

SUPERIOR COURT OF JUSTICE

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TOD WEBSTER and SHILO SMITH

Plaintiffs

v.

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INNERACTIVE SECURITY SERVICES INC., 536357 ONTARIO LIMITED,  
1320061 ONTARIO INC., carrying on business as GUELPH CONCERT  
THEATRE a/o 1841984 ONTARIO LIMITED, STAR SECURITY INCORPORATED,  
TODD GOTTSCHALK

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Defendants

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R E A S O N S F O R J U D G M E N T

BEFORE THE HONOURABLE MR. JUSTICE A. SKARICA  
on October 29, 2020 at HAMILTON, Ontario

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APPEARANCES:

F. Vanopoulos

Counsel for the Plaintiffs

R. Betts

Counsel for 1320061 Ontario Inc.

30

R. Antoniuk and Matthew Miller

Counsel for the Defendant

Star Security Incorporated

(i)  
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Legend

[sic] indicates preceding word has been reproduced verbatim and is not a transcription error.

(ph) indicates preceding word has been spelled phonetically

All spellings of names are transcribed as set out in the reporter's notes unless noted with a (ph)

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CITATION: Webster v. Inneractive Security Services Inc., 2020  
ONSC 6957

THURSDAY, OCTOBER 29, 2020

R E A S O N S F O R J U D G M E N T

SKARICA J. (Orally):

In the matter of the summary judgment between the parties, Tod Webster and Shilo Smith, plaintiffs and a number of numbered corporations, including Guelph Concert Theatre and Star Security Incorporated and Todd Gottschalk as defendants; this is dealing with a summary judgment motion brought by the defendants.

**OVERVIEW**

On November 21, 2015, the plaintiff Tod Webster went to a heavy metal concert at the Guelph Concert Theatre. Within minutes of the music starting, the plaintiff was found severely injured, laying on the ground surrounded by a crowd of people. The plaintiff sued a variety of defendants basing his lawsuit on negligence, occupier's liability and breach of the *Ontario Liquor Licence Act*. The defendants deny they were negligent and bring a summary judgment motion to have the plaintiffs' lawsuit dismissed.

**ISSUE**

Is there any evidence of liability by any of the defendants that requires a determination of that issue at a trial?

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**FACTS**

Evidence of the plaintiff Tod Webster:

The discovery transcript of the plaintiff appears in the filed materials in at least three different places. Why that happens, I do not know; it is not as if there is not enough material before me. It appears at the following places:

1. Transcript brief, moving party, tab 3.
2. Responding motion record of plaintiffs, volume 2, Exhibit P on the affidavit of Nancy Dietrich.
3. Motion record of the defendant Star Security, volume 1 of 2, Exhibit I.

Accordingly, because it shows up in so many places, I will refer to the transcript by its page numbers. Important details included in the examination of discovery of Tod Webster, the plaintiff, include:

1. The plaintiff consumed six beers over three to four hours at a birthday party in the afternoon before attending the concert. The plaintiff also consumed a couple of tokes of marijuana. See pages 65 through 66.
2. The plaintiff, at approximately 6:30 to 7:00 p.m. attended the concert. The concert started at 7:30 p.m. The plaintiff attended the concert with five of his friends. See page 67 through 68.

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5 3. The five friends were Brandon Smith, referred to as Dude, Jamie Arthur, Sean Patterson, Courtney Earl and Edward Beavis(ph). Tickets were bought in advance. See pages 68 through 69.

10 4. The plaintiff, once inside the concert venue, bought two tall boy beers. He was in the midst of drinking the first one and did not get to the second one. See page 75.

15 5. The plaintiff was "literally" jumping up and down waiting for the band. No one was violent. See pages 78 through 79.

20 6. The band - Machine Head - then came out and played their first song Imperium. See page 80.

25 7. The accused testified:

The only thing I remember was that I had my arms around my brother-in-law, I had my arms around Jamie and Brandon, and we were singing the song, jumping and down. I had my hand in the air and I just remembered going down. I don't remember much of what happened after that situation.

See pages 80 through 81.

30 8. After being directed to his police statement, made on November 28th, 2015, several days after the incident, (see Exhibit O in the responding motion record of the plaintiff, volume 2 of 2), the plaintiff Tod remembered moving away from

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5 Jamie and Brandon and when he moved away from them, "Everything got shut off". He was bumped earlier but at the point he went down, there was no mosh pit. See pages 81 through 82.

