ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
WIESLAW GALKA	Howard R. Blitstein, for the Plaintiff
Plaintiff	
- and -	
PATRYK STANKIEWICZ and THE CITY OF TORONTO	Michael W. Czuma for the Defendant, Patryk Stankiewicz and E.A. Ayers, Q.C., and Robin A.F. Squires for the Defendant, City of Toronto
Defendants	
	HEARD: April 21-24, 27; December 21-23, 2009; written submissions January 18 and February 1, 2010

REASONS FOR JUDGMENT

Baltman J.

"Fundamentally the marksman aims at himself"[1]

INTRODUCTION

[1] One autumn day in 2000, Wieslaw Galka and his good friend Patryk Stankiewicz went out for a picnic lunch and a casual game of archery, on a range managed by the City of Toronto. No one could have predicted the day would end in tragedy. Midway through the afternoon, as part of a bizarre scheme to find lost arrows, Mr. Stankiewicz shot an arrow which pierced Mr. Galka's left eye and lodged itself into his brain. He has been left with grievous injuries, including partial deafness and blindness, drastically reduced mobility, and profound psychiatric needs.

[2] Mr. Galka has sued both Mr. Stankiewicz and the City, claiming over three million dollars in damages. He concedes that he bears significant blame for this disaster, but maintains that Mr. Stankiewicz was negligent in his use of a bow and arrow and the City was negligent in its operation of a public archery range. Both defendants deny any negligent behaviour but argue, in the alternative, that any negligence on their part was not the effective cause of Mr. Galka's losses. The issues, therefore, are:

1. Was Mr. Stankiewicz negligent in his use of the bow and arrow?

2. Was the City negligent in its operation of the archery range?

3. If the answer to question #1 or #2 is yes, did that negligence cause or materially contribute to Mr. Galka's injuries, and if so, to what degree?

4. What is the quantum of Mr. Galka's losses?

THE FACTS

[3] Except where indicated, the facts are largely undisputed.

Background

[4] At the time of this incident Mr. Galka was 45 years old, having emigrated from Poland 11 years earlier with a Masters degree in engineering. He was working as a plant manager at Assent, which manufactured plastic bottles. He was a valued and capable employee. Outside of work, he enjoyed fishing.

[5] In the early 1990s, Mr. Galka befriended Mr. Stankiewicz, a 21 year old man also originally from Poland. Mr. Stankiewicz's sister, who had recently started working at Assent, asked Mr. Galka to help her brother get a job at the

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[1] D.T. Suzuki (1870-1966)

company. Mr. Galka obliged and Mr. Stankiewicz soon started working at Assent as a packer. Mr. Galka took the young man under his wing and Mr. Stankiewicz soon became a maintenance mechanic. With Mr. Galka's encouragement, Mr. Stankiewicz enrolled at Ryerson University and in 1999, obtained an engineering degree. He then returned to work at Assent and eventually became Mr. Galka's roommate.

[6] By 2000, Mr. Stankiewicz had become a production manager at Assent, and was assigned to a new production facility that had just opened in Mississauga. The two men remained friends and roommates but did not spend much leisure time together other than fishing. Mr. Galka thought of himself as a father figure to Mr. Stankiewicz.

[7] Mr. Galka regularly bought his fishing gear at LeBaron, a sporting goods store in Mississauga. When there, he would often admire the hunting bows on display. Although he had no experience with bows and arrows, he was interested in the sport of archery because of the physical strength and concentration required.

[8] Sometime around the summer of 2000, Mr. Galka decided to purchase a hunting bow from LeBaron along with several aluminum arrows and some more expensive carbon arrows, the latter costing approximately $15.00 each. With no

outdoor location to use his newly purchased equipment, on a few occasions Mr. Galka practiced in a hallway at the production facility of Assent, either after hours or on the weekend when no one was there. He used folded cardboard boxes as a target. He locked the doors to the facility so no one could unexpectedly walk into the narrow hallway where he was shooting.

[9] Mr. Stankiewicz was also interested in Mr. Galka's new archery equipment and they often discussed the sport and the equipment. Mr. Stankiewicz took the bow and arrows to his plant and shot arrows against a wooden fence in a nearby empty hydro field.

[10] One day in the fall of 2000, Mr. Stankiewicz was reading an article in a local newspaper about an Olympic archer who practiced at a public archery range just south of the Ontario Science Centre near Don Mills and Eglinton, in Toronto. On Monday October 9, 2000 – the Thanksgiving holiday, and certainly a misnomer in this case – he and Mr. Galka decided to visit the archery range

[11] The two men packed the bow and arrows, a lunch and a portable barbeque and headed for the Science Centre. They parked their car behind the Centre, went down a set of stairs and along a grass pathway, and came upon the northwest entrance to the archery range.

The Archery Range

[12] The archery range at the E.T. Seton Park is the only public archery facility in Canada. It came into being in the late 1960s following an 800 person petition requesting that the City designate the unused field just south of the Science Centre on the west side of Don Mills Road as an archery range. The range is approximately 400 feet wide from north to south and 1000 feet long from west to east, i.e. more than two full size soccer fields. It is bordered at the east end by a forested area.

