the public about areas of crime. The plaintiff submits that no such bulletin was posted about Cheers, despite the police being aware of problems at Cheers from as early as 1995.
- [297] The plaintiff submits that the evidence establishes that Cheers had a reputation for violence, that the DPD knew about the propensity for violence at Cheers due to the high number of reported incidents between January 1998 and March 2007 totalling 2,410 service calls. The plaintiff asserts that the police demonstrated an understanding of the problems at Cheers when they set up "mobile command posts" outside of Cheers to deal with potentially violent situations before they escalated.
- [298] The plaintiff says that the DPD failed to take appropriate preventative action in relation to Cheers and had they discharged their duty adequately, he would not have sustained his injuries.
- [299] The plaintiff submits that over-serving alcohol is likely the true cause of the altercation in which he sustained his injuries and submits that the failure of the police to come to grips with the problem of over-service and the accompanying violence amounts to condonation of the atmosphere at Cheers. The plaintiff referred to the evidence of violence or potential violence at Cheers over the years and submits that the police response was inadequate to ensure a safe experience for people such as himself.

- [300] The plaintiff cited *O'Rourke v. Schacht*, [1976] 1 S.C.R. 53 and *D.N. and D.S.G. v. The Corporation of the District of Oak Bay*, 2005 BCSC 1412 for the proposition that the police can be held liable for a failure to warn an appropriate association or government agency which would then be in a good position to take preventative action.
- [301] The plaintiff submits that the obvious preventative step for the DPD to take was reporting Cheers to the municipal council and the LCLB. The plaintiff submits this would have resulted in enforcement proceedings that would have led to either a suspension of Cheers' liquor licence or closure of the bar. Had such enforcement proceedings taken place, Cheers would either have been closed or operating in a safer manner on the night the plaintiff attended the bar and suffered his injuries.
- [302] The plaintiff also relies on *Schacht, and Jane Doe v. Toronto (Metropolitan) Commissioners of Police* (1998), 160 D.L.R. (4th) 697 (Ont. Gen. Div.) for the proposition that police can be held liable for a failure to warn which includes a duty to warn potential victims. The plaintiff submits that the police could have warned individuals entering the bar about potential dangers during their routine patrols of the area or while uniformed officers checked the identification of patrons entering Cheers. The plaintiff also suggested that police could have put up a sign warning people about the dangers of entering Cheers.
- [303] The plaintiff also submits that the police have liability grounded in the negligent conduct of their investigation of his assault.
- [304] The plaintiff relies on *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 and *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 for the proposition that the police owe a duty of care to members of the public and suspects under investigation to conduct themselves competently. The plaintiff submits that the principles in those cases are also supportive of a duty of care to victims. The plaintiff submits this was recognized in *Traversy v. Smith* (2007), 52 C.C.L.T. (3d) 109 (Ont. Sup. Ct.) in which there was a refusal to strike a statement of claim asserting a duty of care between an officer investigating an accident and a victim of that accident.
- [305] The plaintiff relies on the case of *Small v. Stec* (2009), 186 C.R.R. (2d) 363 (Ont. Sup. Ct.) for the proposition that a negligent investigation could result if there is proof that interviewing potential witnesses would have had an impact on the outcome of the case.
- [306] The plaintiff submits the Delta Defendants were negligent in their investigation of his assault by not proceeding to interview witnesses in a timely manner and submits that had the interviews taken place in a timely manner, the police would have likely made an arrest, secured a conviction and identified the perpetrator to the plaintiff for a civil action. The plaintiff submits that in particular, the police spent insufficient time at the scene conducting an investigation on the night of the altercation.

- [307] The plaintiff places significant reliance on *Odhavji Estate v. Woodhouse and Mooney v. British Columbia*, 2004 BCCA 402 as authority that the police can owe a duty of care to victims in the context of conducting criminal investigations.
- [308] The plaintiff submits that the failures of the Delta Defendants to warn the plaintiff of the dangers at Cheers or to conduct a reasonably competent investigation caused the plaintiff's injuries.
- [309] The plaintiff submits the standard of care is dependent on the facts of the case and in the present case, the defendants were required to take reasonable steps to mitigate the danger to the plaintiff in becoming a patron at Cheers pub. The plaintiff submits reasonable steps in the circumstances involve:
1. recognizing the potential for harm to persons who might attend Cheers night club;
 2. reporting incidents of violence to the LCLB;
 3. reporting incidents of violence to the municipal council;
 4. warning management of Cheers to clean up the place or risk losing their liquor licence and/or business permit;
 5. warning prospective patrons of dangers within Cheers; and
 6. conducting a reasonably thorough investigation.
- [310] As to causation, the plaintiff relied on *Athey v. Leonati*, [1996] 3 S.C.R. 458 where Major J. stated the test for causation at paras. 13 and 14 as follows:
- [13] Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).
- [14] The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.
- [311] The plaintiff also relies on *Hanke v. Resurface Corp.*, 2007 SCC 7 at para. 21, where Chief Justice McLachlin confirmed the test for causation as follows:

First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred ...

[312] The plaintiff submits but for the negligence of the police, Cheers would not have existed in the form that it did on December 26, 2006 and Mr. Burnett would, in all probability, not have been assaulted. The plaintiff submitted in the alternative that if the court determines there are gaps in the chain of causation caused by the need to determine the actions of third parties such as the LCLB or municipal council, the court may need to rely on the "material contribution test".

[313] The material contribution test was set out by Chief Justice McLachlin at para. 25 of *Resurfice* where she held as follows:

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

[314] The plaintiff noted that at para. 28 of *Resurfice*, Chief Justice McLachlin described a situation where it would be impossible for the plaintiff to prove that but for the defendant's negligence, the plaintiff's injury was caused:

A second situation requiring an exception to the "but for" test may be where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus breaking the "but for" chain of causation.

[315] The plaintiff submits that in such circumstance, based on the recent case of *Clements (Litigation Guardian of) v. Clements*, 2010 BCCA 581, it is appropriate to use the "material contribution test" in assessing the Delta Defendants' liability. The plaintiff submits that liability should be found against the Delta Defendants and apportioned 50% to the Delta Defendants, 25% to Cheers and 25% to the assailant himself.

[316] The plaintiff submits there should be no contributory negligence found based on the submission that even if Mr. Burnett was intoxicated and under the influence of cocaine and steroids at the time of the altercation, a person in his position would be "a product of his environment" and ought not to be held responsible for any violent behaviour he may have exhibited while intoxicated at Cheers.

ii. The Delta Defendants' Position

[317] The defendants submit that a review of the police incident reports for 2005 and 2006 reveal relatively minor incidents of violence and that the police response to each of the situations was entirely appropriate in the circumstances. The defendants submit the plaintiff's claim that there is no evidence of any enforcement measures is therefore without foundation. The

plaintiff submits that as far as a failure to warn is concerned, that the evidence taken as a whole does not establish that the plaintiff would have been aware of any warning issued by the Delta Defendants, or if he did become aware, would have heeded it, given the circumstances under which he attended Cheers and given the fact that he had on previous occasions attended at bars in which violence occurred.

- [318] Insofar as negligent investigation is concerned, the defendants submit that the plaintiff has failed to establish a duty of care owed to him by the police, a breach of the applicable standard of care and causation. The defendants submit the police response was reasonable.
- [319] As to the duty of care in relation to the plaintiff both pre-assault and post-assault, the plaintiff submits that the test to be met is:
- a. whether the relation between the plaintiff and the defendant discloses sufficient foreseeability and proximity to establish a prima facie duty of care; and
 - b. if so, whether there are any residual policy considerations which ought to negate or limit that duty of care.
- [320] The Delta Defendants submit that this case is distinguishable from the Jane Doe case and the case of Mooney relied on by the plaintiff, in that in those cases, the victim was either a member of a narrowly defined class of potential victims or a particular victim exposed to danger from a particular identifiable source. In the present case, the defendants submit Mr. Burnett cannot be described as falling into a similarly narrow class of potential victims. The defendants say that the harm to the plaintiff is not foreseeable in the present case and in any event, the class to which the plaintiff belongs is too broad to impose a duty of care.
- [321] As to the standard of care, the defendants say that the applicable standard of care is stated in *Hill v. Hamilton-Wentworth* as a reasonable police officer in comparable circumstances.
- [322] The defendants submit that the Court is not to substitute its own judgment for what it might do if put in a position of police at Cheers during the time period in question, but rather to determine whether the steps that were taken by the DPD fall within the range of options of what a reasonable police officer might do in response to such circumstances.
- [323] The defendants point out that the DPD conducted regular walk-throughs of Cheers, they conducted routine patrols of the area and had an established presence outside Cheers at closing time. The DPD also promptly responded to calls for service when received and accompanied LCLB inspectors on visits to Cheers. The defendants submit that all of these initiatives are consistent with the approach taken by the VPD in policing the Granville entertainment district and meet the appropriate standard of care.
- [324] With regard to the investigation, the DPD interviewed many witnesses in the days following the altercation. The bar stool thought to be the one used to strike Mr. Burnett was seized and subjected to forensic testing. The surveillance footage was also seized and reviewed thoroughly. The cab driver who was seen in the video footage passing the bar at the time of

the altercation was interviewed. Mr. Burnett himself was also interviewed and shown video footage of the incident, but all these interviews proved fruitless. The defendants say that taken in its totality, the investigation is consistent with a competent police investigation, which is still seen as ongoing.