9. There was a group of people surrounding the plaintiff, but it was not a mosh pit. See page 83.

10. There were no fights or any violence or disputes that the plaintiff observed. See pages 83 through 84.

11. The plaintiff Tod has spoken to his five friends and no one saw what happened to Tod. See page 84.

12. Tod remembers the incident as:

20 I was conscious, but I was falling to the ground. Everything was, I can't really describe it because its never happened to me, everything was kind of like almost slow  
25 motion, kind of fuzzing falling down, and I just remember seeing legs and feet. It was an odd feeling.

30 See page 84.

13. Tod was just lying there not moving. He remembers kind of coming out of a slow daze.

He couldn't feel or move his arms or legs. See pages 85 through 86.

14. People moved Tod inside the concert hall. See page 88.

15. At page 89 through 90, Tod summarizes what happened to him as follows:

QUESTION 561: Is there anything else that you can tell me that you recall happening from the time Imperium starts to the time you're on the ground in the concert theatre hall?

ANSWER: No.

QUESTION 562: As I understand it, you believe that you were hit from behind, but you don't actually know what happened to you?

ANSWER: I don't know what happened to me.

QUESTION 563: The police, you indicated to the police that you actually didn't feel a blow on the back of your head?

ANSWER: I have no idea. I didn't know I got hit in the back of the head until I was at the - I forget what hospital I was in and they said I'm bleeding in the back of the head.

Continues at page 90:

QUESTION 568: Okay, but you didn't do anything to cause anyone to try to attack you, as far as you recall?

ANSWER: No. Every person that you ever bump into you kind of make eye contact and, a body check, head bang then you move on and....

QUESTION: It's respectful?

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ANSWER: It's common, it's very common. It's not a violent thing.

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16. Tod suffered serious injuries from the incident, gash at the back of the head requiring sutures, spinal paralysis, severe nerve damage resulting in the plaintiff Tod - and I do not mean Tod as disrespectful, it is Tod Webster - resulting in Tod being considered an incomplete quadriplegic because he has issues with all four limbs. See pages 98 and 99 of the transcript.

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That is my summary of the plaintiff's evidence.

TODD GOTTSCHALK

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Todd Gottschalk is the vice president of operations of Inneractive Security Services Inc. Mr. Gottschalk provided a statement on December 11th, 2015. He indicates that on November 21, 2015, the day of the concert, he was privately contracted to monitor security operations at the Machine Head show at Guelph Concert Theatre. As the show started, Mr. Gottschalk saw a handful of people, 7 - 10, start to dance in the circle. I think it is useful to review the entire statement of Mr. Gottschalk (see tab G of the motion record of moving party):

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To whom it May Concern:

On November 21st, 2015, I, Todd Gottschalk, was privately contracted to monitor security operations and assist with the band for a Machine Head show at Guelph Concert Theatre.



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While assuming my position at the side of the stage, shortly after the band had started the show, I observed a small dance circle starting to form in the front stage area. Nearby, a patron moved out of the way and were not bothered as a handful of people, 7 - 10, started to dance in a circle. I observed security that was working in the barricaded area and the side stage carefully observing the actions of the people dancing and making sure all was good and the nearby patrons were not disturbed and that the people dancing did not become over zealous.

Venue security kept a close watch on the group of dancers and the surrounding public to ensure all was good. Shortly into the show, I cannot be exact on how long into the show, I observed a larger framed male dancing rather oddly, differently from the others, enter the circle. The male had just entered the circle and immediately, the other people dancing stayed away from him. I was about to advise the club security to go talk to this guy when I observed he had fallen. I did not see anyone around him as he fell, nor did I notice anyone push him. He was dancing oddly and then just collapsed.

I motioned for venue security from the barricade to follow me to go see if the man was okay. I arrived within 45 seconds of the male initially falling and as I arrived, the male was attempting to stand back up, but could not. People around were trying to help but it seemed as if he had just become dead weight and was just too heavy to lift. As I got closer, I noticed the male trying to talk to people nearby and then he just sort of sat down on the floor. Myself and the venue staff were present as the male was just laying on the floor. He was moving around, almost as if he was rolling on the floor. He was talking but I could not make out what he was saying. Another venue staff arrived, and the male was helped to his feet. It appeared he attempted to walk with the staff as they took him to the front of the venue. I returned to my position at the side of the stage and resumed my duties.

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That statement is dated December 11, 2015,  
approximately three weeks after the incident.