[13] From all accounts, the range has stayed the same since its inception, apart from the City's installation of a perimeter fence in 1987. The range was and continues to be set up in accordance with international archery standards of the Fédération Internationale de Tir à l'Arc ("FITA), with targets (known as "butts") set at distances of between 15 to 90 metres from the firing line. The range is maintained by city staff who cut the grass and remove litter on a weekly basis, and inspected by a supervisor regularly to ensure that that work is being completed properly.

[14] There is no formal supervision at the range. It is accessible to anyone, 24 hours a day, at no charge. At the time of this incident, there were two entrances to the archery range, and they were always open. One was located at the

southwest corner of the range and consisted of a single door opening into the chain link fence. Just inside this entrance was a posted sign (the “Rules Sign”) which read:

THIS IS A PUBLIC ARCHERY RANGE – ALL PERSONS MUST WITHOUT EXCEPTION OPERATE UNDER THE FOLLOWING RULES

1. All persons to be clear of range before shooting can commence
2. Arrows must be shot from designated shooting line only
3. Arrows must be aimed and released at Target (butts) only
4. Archers shall shoot arrows at the same time
   Archers shall retrieve arrows at the same time
5. Archers under 16 years of age must be accompanied by an adult at all times on the range
6. Target arrows only may be used on this range

PERSONS USING THIS RANGE DO SO AT THEIR OWN RISK

For information concerning instructors and club activities telephone the Metro Parks and Property Dept. for scheduled times of use 392-2531

NO DOGS ALLOWED

METRO BY-LAW 129-92

[15] The second entrance was located towards the northwest corner of the range and consisted of a double door entry through the fence. At the time of this incident, there was a sign attached to the fence just to the left of the entrance which stated “No Dogs Allowed”.

[16] Further to the left or north of this entrance and inside the fence, almost in the corner of the range, was another Rules Sign which was identical to the one reproduced above, but absent the reference to “No Dogs”.

[17] There were three additional signs spread along and just west of (behind) the shooting line which state “Shoot From Firing Line Only”.

[18] The targets, known as “butts”, are spaced out in pairs across the field at steadily increasing distances from the firing line, with butts “A”, at the south end, at a distance of 18 metres from the firing line, and butts “F”, at the north end, at a distance of 90 metres. The evidence regarding the distances laterally among the various butts was both sparse and unclear.

[19] Andy Swanenberg is the parks supervisor who testified for the City. He stated that outside of the signage there are no further safeguards in place to

ensure that participants conduct themselves safely on the range when shooting and retrieving arrows. Essentially, the City relies entirely on the signs to control behaviour on the range.

[20] The range is open to any member of the general public. Everyone from Canadian Olympic team members and their coaching staff, members of private archery clubs and experienced recreational archers, to novice archers and total beginners can use the range without restriction.

[21] The City provides no equipment other than the butts. Players bring their own bows and arrows to the range and retrieve them on their own.

[22] Since the range opened in 1968, this is the only known case where someone has been injured.

Events of October 9, 2000

[23] When the two men arrived at the northwest entrance to the range, Mr. Galka noticed the sign restricting access to dogs attached to the left side of the double door. He also noticed the sign saying “Shoot from Firing Line Only”. He did not notice any other signs at the range before he and Mr. Stankiewicz began shooting.

[24] Mr. Stankiewicz testified he recalled taking one or two trips to bring all of their gear down from the car into the range. They brought a barbeque, a basket of food, the bow and arrows, binoculars and a shooting glove, and set it all on the first picnic table to the right of the northwest entrance. He could not recall what signs he read upon arriving at the range.

[25] The two men began shooting at butts C and D, which were approximately 50-60 metres from the firing line. As they had only one bow between them, they took turns shooting at targets and then retrieving their arrows. While they hit the targets on some occasions, on others they missed. They also lost a few of the more expensive carbon arrows.

The Experiment

[26] After shooting for nearly two hours they stopped to eat lunch. During lunch they discussed the possible location of the missing arrows. Mr. Stankiewicz believed they were in the grass behind the butts but in front of the forested area, while Mr. Galka thought they were further back, possibly in the forest itself.

[27] At trial, Mr. Stankiewicz recalled that the two men came up with an experiment to find the arrows, whereby one of them would shoot an arrow over the top of the target while the other stood downrange near the line of fire to watch

where the arrow landed. Presumably, this missile would lead them to their lost arrows. Mr. Galka could not recall such a conversation when asked about it at trial, but did not deny that it took place.

[28] At some point during the lunch hour both men read the Rules Sign in the southwest corner of the range. By the time lunch ended they were the only players on the entire range.

[29] After lunch, Mr. Galka walked approximately 130 to 150 metres downrange, behind one of the targets at which the men had been shooting. Mr. Stankiewicz testified that Mr. Galka then stood 15-20 metres off to the side of butt “C” and parallel to the line of fire, to watch where the arrow landed. Mr. Stankiewicz yelled at Mr. Galka and raised his bow to signify that he was preparing to shoot in accordance with the plan. He saw Mr. Galka acknowledge him by waving back. He then proceeded to load the bow, aimed over the left butt of target “C”, and fired.

[30] Mr. Galka does not deny that this plan may have been agreed to, but has no recollection of discussing it with Mr. Stankiewicz. Mr. Galka testified that he was looking for arrows in the grass 10-20 metres off to the side of the target. He suddenly caught a glimpse of an arrow flying toward him in the air. The arrow entered his left eye and lodged itself in his brain, causing serious injury.