- [325] The defendants submit that causation is not made out in the present case. The defendants say that the material contribution test is unavailable under *Hanke v. Resurface Corp.* because it is not impossible for the plaintiff to establish causation through the "but for" test. The defendants say that the plaintiff has failed to establish that had the police reported incidents of violence to the LCLB that the board would have exercised its discretion to take action against Cheers. The defendants submit that even if they had, it is unlikely and unproven that the action would have been sufficient to prevent Mr. Burnett's injuries. The defendants rely on the fact that the plaintiff admitted in cross-examination that he attends bars he knows to be violent and submit that even if the police had warned people about potential dangers at Cheers, the plaintiff would have likely been at Cheers on the night in question anyway. The defendants point out that Mr. Burnett is not a resident of Delta and would have had no reason to read DPD bulletins. The defendants submit that there is evidence that Mr. Burnett ignored a caution from Cheers staff to stand down from the verbal altercation that preceded his injuries and that implies he would not have heeded any such warning in any event. The defendants submit in the alternative the plaintiff should be found contributorily negligent and in any event their apportionment of any liability should not exceed 10%.

F. DISCUSSION AND CONCLUSION - LIABILITY

i. The Law

- [326] I see the dominant issue in this case as whether the law recognizes a private law duty of care in the police discharge of their public duties in circumstances akin to those in the present case.
- [327] A number of cases have explored that issue, the most prominent of which is the decision of the Supreme Court in *Hill v. Hamilton Wentworth (Regional Municipality) Police Service Board*, 2007 SCC 41. It was written by Chief Justice McLachlin and dealt with the issue "whether the law recognizes a duty of care on an investigating police officer to a suspect in the course of an investigation."
- [328] The matter was unsettled and the Chief Justice noted the need to "ask whether as a matter of principle, a duty of care should be recognized in this situation." Although the various other decisions relied on by counsel in the present case focus on the relationship between a police officer and a victim or the family of the victim, the resolution of the issue in *Hill*, and the analysis which led to it, play an important role in gauging the proper scope of those decisions and the extent to which they assist in resolving this case.
- [329] In *Hill*, Chief Justice McLachlin held as follows at para. 20:

[20] The test for determining whether a person owes a duty of care involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a prima facie duty of care; and (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care? (See *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), as affirmed and explained by this Court in a number of cases (*Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, at paras. 25 and 29-39; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80, at para. 9; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69, at paras. 47-50; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18, at para. 47.)

[330] In connection with the proximity aspect of the relationship at issue, McLachlin C.J.C. held as follows at paras. 22 - 24 of her decision:

[22] The first element of such a relationship is foreseeability. In the foundational case of *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), Lord Atkin stated:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. ... Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Lord Atkin went on to state that each person "must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" (p. 580). Thus the first question in determining whether a duty in negligence is owed is whether it was reasonably foreseeable that the actions of the alleged wrongdoer would cause harm to the victim.

[23] However, as acknowledged in *Donoghue* and affirmed by this Court in *Cooper*, foreseeability alone is not enough to establish the required relationship. To impose a duty of care "there must also be a close and direct relationship of proximity or neighbourhood": *Cooper*, at para. 22. The proximity inquiry asks whether the case discloses factors which show that the relationship between the plaintiff and the defendant was sufficiently close to give rise to a legal duty of care. The focus is on the relationship between alleged wrongdoer and victim: is the relationship one where the imposition of legal liability for the wrongdoer's actions is appropriate?

[24] Generally speaking, the proximity analysis involves examining the relationship at issue, considering factors such as expectations, representations, reliance and property or other interests involved: *Cooper*, at para. 34. Different relationships raise different considerations. "The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic": *Cooper*, at para. 35. No single rule, factor or definitive list of factors can be applied in every case. "Proximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (*Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 at p.

1151, cited in Cooper, at para. 35).

- [331] Chief Justice McLachlin noted that most cases of negligence proceed on "a type of relationship previously recognized as giving rise to a duty of care" but where "hitherto unconsidered" relationships arise from a claim, "courts must consider whether the claim for sufficient proximity is established."
- [332] In the case before her, the Chief Justice posed the question "whether on principles applied in previous cases this relationship is marked by sufficient proximity to make the imposition of legal liability for negligence appropriate."
- [333] The court in Hill did not, however, rely heavily on previous cases decided in the context of a relationship between the police and a victim or a police chief and the family of a victim. In connection with such cases, Chief Justice McLachlin wrote as follows:
- Further, I cannot accept the suggestion that cases dealing with the relationship between the police and victims, or between a police chief and the family of a victim are determinative here, although aspects of the analysis in those cases may be applicable and informative in the case at bar. (See Odhavji and Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1998), 160 D.L.R. 4th, 697 (Ont. Gen. Div.)).
- I note that Jane Doe is a lower court decision and that debate continues over the content and scope of the ratio in that case. I do not purport to resolve those disputes on this appeal. In fact, and with great respect to the Court of Appeal who relied to some extent on this case, I find the Jane Doe decision of little assistance in the case at bar.
- [334] I take the Chief Justice's comments with respect to the Jane Doe decision in particular, to be somewhat cautionary. In that case, the Court found a duty of care to exist between the police force investigating a serial rapist operating in a particular neighbourhood and one of his victims. I will return to that case later in these reasons.
- [335] In the Hill decision, the court concluded that the relationship between an investigating police officer and a suspect under investigation was sufficiently proximate to engage a duty of care. In the result, the Supreme Court of Canada dismissed the plaintiff/appellant's appeal however, on the basis that the impugned police conduct met the general standard of care and was therefore not negligent.
- [336] How the Court in Hill approached and analyzed the issue of proximity is of considerable importance to the case at bar. The Chief Justice noted that the "most basic factor to consider" is whether "there is a relationship between the alleged wrongdoer and the victim, usually described by the words 'close and direct'".
- [337] The court noted the relationship need not be "intimate" or involve "physical proximity", but requires circumstances in which the actions of the defendant "have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed."

- [338] The Chief Justice concluded that the presence or absence of a personal relationship "is an important factor to consider in the proximity analysis" although she noted it was "not necessarily determinative".
- [339] Chief Justice McLachlin also noted the plaintiff has "the formal onus of establishing the duty of care" and the factors at play in the first stage of the analysis are those which arise "from the relationship between the plaintiff and the defendant, for example, expectations, representations, reliance and the nature of the interest engaged by that relationship: Cooper at para. 30 (emphasis deleted) and 34."
- [340] In finding a relationship with sufficient proximity to support a cause of action in Hill, the Supreme Court found it to be "personal" and "close and direct". Hill was "a particularized suspect". The relationship was not with "the universe of all potential suspects" nor was the plaintiff "one person in a pool of potential suspects". The court noted he was thus in a closer relationship than in Cooper and Edwards where "the public officials were not acting in relation to the claimant (as the police did here) but in relation to a third party (i.e. persons being regulated) who at a further remove interacted with the claimants."
- [341] The Chief Justice noted the interests engaged by the relationship are additional considerations. She noted that there were no "personal representations" by the defendant or "consequent reliance" by the plaintiff which weighs against proximity, but that nevertheless the plaintiff (as a targeted suspect) "has a critical personal interest in the investigation" or that his "freedom, reputation and how he may spend a good portion of his life [are] at stake".
- [342] In the result, the court concluded that "viewed from the broader societal perspective, suspects may reasonably be expected to rely on the police to conduct their investigation in a competent and non-negligent manner" [emphasis added].
- [343] In the case of Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police, supra, there were three decisions: the first was the decision of Henry J. of the Ontario Supreme Court High Court of Justice ((1989), 58 D.L.R. (4th) 396) dismissing an application by the defendant to strike the plaintiff's pleadings; the second was a decision of the Ontario Supreme Court, Divisional Court, (1990) 72 D.L.R. (4th) 580) dismissing an appeal from the ruling of Henry J.; and the third was the decision of MacFarland J. of the Ontario Supreme Court ((1998), 160 D.L.R. (4th) 697) granting judgment to the plaintiff.
- [344] Justice MacFarland neatly summarized the issues raised and resolved with respect to the existence of a duty of care in the circumstances of the case before her in paras. 180 - 183 of her judgment as follows:

[180] My task has been rendered less onerous by the very thorough analysis of Henry J. of the issues raised by the pleading in this case reported at (1989), 58 D.L.R. (4th) 396, 48 C.C.L.T. 105 (Ont. H.C.J.), when the matter came before him on a motion to strike out the statement of claim and the succinct reasons of Moldaver J. (as he then was) on behalf of the Divisional Court (1990), 74 O.R. (2d) 225, 72 D.L.R. (4th) 580, when the decision of Henry J. went to that court on appeal.