MILAD YUSFZAY

Milad Yusfzay was also working security and he filed  
an incident report regarding the incident. See tab  
F of the motion record of the moving party.

At around 9:00 p.m., Mr. Yusfzay saw a bunch of  
people looking on the ground in the mosh pit. As he  
approached the crowd, he saw a white male, heavily  
built, lying on the floor. The white man was not  
responsive. Security took the male to the front  
lobby of the theatre and at 9:15 p.m. EMS arrived  
and at 9:17 p.m. the white male was taken to the  
hospital.

SEAN PATTERSON

Sean Patterson is a long time friend, 10 years, of  
the plaintiff. He was one of the friends of Tod  
Webster who attended the concert. Patterson  
indicates that no one in their party was visibly  
intoxicated - see page 6 of the cross-examination at  
tab 5 of the series of transcripts in the transcript  
brief of the moving party.

Sean Patterson did not witness what happened. Sean,  
in his cross-examination transcript, (see page 19 of  
tab 5 in the transcript brief of the moving  
parties), indicated he spoke to two concert  
attendees outside the concert venue in the smoking  
area while the paramedics were working on Tod. Mr.

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Patterson cannot describe these two individuals or even name them, and he did not get their names. These two unnamed, unknown individuals, thought they saw something happen - see page 19 of tab 5 of the transcript brief.

10  
Paragraph 15 of Mr. Patterson's affidavit indicated that these two individuals thought they saw how the incident occurred. This affidavit is located at the responding motion record of the plaintiffs', volume 2 of 2, tab 3. The affidavit is sworn on January 30, 2020, some five years after the incident.

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Paragraphs 8, 12 and 15 of the affidavit indicate:

8. I have been personally involved in at least 100 mosh pits. My experience with mosh pits has involved concert attendees jumping up and down, as well as shoving and body checking attendees onto one another.

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12. I did not observe the mechanism of Tod's injury.

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15. After Tod had been taken to the hospital via ambulance, I spoke to two unidentified concert attendees who informed me that they thought they saw Tod get hit in the head by someone but they didn't know anything further.

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This vague statement, two people "thought" they saw Tod get hit in the head by someone but that they did not know anything further, has little to no probative value. The two people are not named or identified. The circumstances surrounding what was seen by them is not delineated in anyway. These

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hearsay statements by these two people cannot be relied upon to determine what or what did not happen.

5 JAMIE ARTHUR

The plaintiff has filed an affidavit of another of the plaintiff's friends who attended the concert, Jamie Arthur. His affidavit appears at volume 2 of 2 of the responding motion record of the plaintiffs, it is located at tab 2. Highlights include as follows:

15 9. I have personally involved in about 100 mosh pits. My experience with mosh pits has involved concert attendees jumping up and down, shoving each other side to side and body checking into one another while listening to heavy music.

20 11. Myself and my friends, except for Courtney, were present in the mosh pit area from the outset of the concert. We began jumping up and down and thereafter became separated, due to the movement and darkness of the mosh pit.

25 12. Thereafter I noticed somebody on the ground within the mosh pit circle. It is common for attendees to be knocked to the ground in a mosh pit and it has personally happened to me prior to November 21, 2015. I assumed that an attendee would help the person who had fallen, so I continued to watch the music for about a minute after first noticing the person on the ground.

30 13. Thereafter I noticed that the person was still on the floor. I walked over to help and then became aware that the person on the floor was Tod. A few other unidentified individuals and I were unable to assist Tod to his feet so we flagged the

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uniformed security staff for assistance. Two security staff then descended to the main floor.

15. I did not observe the mechanism of Tod's injury, nor his going to the floor. While Tod was lying on the floor, I observed him to have a bloody nose and lip and recall him telling me that he could not move.

This affidavit was sworn January 30th, 2020, which again, I guess is not five years, but it is over four years from the incident in November 2015.

TRIAGE RECORD

The adult emergency triage record of Guelph General Hospital, dated November 21st, 2015, located in the responding motion record of the plaintiffs, volume 1 of 2, at tab 1, Exhibit E, indicates as follows (and it is obviously the notes of the triage nurse who I cannot make out). But in any event, it indicates:

The complaint is spinal injury and triage assessment is in mosh pits at concert and struck from behind and stomped on. No sensation or movement from waist down. Alert and oriented. H-B-D small laceration back of head, denies any neck pain, chest pain.

I infer that those notes are made from the interview of the plaintiff.