[31] Following a police investigation, Mr. Stankiewicz was charged with criminal negligence causing bodily harm. Part way through the preliminary inquiry the matter was adjourned. Mr. Stankiewicz subsequently pleaded guilty to unlawfully causing bodily harm under s. 269 of the *Criminal Code.*

Different Versions of Events

[32] In August 2001, approximately ten months after this incident, Mr. Galka gave a statement to a City investigator about the incident in which he alleged that Mr. Stankiewicz had intentionally fired an arrow at him. In the statement, Mr. Galka recalled that Mr. Stankiewicz had been jealous of him and was after his job. Mr. Galka gave similar statements about what happened to the police and to employees at the Toronto Rehabilitation facility.

[33] In his examination for discovery in April 2004, Mr. Galka gave essentially the same story as that contained in his earlier statements. He gave similar testimony at the preliminary hearing on the criminal matter. However, at trial Mr. Galka's

position was that the injury was most likely neither intentional nor the result of an experiment, but rather accidental; Mr. Stankiewicz simply continued to shoot after lunch, while Mr. Galka was looking for arrows, and Mr. Galka was struck by a stray arrow shot by Mr. Stankiewicz. He attributed his earlier accusations of malice on the part of Mr. Stankiewicz to his brain injury.

[34] I flatly reject the notion that Mr. Stankiewicz deliberately injured Mr. Galka. Mr. Galka was his mentor, friend and roommate. There is no evidence of friction between them, or even a suggestion that they had argued that day. It therefore makes no sense that Mr. Stankiewicz wished him harm. I recognize that Mr. Galka took that position for a long time after this event. But that must be seen in context; Mr. Galka woke up from this tragedy with severe brain damage, including distorted perception and impaired cognitive function. Moreover, once he realized how severe and permanent his injuries were, he was predictably angry and bitter. He turned on the most obvious culprit and levied the most serious accusation. In those circumstances, his after the fact analysis is not reliable.

[35] I find that the most likely scenario is that advanced by Mr. Stankiewicz, namely that this injury resulted from a regrettable experiment by him and Mr. Galka to retrieve lost arrows. I arrive at this conclusion for several reasons. First, Mr. Galka does not deny that this may have been the plan. Second, I found Mr.

Stankiewicz's testimony credible on this issue. He admitted to the experiment even though it is far more damning than an explanation based on a pure accident. Moreover, instead of blaming Mr. Galka for the idea, Mr. Stankiewicz testified in examination in chief that he had proposed the experiment to Mr. Galka:

> Q. …What do you do during lunch?
>
> A. We – we grilled the – the chicken that we had and – and we talked about shooting and then we talked about the missing arrows and – and **I suggested that we – we conduct this experiment** where, because we couldn't see the arrows from where we were shooting from, one of us would go back stand over to the side, clear of the line of fire, and tried to – tried to see the arrow and where it – where it – where it's going and the other person would stand back of the line and try to recreate exactly what happens when you miss the target with the arrow flying over the top of the target.
>
> Q. Okay, so was that done at some point?
>
> A. That was done after lunch.
>
> [emphasis added]

[36] Third, the experiment is consistent with both men's evidence that they spent considerable time over the lunch hour devising a means of tracing the lost arrows. They were anxious to recover those two arrows because they were made of carbon, a more expensive variety than the aluminum arrows they had been able to retrieve. However foolish the plan, it was thought out in advance:

Q. And however, as I understand your evidence, there were two carbon arrows that were still missing by the time of the lunch hour. Is that right?

A. Yes.

Q. And those were the ones that you were trying to find when you and Mr. Galka devised this scheme to trace the path of the arrow?

A. Yes.

Appreciation of the Risk

[37] As noted above, both men admitted they read the Rules Sign before or during lunch, before the incident occurred. They testified that they understood that the sign set out the rules for shooting at the range.

[38] In cross-examination, Mr. Galka stated he may not have fully understood everything on the sign because he was “reading quickly”. However, what is indisputable is that under either scenario – experiment or accident – Mr. Galka *knew* that Mr. Stankiewicz was shooting arrows into the vicinity of where he was standing, and that this was dangerous:

Q. […] but I think you said yesterday that Mr. Stankiewicz was firing arrows at a target while you were out looking for the lost arrows.

A. Yes.

Q. And that you would have been….

A. But I was….

Q. Sorry.

A. But I was far from that location and I thought that I am safe.

Q. You realized it could be dangerous, did you not, Mr. Galka?

A. I did realize, but I didn't realize that it could be so dangerous.

. . .

Q. And you've agreed with me that it would be dangerous for someone to stand in the vicinity of where these arrows are being fired?

A. Yes.

Q. Right. And Mister – Mr. Stankiewicz was a – a novice, so to speak, with respect to use of this bow. He'd only shot it a few times like you've testified to?

A. Yes.

Q. So it would make sense for no one to be out on this range when someone else is firing arrows at the targets?

A. That would be logical.

[39] He explained that he "took" the risk because he estimated "it wasn't so great". He also agreed that had he followed the posted rules, the injury would not have occurred.

[40] As for Mr. Stankiewicz, his evidence on this issue was contradictory. At one point, he stated that at the time of the incident he did not appreciate that he was violating a specific posted rule. However, during cross-examination by counsel for the City, he testified that he had read the rules before they ran the "experiment", and realized it was dangerous for Mr. Galka to stand in the vicinity of where an arrow might be fired. He further agreed that they had breached the rules by deliberately firing an arrow over the target while Mr. Galka was in the range ahead of him. And he conceded that had he followed the rules, the injury "probably" would not have occurred.