[181] After citing s. 57 of the Police Act, and observing that by virtue thereof the police are charged with the duty of protecting the public from those who would commit or have committed crimes, Moldaver J. (as he then was) goes on at pp. 230-31 as follows:

To establish a private law duty of care, foreseeability of risk must coexist with a special relationship of proximity. In the leading case of *Anns v. Merton* (London Borough), [1978] A.C. 728, [1977] 2 All E.R. 492, 121 Sol. Jo. 377 (H.L.), Lord Wilberforce defined the requirements of this special relationship as follows at pp. 751-52 A.C.:

First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a *prima facie* duty of care arises.

This principle has been approved by the Supreme Court of Canada in *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, 66 B.C.L.R. 273, 29 C.C.L.T. 97, 8 C.L.R. 1, 10 D.L.R. (4th) 641, 26 M.P.L.R. 81, 54 N.R. 1, [1984] 5 W.W.R. 1.

Do the pleadings support a private law duty of care by the defendants in this case?

The plaintiff alleges that the defendants knew of the existence of a serial rapist. It was eminently foreseeable that he would strike again and cause harm to yet another victim. The allegations therefore support foreseeability of risk.

The plaintiff further alleges that by the time she was raped, the defendants knew or ought to have known that she had become part of a narrow and distinct group of potential victims, sufficient to support a special relationship of proximity. According to the allegations, the defendants knew:

- (1) that the rapist confined his attacks to the Church-Wellesley area of Toronto;
- (2) that the victims all resided in second or third floor apartments;
- (3) that entry in each case was gained through a balcony door; and
- (4) that the victims were all white, single and female.

Accepting as I must the facts as pleaded, I agree with Henry J. that they do support the requisite knowledge on the part of the police sufficient to establish a private law duty of care. The harm was foreseeable and a special relationship of proximity existed.

Do the pleadings support a breach of the private law duty of care.

The law is clear that in certain circumstances, the police have a duty to warn citizens of foreseeable harm. See *Schact v. R.*, [1973] 1 O.R. 221, 30 D.L.R. (3d) 641 (C.A.), *affd sub nom. O'Rourke v. Schact*, [1976] 1 S.C.R. 53, 55 D.L.R. (3d) 96, 3 N.R. 453, and *Beutler v. Beutler; Adams v. Beutler* (1983), 26 C.C.L.T. 229 (Ont. H.C.J.). The obvious purpose of the warning is to protect the citizens.

I would add to this by saying that in some circumstances where foreseeable harm and a special relationship of proximity exist, the police might reasonably conclude that a warning ought not to be given. For example, it might be decided that a warning would cause general and unnecessary panic on the part of the public which could lead to greater harm.

It would, however, be improper to suggest that a legitimate decision not to warn would excuse a failure to protect. The duty to protect would still remain. It would simply have to be accomplished by other means.

In this case the plaintiff claims, *inter alia*, that the duty owed to her by the defendants required (1) that she be warned of the impending danger; or (2) in the absence of such a warning, that she be adequately protected. It is alleged that the police did neither.

Instead she claims they made a conscious decision to sacrifice her in order to apprehend the suspect. They decided to use her as "bait". They chose not to warn her due to a stereotypical belief that because she was a woman, she and others like her would become hysterical. This would have "scared off" the attacker, making his capture more difficult.

[182] The evidence establishes that Det. Sgt. Cameron clearly had linked the four rapes which preceded Ms. Doe's by the early days of August in 1986 and he and Det. Sgt. Derry knew that the rapist would continue to attack women until he was stopped. They knew the rapist was attacking single white women living alone in second - and third-floor apartments with balconies in the Church/Wellesley area of the City of Toronto.

[183] On the evidence I find the plaintiff has established a private law duty of care.

[345] She went on to consider whether the police breached the private law duty of care to the plaintiff in paras. 184 - 189 as follows:

[184] Detective Sgts. Derry and Cameron determined, in the context of their investigation, that no warning would be given to any women - let alone the specific target group they had identified and among the reasons given for deciding not to warn was their view that women would panic and compromise the investigation. Detective Sgt. Cameron gave this as a reason to Ms. Doe when he interviewed her following her rape and she asked why women had not been warned.

[185] In spite of the knowledge that police had about this sexual rapist and their decision not to warn, they took no steps to protect Ms. Doe or any other women from this known danger. In my view, in the circumstances of this case, the police failed utterly in the duty of care they owed Ms. Doe.

- [186] The decision not to warn women was a decision made by Sgts. Cameron and Derry in the course of their investigation. It was made on the basis of "shop talk" they had overheard or been a part of, according to them, in relation to the Dawson Davidson Annex Rapist investigation. What is apparent is that neither Sgts. Cameron nor Derry made any real effort to look into that investigation and determine whether in fact it had been the publicity that caused Dawson Davidson to flee.
- [187] Their decision was based largely on rumour and "shop talk" essentially within the 52 C.I.B. and they said they relied on it alone in making the very serious decision not to warn these women of the risk they faced. This they did in the face of the almost certain knowledge that the rapist would attack again and cause irreparable harm to his victim. In my view their decision in this respect was irresponsible and grossly negligent.
- [188] There is simply no evidence before this court which could be interpreted as suggesting that no warning should have been given in the circumstances of this case. The only persuasive expert opinion called by the defence, in fact, suggests that a suitable warning could have been and should have been given. While the defence experts were careful in giving their evidence when one looks at the totality of their evidence this conclusion is irresistible.
- [189] Sergeants Cameron and Derry made a decision not to warn women in the neighbourhood and did not do so. They took no steps to protect the women they knew to be at risk from an almost certain attack in result, they failed to take the reasonable care the law requires and denied the plaintiff the opportunity to take steps to protect herself to eliminate the danger and ensure that she would not be attacked.
- [346] In a not dissimilar case, *Hill v. Chief Constable of West Yorkshire*, [1988] 2 W.L.R., 1049 (HL), a young woman was attacked and killed by a man who was eventually charged and convicted of her murder. It was alleged that he had attacked and killed or attempted to kill a number of young women in the same area in similar circumstances in previous years. The deceased mother launched an action framed in negligence against the police, claiming damages, alleging the police failed in their duty to properly investigate the previous offences and arrest the perpetrator before the deceased was killed.
- [347] At first instance, on application of the defendants, the plaintiff's Writ and Statement of Claim was struck as disclosing no cause of action. That ruling was upheld in the Court of Appeal and ultimately by the House of Lords.
- [348] In the majority judgment in the House of Lords, Lord Keith of Kinkel outlined the public law duty of police officers and its implication for the private law duty of care being asserted at pp. 5 - 6 as follows:

By common law police officers owe to the general public a duty to enforce the criminal law: see *Reg. v. Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 Q.B. 118. That duty may be enforced by mandamus, at the instance of one having title to sue. But as that case shows, a chief officer of police has a wide discretion as to the manner in which the duty is discharged. It

is for him to decide how available resources should be deployed, whether particular lines of inquiry should or should not be followed and even whether or not certain crimes should be prosecuted. It is only if his decision upon such matters is such as no reasonable chief officer of police would arrive at that someone with an interest to do so may be in a position to have recourse to judicial review. So the common law, while laying upon chief officers of police an obligation to enforce the law, makes no specific requirements as to the manner in which the obligation is to be discharged. That is not a situation where there can readily be inferred an intention of the common law to create a duty towards individual members of the public.

[349] Lord Keith noted at p. 6 the elements of a private law duty of care requires more than simply foreseeability of harm:

Some further ingredient is invariably needed to establish the requisite proximity of a relationship between plaintiff and defendant and all the circumstances of the case must be carefully considered and analyzed in order to ascertain whether such an ingredient is present.

[350] Lord Keith considered the case of *Dorset Yacht Co. Ltd. v. Home Office*, [1970] A.C. 1004 (H.L.), in which young inmates with records of previous escapes were taken to an island by prison officers in the vicinity of some moored yachts. Some of the inmates escaped from the island by taking a yacht and in the course of their manoeuvres damaged another yacht.