DISCHARGE SUMMARY

There is an Exhibit F, responding motion record of the plaintiff, volume 1 of 2, a discharge summary where the surgeon indicates:

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HISTORY:

5 This is an unfortunate 32 year old male, previously well, who was dancing in the mosh pit at a concert up in Guelph where he was visiting from Kingston when he was unexpectedly and unexplained, struck with violence on the back of the head under unclear circumstances.

TRIAGE RECORD AND DISCHARGE SUMMARY COMMENTS

10 The triage record, prepared by a nurse, appears to be his or her notes of an interview of the plaintiff Tod. These statements made by Tod are clearly refuted by his subsequent testimony in his discovery transcript, which I have reviewed. Accordingly, this part of the medical record has no probative value in determining what actually happened to the plaintiff in the concert incident. The discharge summary, which I have indicated appears as Exhibit F in the responding motion record of the plaintiff, volume 1 of 2, indicates and this appears to be a summary of the triage record, indicates the plaintiff was, "unexpectedly and unexplained struck in the back of the head under unclear circumstances."

25 These statements by the surgeon, based on sources which are not explained, are vague at best, of dubious probative value and if probative of anything, indicate the injury was unexpected, unexplained and unclear. This is evidence that does not exactly support a conclusion that the incident and/or injury were foreseeable by the defendants. The plaintiff has not produced any evidence from a

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5 medical expert regarding causation of injury. The plaintiff submits that the manner of the plaintiff being escorted out of the theatre exacerbated or contributed to the injuries but there is no medical evidence to indicate that the plaintiff's injuries were caused or exacerbated by being "dragged" from the incident scene.

10 **THE LAW**

10 Summary Judgment

15 On a motion for summary judgment the parties must "Put its best foot forward" or "Lead trump or risk losing". The test is whether the court's appreciation is sufficient to rule on the merits fairly and justly without a trial. See *Sweda Farms Limited v. Egg Farmers of Ontario*, [2014] OJ No. 851 at paragraphs 26 - 34.

20 In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada, at paragraph 49, indicated:

25 [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

30 In my opinion, all three of those factors are present here.

Negligence

The element of foreseeability

As indicated in the factums submitted before me, it is well established in law that liability is grounded in a party's breach of duty arising from the creation of an unreasonable risk of harm. In the leading case of Rankin, *Rankin's Garage and Sales v. J.J.*, [2018] SCJ No. 19 at paragraphs 19, 20, 21, 22, 24, 46, 50, 53, the Supreme Court of Canada indicates as follows:

[19] Whether or not a duty of care exists is a question of law and I proceed on that basis. The plaintiff bears the legal burden of establishing a cause of action, and thus the existence of a prima facie duty of care. In order to meet this burden, the plaintiff must provide a sufficient factual basis to establish that the harm was a reasonably foreseeable consequence of the defendant's conduct in the context of a proximate relationship. In the absence of such evidence, the claim may fail.

[20] Once the plaintiff has demonstrated that a prima facie duty of care exists, the evidentiary burden then shifts to the defendant to establish that there are residual policy reasons why this duty should not be recognized.

[21] Since *Donoghue*, the "neighbour principle" has been the cornerstone of the law of negligence. Lord Atkin's famous quote respecting how far a legal neighbourhood extends incorporates the dual concerns of reasonable foreseeability of harm and proximity:

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. You must take reasonable care to avoid acts



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5 or omissions which you can reasonably foresee would be likely to injure your neighbour. 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.

10 Reasonable foreseeability of harm and proximity operate as crucial limiting principles in the law of negligence. They ensure that liability will only be found when the defendant ought reasonably to have contemplated the type of harm the plaintiff suffered.

15 [22] The rationale underlying this approach is self-evident. It would simply not be just to impose liability in cases where there was no reason for defendants to have contemplated that their conduct could result in the harm complained of. Through the neighbour principle, the defendant, as creator of an unreasonable risk, is connected to the plaintiff, the party whose endangerment made the risk unreasonable. The wrongdoing relates to the harm caused. Thus, foreseeability operates as the "fundamental moral glue of tort", shaping the legal obligations we owe to one another, and defining the boundaries of our individual liability.

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25 [24] When determining whether reasonable foreseeability is established, the proper question to ask is whether the plaintiff has "offer[ed] facts to persuade the court that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged. This approach ensures that the inquiry considers both the defendant who committed the act as well as the plaintiff, whose harm allegedly makes the act wrongful. As Professor Weinrib notes, the duty of care analysis is a search for the connection between the wrong and the injury suffered by the plaintiff.