Expert Evidence about the Range

1. Dr. Marc Green

[41] Dr. Green is a human factors[2] expert who provided some evidence on behalf of the plaintiff that the posted rules are not followed. During a 45 minute period where he observed participants at the range, he concluded that no one was following two of the rules, namely that the range must be clear before

shooting can commence and that all participants must shoot and retrieve arrows at the same time. He witnessed participants routinely going into the range while others continued to shoot and saw no communication among participants to coordinate the shooting and retrieval of arrows. The photographs he took are consistent with his observations.

[42] Dr. Green testified that warning signs are at the bottom of the safety hierarchy. Although inexpensive, they are often the most ineffective safety measure, because they download the entire responsibility onto the user. According to him, it was predictable that people on this range would not obey the signs because they perceive a low risk of injury and a high cost of compliance (coordinated arrow retrieval amongst strangers, or in Mr. Galka's case, leaving behind expensive carbon arrows). Therefore, in his view, further safety measures should have been taken, the most feasible of which was some sort of supervision on site.

2. Dr. Don Donderi

[43] Dr. Donderi, also a human factors expert, testified on behalf of the City. He did not visit the site but instead sent an employee to take photographs. He expressed the view that signs are generally effective in altering human

[2] Human factors is a discipline which examines, amongst other things, how individuals interact with their

behaviour. However, signs are not perfect; to be effective, they must be complied with. In this case the sign which both men admitted seeing (in the southwest corner of the range) was legible, comprehensible, and appropriately placed. From Dr. Donderi's perspective, the problem was not the sign, but their decision not to comply with it.

[44] Dr. Donderi agreed that the sign in the northwest corner of the range was, at the time of this incident, too far from the gate to be useful. That sign has since been relocated so that it is visible upon entry at the northwest gate.

[45] Dr. Donderi also agreed that in the photographs taken by Dr. Green it appeared that archers were disobeying the rules by shooting arrows while others were retrieving. He noted, however, that none of the individuals retrieving arrows appeared to be standing downrange from the shooter, but rather were moving laterally down the field at some distance from the line of fire.

3. Ms. Joan McDonald

[46] Ms. McDonald has been involved in the sport of archery either as a competitor or a coach for over 40 years. She is currently the coach of Canada's Olympic archery team and has held that position for approximately ten years. For more than the past 20 years she has held senior ranking positions with the

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physical environment.

Federation of Canadian Archers (FCA), the governing body of archery in Canada. Both as a competitor and a coach, she has travelled to archery facilities all over the world. She is very familiar with the Seton facility that is the subject of this action, as she regularly coaches athletes training for the Olympics or Pan American Games at the site. She is at the range three days per week, four hours per day, from the spring to the fall seasons, shooting arrows or training her team members. Her expertise in archery and familiarity with archery facilities and safety issues is extensive, and was unchallenged at trial.

[47] Ms. McDonald testified that the Seton range easily complies with international standards for practice ranges designed for outdoor target shooting. In all her years she has never heard of any other accident at this range. In her view, the range is one of the safest she has seen in her travels due to its configuration and design: it is completely fenced in, which makes it safe because the fencing forces non-archers to walk around the range instead of traversing behind the target butts; it contains high banks to the east and the north, and a berm on the west side, which makes the range almost invisible to people walking through the nearby park or travelling down Don Mills Road. Since people and, in particular, children and teenagers cannot see the range, they are not tempted to jump the fence and walk onto the range. It also contains a large open area behind the targets such that users can easily locate arrows shot beyond the

butts. Finally, the range is much larger than most and the targets are spread far apart laterally, leaving ample space for safe shooting. In her view, there is nothing more the City should have done to make it safe.

[48] The range is of enormous importance to competitive and recreational archery in the Greater Toronto Area. The Canadian Olympic team can have as many as 12 members, half of which typically come from the Toronto area and train almost exclusively at this range. Many Pan American champions train there as well. The range allows for local athletes to develop their skills because it is centrally located within a large population base and easily accessible by public transportation. And because it is open every day, and used for three of the four seasons, archers can work practices in around their work and school schedules.

[49] Ms. McDonald testified that in general, archery is a safe sport. Other practice facilities similar to this range exist in Canada and internationally, and contain similar signage. She is not aware of any other accidents occurring on a target range. Some of them may have supervision for particular events but not, as a general rule, for public usage. In her view, the posted rules at the Seton range are sufficient safety measures: “The posted rules cannot be missed, and they really amount to nothing more than a reduction of common sense to writing.”

[50] However, she conceded that people do violate the rules on occasion, which is why she and her archers will intervene and "self-police" where required. In particular, they occasionally find archers going down range to retrieve arrows from one butt while people are shooting at other butts nearby. She estimated that every few weeks, on average, one of them may intervene to warn participants against such a practice. That said, she emphasized that she has never seen anyone attempt to retrieve arrows from behind the identical butt toward which another archer is aiming. Nor had she ever heard of the kind of experiment deployed here:

> Q. For the purpose of my next question, I want you to assume that there are two archers on the range alone, and one of them walks 130 to 150 metres away from the firing line and stands 10 to 20 metres south of the target, with the goal that an archer, who's a novice, will fire over the target so that the archer down range can see where the arrow goes. In your years have you ever heard of anything like that happening?
>
> A. No. It's…
>
> Q. Have you ever seen it happening?
>
> A. No, I haven't. I'm glad I haven't.