[351] The owner brought suit against the prison officials. In that case, a private law duty and care was found to exist with the requisite relationship of proximity.

[352] In his judgment, Lord Keith characterized the relationship thus at p. 7:

To give rise to a duty on the part of the custodian owed to a member of the public to take reasonable care to prevent a Borstal trainee from escaping from his custody before completion of the trainee's sentence there should be some relationship between the custodian and the person to whom the duty is owed which exposes that person to a particular risk of damage in consequence of that escape which is different in its incidence from the general risk of damage from criminal acts of others which he shares with all members of the public.

[353] Lord Keith noted that "Ms. Hill was one of a vast number of the female general public who might be at risk from (the killer's) activities but was at no special distinctive risk in relation to them ...". He concluded as follows:

The conclusion must be that although there existed reasonable foreseeability of likely harm to such as Ms. Hill if Sutcliffe were not identified and apprehended, there is absent from the case any such ingredient or characteristic as led to the liability of the home office in the *Dorset Yacht* case. Nor is there present any additional characteristic such as might make up the deficiency. The circumstances of the case are therefore not capable of establishing a duty of care owed towards Ms. Hill by the Westyorkshire police.

- [354] In *Traversy v. Smith*, supra, the Court was dealing with an application for leave to appeal the dismissal of a motion to strike out the plaintiff's statement of claim as disclosing no reasonable cause of action against Her Majesty the Queen in Right of Ontario and Constable P.J. Toms. The claims against HMTQ (Ont) and Toms alleged negligent investigation into a serious motor vehicle accident which the plaintiff/respondent was involved in. The claim was based on "ongoing mental distress, anger, depression and anxiety" as well as "prejudice to the plaintiff's ability to determine the events of the accident ..." and damages arising from the plaintiff's inability to prove negligence against the principal defendants as a result of the negligent investigation.
- [355] The chambers judge noted that the tort of negligent investigation by police had been recognized in Ontario in *Beckstead v. Ottawa (City) Chief of Police* (1995), 37 O.R. (3d) 62 (C.A.) and *Hill v. Hamilton Wentworth Regional Police Services Board et al* (2005), 76 O.R. (3d) 481 (C.A.).
- [356] The chambers judge in *Traversy* concluded the plaintiff before her had an interest in P.J. Tom's alleged negligent investigation and that the defendants were unable to demonstrate that it was certain the plaintiffs would fail in establishing liability.
- [357] The divisional court judge agreed. Mr. Justice Power ruled, after considering the Supreme Court of Canada's decision in *Hill v. Wentworth* that leave to appeal should not be granted. He concluded as follows at para. 33:

For the foregoing reasons I am satisfied that the moving parties have failed to meet the tests for leave to appeal set out in Rule 62.02(4)(a) and (b). Indeed, in my opinion, Ratushny J.'s decision is a correct decision. In my opinion, the existing jurisprudence does not, as argued, stand for the proposition that there is no private law duty of care giving rise to an action in negligence between a police officer investigating a motor vehicle accident and one of the persons (or to that person's family) whose injuries in the accident were caused by others and who is claiming damages as a result of the underlying accident. (See para. 15(a) and (b) of these reasons). In addition, without a court having an opportunity to examine the entire circumstances of the relevant circumstances, it cannot be stated categorically that the relationship is not a proximate one. (See para. 15(d) of these reasons).

- [358] In another case relied on by counsel for the defendants, Donald J.A., in dissent, addressed the issue of whether an investigating officer owes a duty of care to a potential victim. In *Mooney v. B.C. (Attorney General)*, 2004 BCCA 402 at issue was whether the trial judge erred in dismissing the plaintiff's claim finding no causation between the negligent investigation and the ultimate harm suffered by the victims. In coming to his conclusion, the trial judge found a duty of care and a breach of the standard of care in circumstances where the police failed to investigate threatening behaviour of the plaintiff Bonnie Mooney's former spouse, Ronald Kruska. Seven weeks after the failed investigation, Kruska came to Bonnie Mooney's house and seriously injured her daughter, the plaintiff Michelle Mooney, shot and killed a friend of Ms. Mooney's and caused significant psychological trauma to the plaintiff Kristy

Mooney who was present at the time, but not physically injured.

[359] The trial judge dismissed the action, finding no causal connection between the failure to investigate and the subsequent harm to the various plaintiffs.

[360] The trial decision was upheld by Hall and Smith JJ.A. on the issue of causation.

[361] In his dissent, Donald J.A. would have found causation and was thus obliged to deal with the respondent's argument that there was no duty of care in respect of the victims of the crime which the negligent investigation failed to deter.

[362] In connection with that argument by the respondents, Donald J.A. held as follows at para. 44:

These arguments are supported by English authority, most notably *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 (H.L.). The trial judge did not find that case helpful, nor do I. The public policy considerations were said there to apply where a claim is from a member of a large indeterminate class of persons to whom a general duty of protection is owed. The House of Lords did not exclude private law responsibility for claims arising within a proximity of relationship between the police and the claimant: *Home Office v. Dorset Yacht Co. Ltd.*, [1970] A.C. 1004, 2 All E.R. 294.

[363] Justice Donald then quoted passages from Lord Keith's judgment in *Hill v. Chief Constable West Yorkshire Police* and made the following observations in distinguishing it from the case before him at paras. 46 and 47:

[46] The facts in the instant case are quite different from *Hill*, *supra*. Bonnie Mooney sought police assistance and had a direct engagement with an officer when she presented her complaint. She had a pressing need for protection as a potential victim of Kruska's violence and the police should have recognized that. She cannot be said to fall into a large indeterminate class; to the contrary she was a person, in Lord Keith's words at 243 of *Hill*, *supra*, with a "special distinctive risk".

[47] In any event, Canadian courts are not so protective of the police. A private duty of care was found in two cases where the victims were part of a class rather than individuals specifically at risk.

[364] The two cases cited by Justice Donald were *O'Rourke v. Schacht* which dealt with a police failure to replace a sign warning of an open culvert under construction on a highway after an accident, and the *Jane Doe* decision.

[365] In finding a relationship of proximity between the police and Ms. Mooney, Donald J.A. also relied on policies laid down by the Ministry of the Attorney General, adopted by the R.C.M.P. in relation to domestic violence, which he observed "relate not only to the special proximity between police and complainants, but also gave content to the duty of care and set the standard of care."

- [366] Justice Donald then turned to consider the case of *Odhavji Estate v. Woodhouse*, which had been decided after the appeal before him was argued. He summarized the circumstances of that case in para. 52 as follows:
- [52] Since the hearing of the appeal, the Supreme Court of Canada issued its reasons in *Odhavji Estate v. Woodhouse*, 2003 SCC 69. It concerns an action framed in tort alleging misfeasance in public office and negligence against police authorities and others. Marvish Odhavji was shot and killed by officers of the Metropolitan Toronto Police Service after a robbery. The Special Investigations Unit was called in to investigate the conduct of the officers. The officers refused to cooperate and thereby compromised the investigation. Members of the family of the shooting victim sued to recover damages for psychological harm resulting from the unsatisfactory investigation. They alleged that the failure of the Chief of Police and the Police Services Board to command the officers' cooperation was misfeasance and negligence.
- [367] In the result, in that case, the Court held the claims against the police officers and the Chief of Police could stand.
- [368] Justice Donald concluded in the circumstances before the court in *Mooney* that the trial judge was correct in imposing a duty of care on the police, holding at para. 57:
- [57] In summary on the question of the duty of care, having made herself known to the police as a person in fear of a violent abuser, Bonnie Mooney established a special relationship of proximity with the police thereby creating a private duty of care. The duty on the police was to act on the complaint promptly. I am in substantial agreement with the trial judge's ruling on this issue.
- [369] As noted, the majority decisions rendered by Hall and Smith JJ.A. dealt with the appeal without reference to the correctness of the trial judge's determination that there was a duty of care in the circumstances of that case.
- [370] In a 2009 decision, *Project 360 Investments Ltd. (Sound Emporium Night Club) v. Toronto Police Services Board*, 2009 CanLI 36380 (Ont. S.C.) MacDonnell J. dealt with an application to strike pleadings asserting a claim in negligence against police officers.
- [371] MacDonnell J. described the application before him thus in para. 1:

The defendants move under Rule 21.01(1) of the Rules of Civil Procedure for an Order striking paragraphs 35 and portions of paragraph 36 of the Statement of Claim. They submit that those paragraphs assert a claim in negligence that cannot possibly succeed because it is premised on a general private law duty of care, owed to individual members of the public by the police, that does not exist. While the defendants do not dispute that particular circumstances may create a relationship that is sufficiently proximate to give rise to a private law duty of care, they submit that with respect to the claim asserted in the impugned paragraphs no such circumstances have been pleaded.