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[46] The fact that something is possible does not mean that it is reasonably foreseeable. Obviously, any harm that has occurred was by definition possible. Thus, for harm to be reasonably foreseeable, a higher threshold than mere possibility must be met. Some evidentiary basis is required before a court can conclude that the risk of theft includes the risk of theft by minors. Otherwise theft by a minor would always be foreseeable – even without any evidence to suggest that this risk was more than a mere possibility. This would fundamentally change tort law and could result in a significant expansion of liability.

[50] Given the absence of compelling evidence on this point, the Court of Appeal could only rely on speculation to connect the risk of theft to the risk of personal injury. This was inappropriate. Courts need to ensure that "common sense" is tied to the specific circumstances of the case and not to general notions of responsibility to minors.

[53] Whether or not something is "reasonably foreseeable" is an objective test. The analysis is focussed on whether someone in the defendant's position ought reasonably to have foreseen the harm rather than whether the specific defendant did. Courts should be vigilant in ensuring that the analysis is not clouded by the fact that the event in question actually did occur. The question is properly focussed on whether foreseeability was present prior to the incident occurring and not with the aid of 20/20 hindsight.

In *Stewart v. Pettie*, [1995] 1 SCR 131, the Supreme Court of Canada indicated at paragraphs 49 and 50:

[49] The existence of this "special relationship" will frequently warrant the imposition of a positive obligation to act, but the sine qua non of tortious liability remains the foreseeability of the risk. Where no risk is foreseeable as a result of the circumstances, no action will be required, despite the

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5 existence of a special relationship. The respondents argue that Mayfield should have taken positive action, even though Mayfield knew that the driver was with three other people, two of whom were sober, and it was reasonable to infer from all of the circumstances that the group was travelling together.

10 [50] One of the primary purposes of negligence law is to enforce reasonable standards of conduct so as to prevent the creation of reasonably foreseeable risks. In this way, tort law serves as a disincentive to risk-creating behaviour. To impose liability even where the risk which materialized was not reasonably foreseeable is to lay a portion of the loss at the feet of a party who has, in the circumstances, acted reasonably. Tort law does not require the wisdom of Solomon. All it requires is that people act reasonably in the circumstances. The "reasonable person" of negligence law was described by Laidlaw J.A. in this way in *Arland v. Taylor*:

20 He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct. He does nothing that a prudent man would not do and does not omit to do anything a prudent man would do. He acts in accord with general and approved practice. His conduct is guided by considerations which ordinarily regulate the conduct of human affairs. His conduct is the standard "adopted in the community by persons of ordinary intelligence and prudence."

30 In *Turcotte v. Lewis*, 2018 ONCA 359, the Court of Appeal indicated at paragraphs 58 and 59:

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[58] ... But on any version of the evidence the individual respondents were aware of a clear and substantial risk of violence when the bus arrived in Barrie. The events on the bus, the escalating tensions and shouting and the call for "back up" made a violent confrontation reasonably foreseeable. The individual respondents knew that Turcotte was a likely target of violence and that the risk came from someone on the bus (Aaron Lewis) and from those waiting in the plaza (the "back up"). The risk of violence was sufficiently high to warrant calling police to meet the bus on its arrival at the plaza in Barrie.

[59] The motions judge found that while the potential for a physical altercation was foreseeable, the individual respondents could not have known that it was "imminent or inevitable". This misstated the standard of care. The test is whether harm was reasonably foreseeable. In this case, it clearly was.

Standard of Care

The Supreme Court of Canada provided a summary of the threshold for a finding of negligence in *Ryan v. Victoria (City)*, [1999] 1 SCR 201 at paragraph 28, under the title "Standard of Care",

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

Occupiers Liability Act

5 The Ontario Court of Appeal in *Waldick v. Malcolm*,  
[1989] OJ No. 1970, at paragraph 19 indicated,  
referring to Section 3(1) of the *Occupiers Liability*  
*Act*:

10 [19] A similarly worded statement of an  
occupier's duty occurs in all other Occupiers'  
Liability Acts. All courts have agreed that the  
section imposes on occupiers an affirmative duty  
to make the premises reasonably safe for persons  
entering them by taking reasonable care to  
15 protect such persons from foreseeable harm. The  
section assimilates occupiers' liability with  
the modern law of negligence. The duty is not  
absolute and occupiers are not insurers liable  
for any damages suffered by persons entering  
their premises. Their responsibility is only to  
take "such care as in all the circumstances of  
the case is reasonable". The trier of fact in  
every case must determine what standard of care  
is reasonable and whether it has been met.  
Occupiers are also not liable in cases where the  
risk of injury is "willingly assumed" by persons  
entering the premises or to the extent that such  
persons are negligent. The nature and extent of  
20 these two exceptions will be examined later.