[51] Moreover, according to Ms. McDonald, the people who break the rules are most often experienced archers, not novices. This was confirmed when she reviewed the photos taken by Dr. Green, and identified most of the players, by name, as experienced athletes whom she knows personally. Several of them are

Olympic calibre or competitive level archers. She explained that they tend to make individual assessments of risk about shooting when someone is technically in violation the rules, whereas inexperienced archers tend to follow the rules more strictly. In her view, none of the situations captured in Dr. Green's photos posed a safety risk to anyone on the range.

[52] In cross-examination Ms. McDonald acknowledged that the need for supervision on a range was as one of the topics discussed at the 2002 annual meeting of the FCA High Performance Committee, which she attended. The minutes of that meeting refer to a Junior World Archery competition in Czechoslovakia, and contain a report from the Canadian team captain, Mr. Bob Tataryn, which includes the following comment:

> We found it strange that the practice range was not under any supervision. Archers were at the butts pulling arrows with other archer [sic] at the line shooting at butts one or two over. Finally, an organising committee member was out on the day before official practice to oversee the shooting for safety.

[53] However, Ms. McDonald did not recall being concerned about supervision at this competition. In her report as the "Team Leader – Coach" to the same committee she reported that "the tournament was well run with excellent facilities", although it was delayed by poor weather. She observed that the Canadian team "was a delight …their focus on the job was excellent. We simply

had no problems". Nowhere in her report did she identify any safety concerns. I note as well that this was a junior championship, presumably requiring more supervision than the norm.

4. My assessment of the Experts

[54] In this case Dr. Green and Dr. Donderi provided limited assistance to the court. While I found Dr. Green to be a sincere and well qualified individual, as I explain further below he failed to squarely address the unusual experiment devised by the two men, and therefore the extent to which it might have strayed well beyond any reasonably predictable behaviour - even accepting that the rules are sometimes breached.

[55] As for Dr. Donderi, I found it troubling that he did not even bother to view the site in person[3], particularly as his office is in Toronto. While in some cases photographs may suffice, in this case, where so much of the dispute concerns the physical layout and use of the site, that omission is puzzling. He also appeared to misapprehend the role of an expert witness, having a tendency to offer unsolicited testimony of questionable relevance.

[3] Although Dr. Donderi prepared his report in March 2009, when the range was inactive due to winter conditions, he did not testify until December 2009, and therefore had the intervening summer to view the range in full use.

[56] Ms. McDonald, on the other hand, proved to be an extremely impressive witness. Aside from the obvious advantage of her deep familiarity with the sport of archery, and her intimate knowledge of this range in particular, I found her testimony to be fair and frank. I recognize she has a stake, both personally and professionally, in the outcome of this case, and therefore cannot approach it from a completely neutral vantage point: if the City is found liable, and discontinues the range as a result, her archers may lose their practice venue and their hopes for Olympic victory.

[57] To her credit, Ms. McDonald acknowledged that conflict to some degree during cross-examination, when she was being questioned about a report she received from Kathleen Miller, the Executive Director of the FCA, which supported the City's position in this lawsuit. After Ms. McDonald agreed she had passed the report onto the City's lawyers on this case, the following exchange occurred with plaintiff's counsel:

> Q. Okay. And did you do that in your role as a retained expert in the case, or as your role as an avid user of the archery range?
>
> A. I – I guess as a retained expert.
>
> Q. Are you sure?
>
> A. Yes.

> Q. I suggest to you that the reason you gave the City's lawyers Kathleen Millar's report was in your role as an advocate for the range to do everything that you could do in your power to make sure that nothing happens to this range that you and your fellow competitive archers enjoy on a regular basis?
>
> A. I imagine…
>
> Q. Isn't that the reason?
>
> A. I think it's probably both.

[58] That response is consistent with the impression Ms. McDonald conveyed throughout her testimony, namely someone who passionately promotes the sport but also seeks to have it conducted responsibly. I accept that she sincerely believes this case involves a bizarre experiment and is not indicative of what one would expect to see at the range. As I explain further below, I find her reasoning persuasive.

Evidentiary ruling at trial

[59] Toward the end of his case the plaintiff sought to introduce a briefing note prepared by a City employee on December 7, 2007 as a business record, for the truth of its contents. Although I did not review the report I was told it concerned the use of crossbows on the range as well general safety concerns about the range. The plaintiff argued the report was relevant because it touched upon remedial steps that could be taken to address safety concerns on the range.

[60] The City objected to the admission of the note, arguing that it was not made in the ordinary and usual course of business and that in any case no remedial changes were ever made as a result. After hearing argument I ruled the report inadmissible, with reasons to follow. These are my reasons.

[61] The document appears to be an internal report from an employee in the Parks, Forestry & Recreation department of the City. However, there is no indication who authored the report, his or her seniority, or to whom it was delivered, and thus it is difficult to determine whether the maker was acting in the usual and ordinary course of business. More importantly, the document is essentially double hearsay: the writer is reporting on the opinions s/he has obtained from third parties. Neither the writer nor his sources are available for cross-examination. It would be impossible by reviewing the report alone to ascertain the qualifications or reliability of the writer or his sources, and therefore dangerous to accept those comments for the truth of their contents.