[372] MacDonnell J. gave effect to the motion concluding:

In the absence of circumstances giving rise to a special relationship of proximity, the relationship between the police and individual members of the public does not give rise to a private law duty of care.

[373] He went on to find "the plaintiff has not pleaded facts that establish a special relationship of proximity." He granted leave to amend "if the plaintiff's are so advised".

[374] The factual context before Justice MacDonnell is different from the case at bar. The plaintiffs were the owners of a nightclub in which a patron was shot by a man named McCalla after midnight on October 6, 2002 after he entered the club the previous evening. The plaintiff/owners of the club allege that as a result of the shooting, they suffered economic damages.

[375] The impugned pleadings asserted that the police learned on October 5th that McCalla intended to go to the nightclub armed with a firearm. It was not pleaded that the police were aware of any connection, past, present or prospective between McCalla and the nightclub.

[376] The defendant police conceded that once they had knowledge of McCalla's intention to go to the nightclub, there was sufficient proximity in their relationship to the plaintiff to give rise to a private law duty of care, and thus they sought only to strike the portion of the claim that alleged negligent investigation resulting in a failure to arrest McCalla, which would have prevented the shooting and failure to warn the patrons or staff of the nightclub "of the information that had been compiled on McCalla". The pleadings also alleged a failure to identify McCalla as a suspect, a failure to investigate him adequately or at all, and a failure to take steps to permit the plaintiffs and their staff to identify and locate McCalla.

[377] The premise of the application to strike was that those allegations asserted the police owed the plaintiffs a duty of care "regardless of whether they had any knowledge of a link between McCalla and the plaintiffs." The defendants submitted it is plain and obvious no such duty of care was owed and the police failure to arrest McCalla was in breach of no such duty.

[378] In the course of his reasons for striking the impugned paragraphs, Justice MacDonnell relied on the proposition which he derived from various decisions that "the general relationship between the police and individual members of the public has not been recognized as one in which a private duty of care arises." He acknowledged, however, relying on the Jane Doe case, that "particular circumstances may create a situation in which such a duty is owed". He noted in those cases where a duty of care was found, the courts were required to distinguish the plaintiffs from other members of the public.

[379] He noted that in a series of decisions "in several contexts over the course of the past eight years" different courts have held that "pursuant to the applicable statutory framework, the duty of the defendants was owed to the public as a whole and not to individual members of

the public, and accordingly ... proximity had not been established." He cited *Cooper v. Hobart*, [2001] 3 S.C.R. 537; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562; *Eliopoulos Litigation Trustee of v. Ontario* (2006), 82 O.R. (3d) 321 (C.A.); *Attis v. Canada*, 2008 ONCA 660; *Williams v. Ontario*, 2009 ONCA 378 and *Abarquez et al v. Ontario*, 2009 ONCA 374.

[380] MacDonnell J. concluded from his review of the statutory provisions respecting police in Ontario "it is manifest ... the duties of police officers ... is to the public as a whole and not just specific individuals".

[381] He held at para. 19 as follows:

To paraphrase language used by the Supreme Court of Canada in *Edwards v. Law Society of Upper Canada*, *supra*, and borrowed by the Court of Appeal in *Williams*, *supra*, in fulfilling their duties the police are required to act in the general public interest and to balance "a myriad of competing interests the nature of which are inconsistent with the imposition of a private law duty of care."

[382] On that basis, while acknowledging that a pleading raising a special relationship of proximity between the police and the plaintiff could stand, MacDonnell J. found in the absence of such a pleading no basis to uphold the pleading asserting a private law duty of care. He concluded as follows at para. 28:

As I suggested earlier, the focus of the Chief Justice in *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, and of Henry J., Moldaver J., and MacFarland J. in *Jane Doe*, on the specific aspects of the plaintiffs' situation vis a vis the police that distinguished them from other members of the public would not have been necessary if there were a general private law duty of care owed by the police to individual members of the public. Accordingly, in order for the plaintiffs to maintain an action in negligence against the police for their failure to arrest McCalla prior to October 5, 2002, they must plead facts on the basis of which it could be found that a special relationship of proximity existed prior to October 5, 2002. The Statement of Claim contains no facts of that nature. The plaintiffs have not pleaded that prior to October 5, 2002, the police had any knowledge that McCalla had any link whatsoever to the plaintiffs or their nightclub, that he had ever been there, or that he ever intended to go there. Further, the plaintiffs have not pleaded that the police had any relationship with them prior to October 5. Based on the facts pleaded in the Statement of Claim, prior to October 5 the plaintiffs were in the same position vis a vis the police as every other member of the public.

[383] The most recent decision dealing with allegations of a duty of care arising from police conduct is *Wellington v. Ontario*, 2011 ONCA 274. The issue as posed by the Court in that case was "do victims of crime committed by police officers have the right to sue the special investigation unit ("SIU") for negligent investigation?"

[384] The circumstances giving rise to the issue in that case involved two police officers shooting and killing a 15 year old boy in the context of the pursuit of a van he was driving. The SIU was the body charged with the responsibility of investigating the shooting. The deceased's mother and sister and his estate brought an action against the SIU alleging a negligent investigation. The defendants applied to strike the action as disclosing no cause of action. The application was dismissed by the Chambers judge who held:

It was not plain and obvious that the action could not succeed and a full evidentiary record was required.

[385] The dismissal was appealed to the divisional court and upheld with a dissent. On further appeal to the Ontario Court of Appeal, the appeal was allowed and the action was dismissed.

[386] In its analysis, the Court of Appeal, speaking through Sharpe J.A. considered whether the duty asserted by the plaintiffs was novel or had already been recognized by law as a precondition for determining whether the facts alleged gave rise to a private law duty of care.

[387] The Court noted if the duty has already been recognized by law, then a duty of care is established and it is unnecessary to engage in further analysis. The Court also noted that if it had been held that no duty of care arises on the facts pleaded "a full Cooper/Anns analysis is not required."

[388] The Court considered *Hill v. Hamilton Wentworth*, *Beckstead v. Ottawa (City) Chief of Police*, *supra*, and *Norris v. Gatien* (2001), 56 O.R. (3d) 441 (C.A.) and *Jane Doe vs. Metropolitan Toronto Police Commissioners* and concluded the state of the law was as follows:

While the police owe a duty of care to a particular suspect under investigation (see *Hill* and *Beckstead*) and to warn a narrow and distinct group of potential victims of a specific threat (see *Jane Doe*), there is now a long list of decisions rejecting the proposition that the police owe victims of crime and their families a private law duty of care in relation to the investigation of alleged crimes.

[389] Justice Sharpe found the situation of a suspect, subject to a police investigation, distinguishable as he or she "faces the risk of the stigma of being charged and convicted as well as potential loss of liberty and Charter rights." He noted: "the interest of victims and their families in a proper investigation are simply not comparable."

[390] In the course of his analysis on whether the duty of care alleged had already been recognized by the law, Sharpe J.A. referred to *Norris v. Gatien*, *supra*, in paras. 17 - 19 of his reasons as follows:

[17] The appellants submit that the duty of care alleged by the respondents has already been excluded by a decision of this court. In *Norris v. Gatien*, (2001), 56 O.R. (3d) 441 (C.A.), leave to appeal to SCC dismissed, [2002] S.C.C.A. No. 54, a cyclist was struck and killed by a motor vehicle driven by an OPP officer. The cyclist's family sued the officer, the OPP and Mr. Gatien, the municipal police officer who had investigated the fatal accident. Against Gatien, the plaintiffs alleged that he negligently investigated the death, leading to the failure of the criminal prosecution against the OPP officer for impaired driving causing death and driving "over 80". As in this case, the plaintiffs alleged that their emotional distress had been exacerbated by Gatien's failure to conduct a proper investigation. Gatien successfully moved under Rule 21 to strike the claim as disclosing no cause of action.

[18] This court dismissed the appeal and upheld the order striking out the claim against Gatien. Writing for the court, Austin J.A. applied the test set out in *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, which corresponds closely to the current *Cooper-Anns* test. Austin J.A. concluded, at paras. 17 - 19, that the relationship between the parties did not give rise to a *Prima facie* duty of care:

This is so because the plaintiffs had no legal interest in the investigation or prosecution of [the OPP officer]; that investigation and prosecution were matters of public law and public interest. Nor had the plaintiffs any legal interest in the disciplinary proceedings taken against [the OPP officer]. Had [the OPP officer] been convicted on either or both charges, the plaintiffs, or some of them, may have derived some personal satisfaction from that conviction. That satisfaction, however, would have been a purely personal matter; it would have no reality in law. Nor did the failure to reach that verdict have any consequence for the appellants sounding in damages.