The Toronto Municipal Code, chapter 545, article XLI  
indicates at 545.494, Provision of security guards:

25 A. At all times while the entertainment  
establishment/nightclub is open the  
establishment is staffed with at least one  
security guard for every 100 patrons in  
attendance at the premises.

30 The *Liquor Licence Act*, Section 39(2) of the Liquor  
Licence Act indicates:

39 The following rules apply if a person or an

agent or employee of a person sells liquor to or for a person whose condition is such that the consumption of liquor would apparently intoxicate the person or increase the person's intoxication so that he or she would be in danger of causing injury to himself or herself or injury or damage to another person or the property of another person:

(2) If the person to or for whom the liquor is sold causes injury or damage to another person or the property of another person while so intoxicated, the other person is entitled to recover an amount as compensation for the injury or damage from the person who or whose employee or agent sold the liquor.

**APPLICATION OF THE FACTS TO THE LAW**

Reasonable Foreseeability

While there are some inconsistencies in the description of the witnesses in relation to the video, I believe the following finding of facts can be made: (I should indicate that during this proceeding, a video taken by someone in the crowd of the concert was displayed in court).

The evidence indicates the plaintiff, and his friends attended the concert.

While the plaintiff had consumed beer and marijuana earlier that day, it is clear, from his evidence, and from his friends, he was not intoxicated. He bought two beers and had consumed half a beer. The song Imperium started and was the first song to be played. The video, which was played in court indicates at the approximate 4 minute 51 seconds to

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5 minute mark, the band is encouraging the crowd to start jumping up and down. Sean Patterson, at paragraph 7 of his affidavit, confirms that the lead singer of the band asked the crowd to jump up and down. Sean Patterson indicates at paragraph 9 of his affidavit that he, Tod, Jamie and Brandon were initially adjacent to each other. The formation and movement of the mosh pit caused them to become separated. See paragraph 9 of the Patterson affidavit.

The video shows that at about the 5:30 to 5:39 minute mark, a mosh pit had indeed formed, and people were running in a circle. I infer that it is at about this time that the plaintiff Tod was separated from the group.

Mr. Gottschalk noticed a small crowd starting to form and 7 to 10 people started to dance in a circle. This can be seen at the 5:30 to 5:39 minute mark in the video. Mr. Gottschalk noted that security was carefully observing the actions of all people to ensure all was good. A number of security personnel can be seen observing the crowd on the video. Mr. Gottschalk indicates: "Many security kept a close watch on the group of dancers and surrounding public to ensure all was good". The security guards that can be seen at the front of the stage peering into the crowd, is consistent with this statement by Mr. Gottschalk.

Mr. Gottschalk noticed a large male enter the circle

5 and people stayed away from the large male. Mr. Gottschalk indicates that he was about to advise security to talk to him when Mr. Gottschalk noticed that the plaintiff had fallen. Mr. Gottschalk did not see anyone around him as he fell, nor did anyone push the plaintiff. The large framed male, the plaintiff, was dancing oddly and then just collapsed.

10 The video shows people looking at the ground at 6:24 to the 6:31 minute mark. Jamie Arthur indicates at paragraph 12 of his affidavit that he noticed somebody on the ground within the mosh pit circle. According to the video, this would be around the 15 6:31 minute mark. Jamie Arthur indicates he listened to the music for about a minute and then attended to the person laying on the ground who was his friend Tod, the plaintiff. They then flagged the security who descended to the main floor area. See paragraphs 12 and 13 of the Jamie Arthur 20 affidavit.

25 The video shows security guards going to the ground floor at approximately the 7:30 mark. This is consistent with Jamie Arthur's affidavit evidence at paragraphs 12 and 13. The video is also consistent with Mr. Gottschalk's evidence who indicated he arrived within 45 seconds of seeing the male 30 initially falling. Mr. Gottschalk indicated the man tried to stand up but could not.