[62] Moreover, the report was prepared long after this incident occurred, and therefore cannot shed light on what the City knew or should have known at that time. And while it apparently refers to possible remedial measures, there is no evidence any were taken here.

[63] For all those reasons I declined to admit the report in evidence.

ANALYSIS

Negligence

1. Contributory Negligence

[64] Mr. Galka concedes he is at least partly to blame for his losses. He proposes that he should bear one third of the liability, with each defendant carrying another third. I shall determine Mr. Galka's respective share below.

2. Against Stankiewicz

[65] Neither counsel nor I have been able to locate any jurisprudence dealing specifically with archery ranges. However, an analogy can be drawn with comparable activities. Courts recognize that a duty of care exists between participants in a sport where one player is positioned in an area where the other play may be directing a projectile. In *Pope v. RGC Management Inc.,* 2002 ABQB 823, where the participants were golfers, the court found at para. 26 that a "duty of care existed if the Defendant was aware or ought to have been aware that the Plaintiff was forward of the Defendant's position and between the Defendant and the golf green", in other words, within the golf ball's potential path. See also *Ratcliffe v. Whitehead,* [1933] M.J. No. 49 (Man.K.B.), at paras. 4-6 and *Finnie v. Ropponen,* [1987] B.C.J. No. 448, at paras. 13-14.

[66] In this case Mr. Stankiewicz initiated a plan that put Mr. Galka directly in harm's way. He agreed to fire an arrow in the general direction of where Mr. Galka was standing; he knew Mr. Galka was standing downrange near the line of fire in order to track the arrow and see where it landed, and therefore was in the vicinity of the oncoming arrow. By firing the arrow in these circumstances he created an unreasonable risk of harm. I have no hesitation, therefore, in finding him negligent.

[67] Mr. Stankiewicz relies on the defence of *volenti non fit injuria,* "to a willing person no injury is done." Unfortunately for the defendant, the scope of the *volenti* defence has been drastically reduced by the Supreme Court of Canada's decision in *Dube v. Labar*, [1986] 1 S.C.R. 649, where Estey J. held at p. 658 that:

> [V]*olenti* will arise only where the circumstances are such that it is clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant's part. The acceptance of risk may be express or may arise by necessary implication from the conduct of the parties, but it will arise, in cases such as the present, only where there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to.

[68] As articulated by Wilson J. in *Crocker v. Sundance Northwest Resorts Ltd.,* [1988] 1 S.C.R. 1186, at p. 1202, the *volenti* defence only applies in

situations where the plaintiff has assumed both the physical and the legal risk involved in the activity. Thus, for the defence to apply in this case, I would have to find that the plaintiff willingly assumed the physical risks of the plan to recover the lost arrows, and that he also waived all rights of recovery from the defendant should those risks result in injuries.

[69] Even if I were persuaded that by agreeing to the scheme to find lost arrows Mr. Galka assumed the physical risks therein, that agreement cannot be viewed as constituting a waiver of his legal rights. Nothing about his conduct suggests he abandoned any expectation that the defendant would take due care for his safety. The defence thus fails.

[70] That said, as noted above, Mr. Galka agrees he is contributorily negligent. I will assess Mr. Stankiewicz's respective share below.

3. Against the City

[71] The parties agree that the City has a duty pursuant to the *Occupiers Liability Act*[4] to take reasonable care in its operation of the range, pursuant to s. 3 thereof:

[4] Subsection (4) relieves an occupier of "risks willingly assumed" by the user, essentially codifying the *volenti* defence. The City did not rely upon this provision in its submissions.

> 3. (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
>
> (2) The duty of care provided for in subsection (1) applies whether the danger is caused by the conditions of the premises or by an activity carried on on the premises.

[72] The decision of the Ontario Court of Appeal in *Waldick v. Malcolm* (1989), 70 O.R. (2d) 717, aff'd [1991] 83 D.L.R. (4th) 114 (S.C.C.) is the leading case relating to an occupier's duty of care. The Court emphasized what constitutes reasonable care will turn on the specific facts of each case, at p. 723:

> All courts have agreed that the section imposes on occupiers an affirmative duty to make their premises reasonably safe to protect others from foreseeable harm…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."

[73] Applied to this case, the plaintiff's argument (although not precisely stated in this fashion) appears to be along the following lines: The City's own expert, Ms. McDonald, has acknowledged that users of the range regularly violate the rules. Other evidence confirms that archers commonly shoot while other players are on the field retrieving arrows. This is precisely what the signs prohibit. The City has done nothing to stop this. Therefore the City has known (or should have known) for some time that the safety rules were being violated and should have foreseen that a player would, as a result, be hit by a stray arrow.

[74] While that argument has some superficial appeal, in my view it does not bear up under closer scrutiny. This case involved a deliberate choice by two adults to take matters into their own hands, regardless of the obvious risks. Both men admitted reading the warning sign before this incident occurred. The sign was obvious, legible, concise, and understandable. Galka admitted that being downrange from a person shooting arrows was dangerous, but he embarked upon the experiment nonetheless.