[19] White *Norris* preceded the Supreme Court's holding in *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, that the police owe a duty of care to targeted suspects (discussed below), that duty had already been recognized by this court in *Beckstead v. Ottawa (City) Chief of Police*, (1997), 37 O.R. (3d) 62 (C.A.). In *Norris*, at paras. 19-20, Austin J.A. held that neither *Beckstead*, nor *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, (1990) 74 O.R. (2d) 225 (Div. Ct.), supported the family's claim. In *Beckstead*, the careless investigation resulted directly in the plaintiff being charged with fraud. In *Jane Doe*, the police negligence contributed to the plaintiff being sexually assaulted by a known suspect. The alleged negligence in both *Beckstead* and *Jane Doe* had a direct, profound and damaging legal impact on the plaintiffs. In *Norris*, the family's claim for added grief or mental distress did not implicate rights or interests of a like nature.

[391] He also dealt with the *Odhavji* case, distinguishing it from the case before him and finding, in Justice Iacobucci's reasons in that case, support for the proposition that individuals are not entitled to damages for an alleged failure to conduct a thorough investigation. He reasoned as follows in paras. 25 - 28 of his judgment:

[25] It is my view that *Odhavji* is distinguishable from the case at bar and that, indeed, passages in *Odhavji* support the position of the appellants.

[26] Unlike the present case, in *Odhavji* the victim's family did not sue the SIU officers or anyone else for negligent investigation of the shooting. The claim against the police officers was for misfeasance in public office, a tort that requires an element of deliberate unlawful conduct as well as awareness that the conduct is unlawful and likely to harm the plaintiff. In finding that the claim for misfeasance in public office should proceed, Iacobucci J., writing for the court, made clear that he was not deciding that the family could sue for negligent investigation, at para. 40:

In the defendant officers' submission, the essence of the plaintiffs' claim is that they were deprived of a thorough, competent and credible investigation. And owing to the fact that no individual has a private right to a thorough, competent and credible criminal investigation, the plaintiffs have suffered no compensable damages. If this were an accurate assessment of the plaintiffs' claim, I would agree. Individual citizens might desire a thorough investigation, or even that the investigation result in a certain outcome, but they are not entitled to compensation in the absence of a thorough investigation or if the desired outcome fails to materialize. This, however, is not an accurate assessment of the plaintiffs' submission.

[27] The negligence claim pleaded against the Chief of Police was directly tied to the misfeasance in public office claim asserted against the individual police officers under his supervision. The "essence" of the claim was that the Chief "breached a duty to take reasonable care to ensure that the defendant officers complied with their legal obligation to cooperate with the SIU investigation", at para. 52. That claim was considered under the *Cooper-Anns* test. The court held, at para. 54, that while the plaintiffs might well have difficulty in establishing that their distress and anger rose "to the level of compensable psychiatric harm", it was not "plain and obvious" that the claim would fail and hence the pleading should not be struck out. Iacobucci J. repeatedly linked the negligence claim against the Chief to the alleged "misconduct" or "improper conduct" of the officers, for example, at paras. 57-58:

It is only reasonable that members of the public vulnerable to the consequences of police misconduct would expect that a chief of police would take reasonable care to prevent, or at least to discourage, members of the force from injuring members of the public through improper conduct in the exercise of police functions.

...

The fact that the Chief already is under a duty to ensure compliance with an SIU investigation adds substantial weight to the position that it is neither unjust nor unfair to conclude that the Chief owed to the plaintiffs a duty of care to ensure that the defendant officers did, in fact, cooperate with the SIU investigation.

[28] When the judgment is read as a whole, I cannot accept the submission that by allowing the action in negligence to proceed against the Chief, Iacobucci J. intended to reverse the proposition asserted a few paragraphs earlier that individual citizens are not entitled to damages where there is a failure to conduct a thorough investigation.

[392] Justice Sharpe concluded that the duty of care at issue before him had not previously been recognized, but went on to consider whether there was anything in the statutory mandate of the SIU that gives rise to a duty of care.

[393] He concluded that "to impose a private law duty of care would, in my view, introduce an element seriously at odds with the fundamental role of the SIU to investigate allegations of criminal misconduct in the public interest." (para. 45). He concluded the SIU's "duties are not focussed on the detection or protection of victim's interests but instead relate to protecting the public at large." (paras. 49).

[394] Sharpe J.A. saw in the circumstance before him, similarity to:

[a] well established line of cases standing for the general proposition that public authorities charged with making decisions in the general public interests, ought to be free to make those decisions without being subjected to a private law duty of care to specific members of the general public.

[395] He concluded the respondents failed to establish a prima facie duty of care under the first branch of the Cooper-Anns test and thus, it was unnecessary to consider whether the duty should be negated for policy reasons.

ii. Application of the Law to the Facts

[396] In my view, the law which has arisen from attempts to establish a private law duty of care from a public official's discharge of public duties does not favour the plaintiff's case.

(1) Pre-Assault

[397] The essence of the plaintiff's case against the Delta Defendants for the pre-assault period is that they knew or ought to have known that Cheers was an environment that fostered a certain level of disturbance and violence on an ongoing basis and that their failure to warn of dangers to potential patrons, to take definitive steps to solve the problem, or to abate the risk it represented to an acceptable level, constitutes negligence. Inherent in the plaintiff's position is the precept that the Delta Defendants owe a private law duty of care to individual members of the public who might become patrons at Cheers pub.

[398] The plaintiff likens his position to that of the plaintiffs in Schacht, or Jane Doe, alleging, as with those plaintiffs, both foreseeability and a sufficiently proximate relationship to establish a private law duty of care.

[399] As I see it, however, although the plaintiff's argument has some attraction, it fails to account for the necessary elements of proximity identified by Chief Justice McLachlin in *Hill v. Hamilton Wentworth* and exemplified in the other decisions dealing with the question of whether and when a private law duty of care can arise from the discharge of a public duty or function.

- [400] The dominant characteristic of proximity necessary to a private law duty of care is a relationship between the alleged wrongdoer and the victim, that is "close and direct" in the sense that "the wrongdoer ought to have the victim in mind as a person potentially harmed". (Hill v. Hamilton Wentworth at para. 29). In that context, "while not necessarily determinative, the presence or absence of a personal relationship is an important factor". (Hill v. Hamilton Wentworth para. 30). In the present case, it could not be said that the relationship between the plaintiff and the Delta Defendants before the assault was close or direct. The plaintiff had never attended Cheers before, he was not known to the Delta Defendants as a person more likely than anyone else to become a patron of Cheers or to be caught up in an assault. He was not a member of a group more likely to be targeted by an assault at Cheers or elsewhere. There is no personal relationship between the plaintiff and the Delta Defendants.
- [401] Insofar as the other factors identified by Chief Justice McLachlin indicative of a close and direct relationship are concerned, including "any expectations, representations and reliance" arising from the relationship are concerned, there was little or no evidence that the plaintiff had any particular expectation of the Delta Defendants vis-a-vis the Cheers pub. It was clear from his evidence that he had been in other drinking premises where fights had broken out both inside and out. Indeed he testified that he had been at the Roxy nightclub both before and after the assault, and based on the evidence of police service calls to that establishment and the evidence of Argent of the VPD, it appears there is little to distinguish the Roxy (and other adjacent Granville Street nightclubs) from Cheers in terms of the number or nature of police service calls and corresponding activities.
- [402] In addition, there was no evidence of any specific representations from or reliance on the Delta Defendants beyond the implicit representation that because Cheers was licensed to operate meant that it met certain regulatory standards. There is little or no evidence, however, that the plaintiff relied on the fact of licensing as warranting a particular standard of behaviour at the bar. Given his previous experiences in various bars and nightclubs, it appears unlikely that the relationship, such as it was, between the plaintiff and the Delta Defendants, entailed any substantive reliance by the plaintiff based on the fact that Cheers was licensed to operate.
- [403] His relationship to the Delta Defendants was no closer or direct (and arguably more removed and less direct) than the relationships in Cooper and Edwards where "public officials were not acting in relation to the claimant ... but in relation to a third party ... who, at a further remove, interacted with the claimants."
- [404] In the present case, the Delta Defendants were similarly removed from the plaintiff. They dealt with representatives of the LCLB as well as Cheers staff and management in an enforcement capacity, but had no direct dealings or relationship with the plaintiff or the person who assaulted him.