Milad Yusufzay, another security guard was at the



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5 left wing of the stage when he saw a bunch of people looking on the ground in the mosh pit. This will be between the 6:30 to 7:30 minute mark on the video. Mr. Yusufzay saw a heavy built white male lying on the floor and called for backup and took the male to the front lobby.

10 The plaintiff Tod Webster's testimony at page 94 through 95 of the discovery transcript is that he recalls the fall occurring within the first two to three minutes of the video. This claim is contradicted by the video itself, along with the evidence of the two security guards and two of his friends. All of the evidence of the video and the two security guards, and the friends is basically consistent with the evidence of those other individuals seen in the video.

20 Both Jamie Arthur, at paragraph 9 of his affidavit and Sean Patterson, at paragraph 8 of his affidavit indicate that they have extensive experience with mosh pits. Both indicate that mosh pits are common at concerts with attendees jumping up and down accompanied by shoving and body checking. It is common for attendees to be knocked down but later to be helped up. Neither Arthur nor Patterson saw the plaintiff Tod fall down.

30 According to Mr. Gottschalk, he saw the plaintiff fall down with no one around him. No one pushed the plaintiff Tod Webster. Mr. Gottschalk indicated that Mr. Webster was dancing oddly and just

collapsed.

5 The plaintiff Tod Webster testified at page 83 of his transcript that no one was being violent and there were no fights breaking out. This is consistent with both the video and Gottschalk's evidence. Tod Webster, indicates at pages 84, 85 and 89 of his transcripts, and concludes as follows:

10 page 84:

QUESTION 534: So do I have it correct, that you sort of move away from Jamie and Brandon, then as I understand it, you have a recollection of just falling down, you're still conscious but you fall to the ground?

15 ANSWER: Yeah, I was conscious, but I was falling to the ground. Everything was - I can't even really describe it because it's never happened to me. Everything was kind of like almost slow-motion, kind of fuzzy falling down and I just remember seeing legs and feet. It was a very odd feeling.

20 QUESTION 535: Did you see any weapons in the crowd prior to that?

page 85:

ANSWER: No.

25 QUESTION 536: What do you remember after that? Do you remember hitting the ground on dance floor?

ANSWER: I remember going, I remember....

QUESTION: Again, I want you to answer....

30 ANSWER: I'm just having a bit like a flashback, like I'm just kind of I remember...

QUESTION: Okay.

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ANSWER: ...laying.

QUESTION: Just pause for one sec. Here's what I want you to do, you told me you remember sort of being conscious as you fall down?

ANSWER: Mm-hmm.

QUESTION 540: You're seeing, I think you said legs and feet. Just from that point forward, take a minute, we're not in a rush, you tell me what you remember step by step from that point forward, okay?

ANSWER: I remember, I remember kind of coming out of a dizzy slow daze and like I'm, okay, I'm going to get up now and I'm like, I'm not moving and I kind of looked down and I could see my arms and legs kind of like, I can't really describe, kind of like in a pile, just kind of lying there.

page 89:

QUESTION 561: Is there anything else that you can tell me that you recall happening from the time Imperium starts until the time you're on the ground in the concert theatre hall?

ANSWER: No.

QUESTION: As I understand it, you believe that you were hit from behind, but you don't actually know what happened to you?

ANSWER: I don't know what happened to me.

QUESTION 563: The police, you indicated to police you actually didn't feel a blow on the back of your head?

ANSWER: I have no idea. I didn't know I got hit in the back of the head until I was at the, I forget what hospital I was in and they said I'm bleeding in the back of the head.

Dr. Bednar, in the discharge summary which I have

referred to, indicates that:

5 The plaintiff was dancing in a mosh pit when he was unexpectedly and unexplained struck with violence on the back of his head under unclear circumstances.

There is no expert evidence regarding causation of the plaintiff's injuries.

10 To conclude therefore, is it reasonably foreseeable that a concert goer would collapse in circumstances that cannot be explained?

15 In my opinion, the plaintiff has not provided a sufficient factual basis to establish that the harm was a reasonably foreseeable consequence of the defendant's conduct in the context of a proximate relationship. See *Rankin (Rankin's Garage & Sales) v. J.J.*, paragraphs 19 and 21.

20 It is obviously possible that harm could come to persons in a mosh pit but that is not the test. Mr. Gottschalk and other security were attending at the front of the stage to ensure against dancing that would be overzealous. Dancing at mosh pits is common and expected by concert goers as is bumping and jumping. Whether something is reasonably foreseeable is an objective test. Ought someone in the defendant's position, reasonably, to have foreseen the harm to the plaintiff prior to the incident occurring and not with the aid of hindsight? I would say no. See *Rankin* at paragraph 53.