[75] Ms. McDonald acknowledged that on occasion archers shoot arrows toward a particular butt while others are retrieving arrows from adjacent lateral butts. That is not this case. Here Mr. Galka deliberately placed himself within range of the very butt over which Mr. Stankiewicz was aiming. Moreover, he did so *knowing* that Mr. Stankiewicz was firing in that direction; indeed, that was the reason Mr. Galka was out there – to watch where the arrow landed. My sole task, *vis a vis* the City, is to determine whether it was negligent in failing to foresee and prevent this particular incident. While Ms. McDonald admitted seeing archers shooting while players at adjacent butts were on the field, she never witnessed – or heard of – archers shooting while another archer was down range of the very same butt. The reason for that is likely because the danger is so obvious that no right thinking person would attempt it.

[76] To the extent there is any parallel between the scenario regularly observed by McDonald and what actually occurred in this case, namely that in both cases the player in the field was approximately 20 metres laterally from the target at which another archer was aiming, the key difference in this case is that the shooter was a complete amateur, to Mr. Galka's knowledge. I find it was reckless of Mr. Galka to place himself even near the line of fire of someone whom he knew had no training or experience.

[77] On behalf of the plaintiff, Dr. Green emphasized that it was unreasonable for the City to expect players to follow the rules, given two factors. The first is the "low perception of risk", i.e. most people do not perceive archery to be a dangerous sport, and therefore won't take any warnings very seriously. The second factor is the "high cost of compliance", namely that it is impractical to expect a bunch of strangers spread out on a range to coordinate their behaviour to the point where no one fires arrows while other players are retrieving arrows from the range. It would use up too much playing time and thus prove too frustrating.

[78] Dr. Green may be correct in saying that people generally do not perceive that archery can be dangerous, although he provided no specific evidence on that point. However, I would be surprised if the average person - even faced with

the possibility of losing costly sporting equipment - did not view the particular experiment embarked upon here as dangerous. As for the high cost of compliance, that has no relevance here, because this scheme did not require cooperation from other users of the range that day; Mr. Galka and Mr. Stankiewicz were the only two players on the range when this occurred, and therefore they had only each other to consider. Moreover, they were not strangers having to negotiate, but friends who were playing together and jointly attempting to retrieve lost arrows. The cost of compliance was zero.

[79] I would add that my conclusion would be the same even if I had found that this was not an “experiment” but rather an “accident”, i.e. that Mr. Galka was simply searching for arrows while Mr. Stankiewicz was shooting, and not watching the flight path of any oncoming arrows. That is because in either case Mr. Galka knowingly put himself in the path of or dangerously close to oncoming arrows. Mr. Galka’s case, at its highest, is that he was looking for arrows downrange and 10-20 metres laterally of the very butt over which Mr. Stankiewicz was aiming. It is one thing for a player to retrieve arrows from the area around a lateral butt; it is another thing entirely to be searching for arrows in such proximity to the very butt over which a novice archer is shooting. In these unique circumstances, the City should not have to compensate for their folly.

[80] It is true that archery, by its very nature, can be hazardous and cause potentially catastrophic injuries, as this case makes clear. But so can golf, swimming and numerous other activities, where courts have declined to impose liability on the occupier upon finding the plaintiff was responsible for his own demise or the occurrence itself was simply unforeseeable. The governing principle was articulated by the Ontario Court of Appeal in *Alchimowicz v. Schram*, [1999] O.J. No. 115:

> [The City of] Windsor was only required to exercise care against dangers that were sufficiently probable to be included in the category of contingencies normally to be foreseen. In our view, an adult diving off the dock at night into shallow water was not one of these contingencies. To exact a standard as suggested by the appellant would effectively make Windsor an insurer against all possible risks. The law imposes no such duty. [citations omitted]

[81] Similarly, in *Doyle v. Petrolia (Town)* (2005), 200 O.A.C. 271, the Court of Appeal overturned the trial judge's finding of negligence against the Town of Petrolia, on the basis that the occurrence was not "sufficiently probable to be included in the category of contingencies normally to be foreseen by the Town, as required by the test in *Alchimowicz"*: at para. 14

[82] In this case, in the same vein, I conclude that the incident in question was so unpredictable that the City could not have been expected to foresee or prevent it.

4. Apportionment of Liability

[83] That leaves Mr. Galka and Mr. Stankiewicz as the responsible parties. The issue then is how to apportion liability. As Mr. Stankiewicz proposed the experiment, and shot the offending arrow, it is tempting to place the majority of responsibility on his shoulders. However, other factors point to Mr. Galka: he was the older of the two and Mr. Stankiewicz's mentor; the equipment belonged to him, and therefore it was for his benefit that they were attempting to recover the lost arrows when this occurred; and whether the incident was an experiment (as I have found) or an accident (as Mr. Galka asserts), in either case he knowingly placed himself in the vicinity of an oncoming arrow.

[84] In my view, those competing factors roughly balance each other out, and I therefore determine that each party should bear 50% liability.

A. Causation

[85] In case I am wrong in my conclusion that the City bears no liability, I will also address the issue of causation.

[86] The parties agree the applicable test 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: *Resurfice Corp. v. Hanke,* [2007] 1 S.C.R. 333, at paras. 19-24. The “but for” test is intended to ensure that a plaintiff will receive compensation for negligent conduct only where a substantial connection exists between the injury and the defendant’s conduct. Where the plaintiff’s injuries may well be due to other factors that are not connected to the defendant, no liability will be found.