- [405] The cases in which police failure to act, or negligent actions in connection with a potential victim have engaged a duty of care, in *Mooney, Jane Doe and Schacht*, either involve specific ascertainable threats to specific ascertainable victims or specific ascertainable threats to a particular class of victim. In *Mooney*, the police duty was engaged by a complaint made by the potential victim, of threats from her former spouse. In *Schacht*, the specific threat or risk of harm was an open culvert under construction on a highway and the identifiable group were users of the highway - a group in relation to whom the elements of representation, reliance and expectation would undeniably be at play in relation to those charged with the responsibility of patrolling the highway. As noted by Sharpe J.A. in *Wellington v. Ontario*, in connection with the *Jane Doe* case, the victims were part of a "narrow and distinct group" facing "a specific threat". There are thus clear distinctions to be drawn between the present case involving the plaintiff's membership in a large indeterminate pool of potential victims and a non-specific threat, which the evidence reveals, was not unique to the Cheers pub.
- [406] Another aspect of the evidence that weighs against finding proximity based on the factors of expectation, representations and reliance, relates to the plaintiff's consumption of alcohol and cocaine in combination with his steroid use. The evidence is that combination of drugs is a potent mix, likely to make the user more prone to responding belligerently to real or perceived provocations.
- [407] While that evidence may be primarily relevant to an issue of contributory negligence, it also has some bearing on proximity. In particular, it belies any inference that might otherwise be open that the plaintiff attended Cheers pub with any particular expectation of, or reliance on there being an environment shaped by police presence, enforcement or regulation.
- [408] In other words, whether the plaintiff's consumption of drugs and alcohol actually contributed to the circumstances giving rise to the harm is not at issue in assessing proximity. The point is simply that it is objectively improbable that a person who consumes a mix of drugs with the potential to cause aggression (in the case of steroids and cocaine) and to decrease inhibitions (in the case of alcohol) in the context of attending a particular nightclub has expectations of or reliance on there being police enforcement of the Liquor Act or licensing regulations.
- [409] That illustrates the difficulty in finding a close and direct relationship between a police or other regulatory agency and a pool of people as large, indeterminate, and idiosyncratic as the potential patrons of any particular bar.
- [410] It also illustrates the difficulty in finding a close causal relationship in such circumstances as it relates to the failure to warn and the subsequent harm caused. It is objectively improbable that the plaintiff would have encountered a warning had one been issued, in respect of the Cheers pub, given his lack of connection to Delta and unfamiliarity with the Delta Defendants' website or any local news sources. Equally, it is objectively improbable

that he would have heeded any such warning had he encountered it, given the evidence of his attendance at other bars or nightclubs with similar environments to Cheers, and his consumption of drugs that would tend to affect his judgment.

- [411] The presence or absence of a close causal connection between the negligence alleged and the harm caused is a factor in determining proximity. In *Odhavji Estate v. Woodhouse*, supra, Iacobucci J. held as follows in the context of a proximity analysis at para. 57:

Although a close causal connection is not a condition precedent of liability, it strengthens the nexus between the parties.

- [412] Where, as here, the causal connection, insofar as the failure to warn is concerned, is remote and speculative rather than close, it cannot be said that the nexus between the parties is strong or compelling.

- [413] For those reasons, while finding some limited evidence of a connection between the Delta Defendants and prospective Cheers patrons arising from the police corporate knowledge that a person entering Cheers was likely to be exposed to an environment involving some violent or turbulent circumstances, I am not satisfied the evidence reaches the level of establishing a close and direct relationship featuring the indicia of proximity identified by Chief Justice McLachlin in *Hill v. Hamilton Wentworth*, supra, or manifested in other decisions such as *Jane Doe*, *Mooney*, or *Schacht*.

- [414] I thus conclude the relationship at issue does not sustain sufficient proximity to found a duty of care. The plaintiff was but one of a large indeterminate pool of potential patrons of Cheers, rather than an identifiable potential victim of a specific threat.

(2) Post-Assault

- [415] The foundation for the asserted liability of the Delta Defendants in negligence post assault, consists of a number of contentions. The first is that Uppal failed to call for assistance from EHS in a timely way. The second is that DPD lost or destroyed critical videotape evidence. The third is that the Delta Defendants negligently conducted their investigation into the plaintiff's assault, thus failing to identify the perpetrator.

- [416] Insofar as the first contention is concerned, assuming the existence of a duty of care between Uppal and the plaintiff when Uppal arrived on the scene to find him seriously injured, there is no evidence of what is alleged. The evidence is that EHS had already been called to the scene and were on the way, and it was EHS who notified the police of the circumstances. There is further evidence that Uppal did in fact request that EHS get to the scene as soon as possible. In the result, there was an interval of slightly less than 13 minutes between the assault and the arrival of EHS. There is no evidence that even if there had been a negligent failure by the defendants to summons an ambulance as soon as possible, that it had any effect or impact on the plaintiff's injuries. There is thus no basis for a finding of a breach of any standard of care against Uppal on the basis that he failed to call for assistance from EHS or that if he did, it was not in any way causative of the plaintiff's

injuries.

[417] An aspect of the plaintiff's assertion of a negligent investigation is the loss or destruction of the critical video evidence. Leaving aside the question of whether there is a duty of care which arises between the Delta Defendants and the plaintiff in the circumstances, the evidence falls short of establishing the loss or destruction of any video surveillance evidence. At best, the evidence establishes that a compact disk "burnt" from the video surveillance on a hard drive was inadvertently destroyed, but only after it was downloaded onto the DPD's hard drive. In addition, the evidence establishes that the video surveillance captured on Cheers pub's computer hard drive from the evening in question was "mirrored" by DPD and was available for the investigation and, in turn, for the plaintiff's action. Accordingly, there is no basis for a finding of negligence with respect to that allegation.

[418] The main thrust of the plaintiff's allegation relates to the fact that the police efforts did not yield sufficient evidence of an assailant to even consider charges, which the plaintiff attributes to the lack of a thorough or competent investigation.

[419] The plaintiff relies particularly on Odhavji Estate, Mooney and Traversy in support of a contention that once he became the victim of a crime, a private law duty of care is imposed on the police charged with the responsibility of investigating the crime.

[420] The case which is factually most similar to the case at bar is Traversy. It is important to note, however, that neither in the original application to strike the pleadings, nor in the application for leave to appeal in that case, was there an affirmative finding that there was such a duty of care. The net effect of Traversy is summed up by Power J. in para. 33 of his judgment that:

Without a court having an opportunity to examine the entire circumstances of the relevant circumstances, it cannot be stated categorically that the relationship was not a proximate one.

[421] Moreover, the currency of that holding, it seems to me, is called into question by the decision of the Ontario Court of Appeal in *Wellington v. Ontario* which held:

[t]o impose a private law duty of care would in my view introduce an element seriously at odds with the fundamental role of the SIU to investigate allegations of criminal misconduct in the public interest. (para. 45);

And:

In my view, this is not a case where a trial is required to resolve the duty of care issue. A duty of care has been excluded by prior decisions of this court, the British Columbia Court of Appeal and numerous trial courts. (para. 52)

- [422] Insofar as Mooney is concerned, it dealt not with the failure of the police to properly investigate the crime which caused the plaintiff's injuries; rather it dealt with an investigative failure which arguably caused those injuries. It was a case like *Jane Doe* of a failure to deal with a specific threat to a specific individual or "a narrow and distinct group of potential victims" (Wellington para. 20).
- [423] Insofar as *Odhavji Estate* is concerned, it too is distinguishable from the case at bar. As Sharpe J.A. noted in Wellington, the claim in *Odhavji* was "for misfeasance in public office, a tort that requires an element of deliberate unlawful conduct as well as awareness that the conduct is unlawful and likely to harm the plaintiff". Justice Sharpe placed significant reliance on the statement of Iacobucci J. who agreed with the proposition that "no individual has the right to a thorough, competent and credible investigation", but noted the claim before the court in *Odhavji* was on a different footing.
- [424] Although the plaintiff has argued in the case at bar that Wellington is distinguishable because it was the family of a victim, rather than the victim, who was the plaintiff, it is significant that the suit was brought in part by the victim's estate. In stating the issue, Sharpe J.A. identified the issue as "do victims of crime committed by police officers have the right to sue the SIU for negligent investigation?".
- [425] The concept that there is a lack of proximity in the relationship between investigating police officers and the victims of the crime which is under investigation, which emerges from Wellington and the obiter of Iacobucci J. in *Odhavji* arises from the precept that the primary relationship in a criminal investigation is between the authority of the police and the individual under investigation.
- [426] It is clear from *Hill v. Hamilton Wentworth* it is that relationship and the function which it embraces which is close and direct and engages the indicia of proximity. While that does not necessarily preclude other relationships of proximity from developing, those other relationships must be subject to the need to protect the primary relationship and function.
- [427] In the present case, it is not pleaded, and nor is there evidence that the failure of the police investigation caused or contributed to any of the injuries suffered by the plaintiff. The evidence presented is compendiously summarized in a report dated June 9, 2009 by Dr. Derek Smith, a psychiatrist retained by the plaintiff to conduct an independent medical examination:

Prior to the assault, the plaintiff was free of medical and psychiatric illness. It is therefore my opinion that all of the current problems are a direct result of the assault and subsequent brain injury of December 26, 2006.