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27.  
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5 On the evidence before me, the defendants acted reasonably in the circumstances and that is all that is required. See *Stewart v. Pettie* at paragraphs 49 and 50.

10 This is not a case like *Turcotte v. Lewis*. Unlike *Turcotte v. Lewis*, there was no prior risk of violence, or risk of a violent confrontation or even a hint of any of that. The potential in the present case of harm from some unknown cause was not reasonably foreseeable. See *Turcotte* at paragraphs 58 and 59.

15 I agree with the factum of the defendant Star Security's submissions at paragraph 58 through 60 where they indicated:

20 58. It is important to note that in the within action, the plaintiffs cannot prove what the action was that had caused the injury. They have not advanced any evidence or put forward any credible theory as to who or what caused the injury. They can only offer guesses or conjecture.

25 59. A guard, acting reasonably could not have foreseen the incident. The moving defendant's guards were following directions and orders and were never notified of any issues. In fact, the evidence is that they were looking out for the concert goers.

30 60. The plaintiff's injury in this case, although unfortunate, was not foreseeable from the moving defendant's perspective and the action should be dismissed against the moving defendant in keeping with the principles set out in the caselaw cited above.

I agree with those comments.

**STANDARD OF CARE**

In *Ryan v. Victoria (City)*, [1999] 1 SCR 201, the Supreme Court of Canada held at paragraph 28:

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

There is insufficient evidence, in my opinion, that the defendants created an objectively unreasonable risk of harm. The evidence of the security guards, and the video confirms it, shows a number of security guards carefully monitoring the crowd. The moving party's factum notes that 15 security guards were placed at various positions. A number of them can be seen on the video. The security to patron ratio was 1:67 which exceeds the industry standards of 1 to 100. See article XLI, reproduced at page 83 of the moving party's factum.

The plaintiff made a number of submissions that the security guards should have been better trained or engaged in different and better procedures. The

5 plaintiff says that there should have been pat downs and weapons checks. The plaintiff says that the security guards should not have moved the plaintiff and argues that better procedures should have been implemented and outlines a number of those at paragraph 65 of its factum. However, there is no evidence that any of alleged defects contributed to the plaintiff's injuries in any way at all. There is no medical evidence that indicates that security, by moving the plaintiff, injured the plaintiff or acerbated his injuries.

#### OCCUPIER'S LIABILITY

15 I agree simply that the plaintiff has not proven the standard of care and has not proven the existence of a specific hazard which caused the incident and has not proven that the hazard arose as a result of a breach by the defendants. See *Waldick v. Malcolm* at paragraph 19.

20 The defendants had a number of security guards who were observing the crowd. The security guards saw the incident and within a minute or two were assisting the plaintiff. They, in retrospect, could have not moved the plaintiff, perhaps that would have been better, but there is no evidence that the moving of the plaintiff contributed to any of his injuries.

30 Occupiers are not insurers, liable for any and all damages suffered by persons on their premises. Their responsibility is only to take such care as in

all circumstances is reasonable.

**LIQUOR LICENCE ACT**

5 The evidence from the plaintiff Tod is that he was not intoxicated. See page 74 of his transcript. He also testified that there was no reason why he should not have been admitted to the concert. See page 74 of his transcript. He testified he bought two tall boys at the concert but only consumed half of the first tall boy. There is no evidence that the plaintiff was intoxicated upon attending the concert. Accordingly, there was no violation of the *Liquor Licence Act*.

15 **CONCLUSION**

The plaintiff has failed to prove its case regarding negligence, occupier's liability and breach of the *Liquor Licence Act*. There is no genuine issue for trial.

20 Order to go:

25 Summary judgment is issued dismissing all claims against all defendants. Costs of the motion and the action are payable to the defendants.



31.  
Certificate

Form 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))

I, Janet Smith, certify that this document is a true and accurate transcript to the best of my skill and ability (and the quality of the copy of the recording and annotations therein) of the recording of Tod Webster v. Inneractive Security Services Inc. in the Superior Court of Justice at Hamilton, ON, taken from Recording No: 4799 608 20201029 094242 10 SKARICT.dcr which has been certified in Form 1, by Fiona McPherson.

November 15, 2020

Date

\_\_\_\_\_  
Signature of Authorized Person  
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