[87] Dr. Green speculated that supervision at the range would have prevented this incident. However, given my finding that the incident was a deliberate scheme to find lost arrows, I disagree. The evidence indicates that the arrow that struck Mr. Galka was the first and only arrow shot by Mr. Stankiewicz as part of the experiment. As there were no previous attempts to trace the missing arrow in this fashion, there would have been no opportunity for any supervisor to appreciate the danger of this action in time to intervene. Even if, as Mr. Galka maintains, it was not an experiment but an accident, a supervisor would only have observed Mr. Galka looking for arrows and could not have known what was about to occur until it was too late.

[88] Mr. Galka submits that the mere presence of a supervisor might have acted as a visual deterrent. While arguable, that assertion is speculative given the overconfident attitude that both men displayed on this outing.

[89] I therefore conclude the plaintiff has failed to establish that any alleged negligence by the City effectively caused his losses.

B. Damages

1. General Damages

[90] The arrow which entered Mr. Galka's left eye shot through his brain and came to rest against the back of his skull. He was taken from the range to the Sunnybrook Hospital and then immediately into the operating room, where the arrow was removed under general anaesthesia. After one month in hospital he was transferred to the Toronto Rehabilitation Institute, where he remained until the end of March 2001. He underwent intense and prolonged physiotherapy, and graduated from being bedridden to a wheelchair and then a walker. He currently uses a cane for mobility. His gait is uneven and he has limited control of his previously dominant right hand. Because he cannot eat, write or groom himself with his right hand he has learned to become left handed.

[91] According to Dr. Seyone, Mr. Galka's treating neuropsychiatrist, he sustained a severe brain injury. His major problems are deafness in his right ear, minimal vision in his left eye, reduced cognitive function and poor mobility. He has also been diagnosed with profound depression, which has manifested itself in persistent feelings of helplessness, regular panic attacks, and suicidal ideation. He relies on numerous medications to control his symptoms.

[92] Mr. Galka is now 54 years old. He is divorced (from before this incident), and his former wife and two grown children live in Poland. He lives by himself in subsidized housing in Mississauga and now survives through a combination of CPP and ODSP benefits. He is competitively unemployable and spends much of his time watching TV or using the Internet.

[93] Given the severity and permanence of his injuries, I would assess general damages at $225,000.

2. Lost Income

[94] In 1999, the year preceding the accident, Mr. Galka earned $53,048, plus benefits which included health and dental insurance with 100% of the premium paid by his employer. The undisputed evidence is that but for the accident, he would have continued to work at a comparable level until at least age 65. His

former employer, Assent, dissolved in 2005. However, given the strong evidence from his employer regarding his capabilities and work ethic, I am satisfied he would have found comparable work to at least age 65. On that basis, his past and future income losses ring in at $1,202,026. In an alternative scenario, if one accepts that he may have been underpaid at Assent compared to the average wages of male workers with university degrees, his losses come in at $1,665,011.

[95] In this case I am satisfied that at the time of this incident he was earning a relatively modest income for his skills and experience, and therefore place his loss near the higher end, at $1,500,000.

3. Future Care

[96] Gail Liffshiz, an occupational therapist and certified life care planner, testified regarding the goods and services Mr. Galka will require over the rest of his lifetime to cope with his physical, cognitive and psychosocial limitations. All of her recommendations are based on what she viewed as reasonable medical possibilities. Their cost has been estimated at $1,087,342 before a gross up for income taxes, and at $1,273,109 with the tax gross up included.

[97] Dr. Seyone reviewed the recommendations for future care needs set out in Ms. Liffshiz' report and either agreed with them or deferred to her on those outside of his area of expertise. Neither defendant called any evidence in response to these recommendations.

[98] Ms. Liffshiz' recommendations include ongoing assessments and support from an occupational therapist, a rehabilitation support worker (RSW), a personal support worker (PSW), and a housekeeper. In cross-examination the City challenged Ms. Liffshiz as to whether there was overlap among those recommendations. I am satisfied there is none of any significance. This is a difficult case involving complex injuries. For example, because of his combined physical and emotional difficulties, Mr. Galka is currently very isolated, and barely participates in any community activities. I agree with the plaintiff that a PSW does not have the training or skills to develop and implement a community integration plan, whereas an RSW does. Similarly, while a PSW can help with his activities of daily living and light housekeeping around the apartment, she would not typically perform heavy cleaning.

[99] That said, I accept that the proposal from Ms. Liffshiz, while based on reasonable medical possibilities, provides for the "Cadillac" of future care. It also does not adequately take into account certain future contingencies, such as his

age and whether his sensitivity to light and sound may preclude some of the future care activities. I would therefore apply a 15% deduction for contingencies to her estimated cost of future care.

CONCLUSION

[100] I conclude as follows:

1. Mr. Stankiewicz was negligent in his use of the bow and arrow.

2. The City was not negligent in its operation of the archery range.

3. Liability between Mr. Galka and Mr. Stankiewicz should be apportioned on a 50/50 basis.

4. Mr. Galka's damages are as delineated in paras. 91-100 above.

[101] Mr. Galka is entitled to prejudgment interest. Given the unusual circumstances of the case I am hopeful the parties can resolve costs on a consensual basis. If not, I may be consulted.

_____

Baltman J.

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

WIESLAW GALKA

Plaintiff

- and –

PATRYK STANKIEWICZ and THE CITY OF TORONTO

Defendants

REASONS FOR JUDGMENT

Baltman J.

Released: May 17, 2010