[428] The relationship at issue is thus not direct. It is not the impact of the asserted negligence on the plaintiff that is relied on as engaging liability but the impact on his opportunity or ability to seek damages from a third party. That was one of the heads of damage alleged in *Wellington v. Ontario*, supra, that the allegedly negligent investigation "lessened (the plaintiff's) opportunity to recover damages in a civil suit." In rejecting that relationship as proximate, Sharpe J.A. noted, in referring to the Cooper-Anns test:

Policy reasons are relevant at both stages of the test. At the first stage, the policy reasons must arise from the nature of the relationship between the parties rather than any external concerns.

[429] It was in that context that the court in *Wellington* ruled at para. 45:

In my view, the SIU does not and should not conduct criminal investigations to advance the private interests of any individual citizen. I agree with the submission ... that there is an inherent tension between the public interest in an impartial and competent investigation and a private individual's interest in a desired outcome of that same investigation which includes seeking to ground a civil action against the alleged perpetrator. To introduce a private law duty of care would in my view introduce an element seriously at odds with the fundamental role of the SIU to investigate allegations of criminal misconduct in the public interest.

[430] The *Wellington* case, while not binding on me, is persuasive authority. Although it is concerned with the statutory mandate of the SIU in Ontario, there is in my view no basis to distinguish *Wellington* from the case at bar for that reason. The relevant provision of the Police Act, R.S.B.C. 1996, c. 367 is s. 34 which reads as follows:

Duties and functions of chief constable and municipal police

34 (1) The chief constable of a municipal police department has, under the direction of the municipal police board, general supervision and command over the municipal police department and must perform the other functions and duties assigned to the chief constable under the regulations or under any Act.

(2) The municipal police department, under the chief constable's direction, must perform the duties and functions respecting the preservation of peace, the prevention of crime and offences against the law and the administration of justice assigned to it or generally to peace officers by the chief constable, under the regulations or under any Act.

[431] In my view, the direction in the Police Act that the police "must perform the duties and functions respecting the preservation of peace, the prevention of crime and offences against the law and the administration of justice" emphasize the very public nature of the duty created, akin to that confronting the SIU.

[432] The point made by *Wellington v. Ontario*, supra, and the cases which it relies on, is that a public duty by its nature excludes the indicia of a proximate relationship with individual or private interests, absent exceptional circumstances. In *Hill v. Hamilton Wentworth*, supra, those exceptional circumstances were described as "critical personal interests" of a suspect

whose "freedom ... reputation and how he may spend a good portion of his life" were put directly at stake by the investigator into the underlying "offences against the law and administration of justice."

- [433] In relation to the plaintiff, however, the direct impact on his personal interest came from the underlying offence, not from the investigation into it.
- [434] The importance and scope of that distinction is emphasized in *Hill v. Hamilton Wentworth*, supra, where the Chief Justice noted at para. 36 as follows:
- [36] The personal interest of the suspect in the conduct of the investigation is enhanced by a public interest. Recognizing an action for negligent police investigation may assist in responding to failures of the justice system such as wrongful convictions or institutional racism. The unfortunate reality is that negligent policing has now been recognized as a significant contributing factor to wrongful convictions in Canada. While the vast majority of police officers perform their duties carefully and reasonably, the record shows that wrongful convictions traceable to faulty police investigations occur. Even one wrongful conviction is too many, and Canada has had more than one. Police conduct that is not malicious, not deliberate, but merely fails to comply with standards of reasonableness can be a significant cause of wrongful convictions. (See the Honourable Peter Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (2001), at p. 10 ("Cory Report"); the Right Honourable Antonio Lamer, *The Lamer Commission of Inquiry into the Proceedings Pertaining to Ronald Dalton, Gregory Parsons and Randy Druken; Report and Annexes* (2006), at p. 71; Federal/Provincial/Territorial Heads of Prosecutions Committee Working Group, *Report on the Prevention of Miscarriages of Justice* (2004); the Honourable Fred Kaufman, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998), at pp. 25, 26, 30, 31, 34-36, 1095-96, 1098-99, 1101 and 1124).
- [435] It is clear from the judgment in *Hill v. Hamilton Wentworth* that the relationship forged by the investigative function between a police officer and a suspect is both close and direct, implicates "critical" personal interests and engages a significant public interest in avoiding wrongful convictions.
- [436] By contrast, the relationship between an investigator and a victim, at least where the substantive harm has already been caused by a third party, is removed and indirect. Moreover, the asserted foundation for finding proximity - the negligent failure to facilitate a civil action against the perpetrator of the substantial harm - runs directly counter to the public interest in ensuring that public officials do not perform their duties and functions to serve private interests.

- [437] In this case, it is alleged that not enough was done in the immediate aftermath of the offence to identify witnesses and obtain information which may assist in determining who the assailant was. That assertion is somewhat speculative, as is the inference that a more comprehensive initial investigation would lead to a successful action or result in the recovery of damages.
- [438] The evidence does establish that over time, all potential witnesses were interviewed, all surveillance tapes were seized and reviewed, certain forensic tests were performed on the alleged weapon used, and information from the public was solicited through the Crime Stoppers program. The causal connection between the alleged negligence and harm to the plaintiff is tenuous. It assumes the presence of a forthright, willing and impartial witness who was overlooked. It also assumes that interviewing Jeremy Wocknitz or other Cheers staffers earlier, or acquiring the surveillance tapes earlier would have changed the course and result of the investigation.
- [439] Jeremy Wocknitz was the only witness who purported to be able to identify the assailant. The fact that at the time of the assault, despite knowing the police were investigating, he declined to come forward to provide any information casts doubt on his initial willingness to cooperate and the reliability of his identification two years later. That he appeared to confuse the assailant with Greg Allan as the one who was knocked down further compromises his reliability. That he subsequently recanted his evidence concerning "Ricky Guy" being the assailant and testified that he did not see what he originally represented to have seen, undermines him and marks his evidence as unreliable.
- [440] The other witnesses who were interviewed gave largely conflicting accounts of what occurred, and Greg Allan, who was likely in the best position to provide information as to what occurred was uncooperative and contradictory in his accounts of the events.
- [441] As earlier noted, in *Odhavji Estate v. Woodhouse*, supra, Justice Iacobucci held that a close causal connection was one of the factors relevant to the inquiry into proximity.
- [442] In my view, the lack of a close causal connection is thus an additional factor weighing against finding proximity in the present case.
- [443] As I see it, while there may be particular cases where the evidence justifies finding a proximate relationship between a police investigator and the victim of an offence being investigated, the circumstances would need to overcome both the inherently indirect nature of the relationship, and the critically important precept that criminal investigations do not serve private interests.
- [444] I conclude this is not such a case. While the import of the assault upon the plaintiff has been profound and devastating, as is clear from *Wellington*, supra, it is not the severity of the underlying harm that determines the issue of proximity.

- [445] This is not a case such as *Mooney* or *Jane Doe* where it is alleged the investigative negligence led to or failed to prevent the harm to the plaintiff. Nor is it a case such as *Odhavji Estate* where it is alleged there was a deliberate and unlawful attempt to thwart an investigation into the wrongdoing which led to the harm alleged.
- [446] In this case, the nexus between the alleged negligence and the harm is weak. Policy reasons intrinsic to the relationship between an investigator and a victim, unlike those between an investigator and a suspect, dictate against finding it to be close and direct in the sense contemplated by the proximity analysis.
- [447] For those reasons, both general to the relationship between an investigating officer and a victim, and specific to the circumstances to the case at bar, I conclude the evidence falls short of establishing the requisite proximity to found a duty of care in the relationship between the plaintiff and the Delta Defendants post assault.
- [448] I am thus I am unable to conclude that the plaintiff has met the burden of establishing liability against the Delta Defendants in this case and accordingly I dismiss the plaintiff's action with costs to the defendants.

"A.F. Cullen J."

The Honourable Mr. Justice A.F. Cullen

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/11/14/2011BCSC1469.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/burnett-v-moir-2011>

Prepared on 26 October 2026 · Esheria