

Court of Queen's Bench of Alberta

Citation: McAllister v Calgary (City), 2018 ABQB 480

Date: 20180619
Docket: 0701 07017
Registry: Calgary

Between:

Kyle Lyndon McAllister

Plaintiff

- and -

The City of Calgary

Defendant

**Reasons for Judgment
of the
Honourable Madam Justice J.C. Kubik**

Introduction

[1] The City of Calgary (the “City”) is a municipality located in the Province of Alberta and is a corporation pursuant to the *Municipal Government Act*, RSA 2000, c M-26. Calgary Transit is a public transit service which is owned and operated by the City. Calgary Transit operates a light rail transit system known as the C-Train or LRT system.

[2] In the early hours of January 1, 2007 the Plaintiff, Kyle McAllister (“Kyle”) was assaulted on the Plus 15 connecting the Canyon Meadows C-Train Station parkade to the Canyon Meadows C-Train Station.

[3] Kyle sues the City for damages he suffered as a result of the assault. The trial of this matter was with respect to liability only. Kyle alleges that the City was an occupier of the premises in question and as such owed him the duty of care prescribed under section 5 of the *Occupiers’ Liability Act*, RSA 2000 c O-4, to ensure he was reasonably safe in his use of the premises. It is alleged that due to insufficient lighting, cameras, peace officers, surveillance video monitoring personnel, and the absence of a trespass ban or special events policy the City failed to meet the duty and standard of care owed, resulting in or contributing to the severity of the assault and injuries suffered. Two of his assailants, A.B. and D.L., though criminally convicted were neither sued by Kyle nor by a third party action by the City.

[4] The City argues that it is not an occupier of the Plus 15. It put forward a number of arguments including that the Plus 15 was a highway or recreational trail exempt from the application of the *Occupiers’ Liability Act*. It also argued that it cannot exert the level of control over the Plus 15 required to give it “occupier” status under the Act. This argument is premised on the notion that the Plus 15 is not only a conduit from the Canyon Meadows C-Train Station parkade to the station itself, but also allows for the passage of pedestrian traffic from the Lake Bonavista neighbourhood to the Canyon Meadows neighbourhood. As a result, the City contends that the definition of an occupier does not extend this far. This argument is coupled with one of foreseeability - that liability would not extend to a sudden, unprovoked and random attack of violence. In the alternative the City argues that if it is an occupier, giving rise to the statutory duty of care, the Plaintiff has failed to prove the standard of care of a municipal transit service in 2006 with respect to the issues of lighting, cameras, sufficiency of peace officers and other personnel, and the reasonableness and efficacy of a trespass ban or special events policy. Finally, the City argues that there is no causal connection between any breach that might have occurred and the Kyle’s injuries.

[5] Kyle bears the burden of proof on a balance of probabilities.

Issues

[6] The issues for the Court are as follows:

- **Issue one:** Was the City an “occupier” of the Plus 15 on January 1, 2007?
- **Issue two:** Was Kyle a “visitor” to those premises?
- **Issue three:** If the answer to both Issues One and Two is yes, giving rise to the duty of care owed pursuant to section 5 of the *Occupiers’ Liability Act*, then what was the standard of care to be met?
- **Issue four:** Was the duty of care breached?
- **Issue five:** If the duty of care was breached did the breach cause or contribute to Kyle’s injuries?

Credibility and reliability of trial witnesses

[7] The factual findings in the matter arise from certain facts agreed upon by the parties in advance of trial, exhibits tendered for the truth of their contents, other exhibits proven during trial, as well as the witness testimony of Kyle, Chelsea Cass (“Chelsea”), and the City’s corporate representative, Daniel Yontz (“Yontz”).

[8] Kyle was a candid, honest witness who related the circumstances of this traumatic event, which resulted in a loss of consciousness and closed head injury, in a straightforward manner. I had no concerns with respect to his credibility or reliability. He did not embellish or exaggerate his testimony and did not appear to have any difficulty in recollecting the events described. Further, his testimony of the events was corroborated by Chelsea’s evidence as well as the documentary evidence tendered.

[9] Chelsea’s testimony was generally consistent with that of Kyle in terms of the details of the events leading up to the assault, the location of the first encounter with A.B. and the end location of the assault. There were moments when her testimony was vague or she was unable to recall details. I did not form the impression that this was evasion on her part. I have considered her testimony in light of the fact that nearly 11 years had elapsed between the events in question and the date of trial, and the reasonable expectation that her memory faded with the passage of time.

[10] Yontz testified as the corporate representative of the City. I had the opportunity to both observe him as a witness and receive evidence through the read-ins from his Questioning for Discovery. In addition, I received the evidence of other City employees, adopted by the City through him. I have considered his evidence largely through the lens of his corporate representative status, and in the context of the corporation’s evidence as a whole. In assessing his testimony as to his personal observations (for example, whether New Year’s Eve was typically a busy evening), I have considered those observations in the entire context of all of the evidence of the City on this point. That is to say, I did not prefer his personal experience evidence, but rather weighed it, on the whole with the entirety of the City’s evidence. This element of weighing the evidence will be addressed more fully later in these reasons.

Issue one

[11] The *Occupiers’ Liability Act* defines “occupier” as:

- (i) a person who is in physical possession of premises, or
- (ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises.

[12] Yontz was cross-examined extensively on the issue of occupation and I accept his testimony in this regard. He testified that the City constructed the Canyon Meadows C-Train Station parkade, Plus 15, shelters, and station and that these facilities were built in their entirety as part of the same project. The City owns the entirety of the facilities and is wholly responsible for the repair and maintenance (including snow and ice removal) of the physical infrastructure of the parkade, Plus 15, and station. No other entity can modify the infrastructure. No one may use the infrastructure for a purpose not approved by the City, and the City controls the activities that

can take place on the Plus 15. Examples included controlling the presence of buskers, protestors, skateboarders, and businesses. He further testified that although the Plus 15 provides public access across McLeod Trail between the communities of Canyon Meadows and Lake Bonavista, it is used predominantly by C-Train passengers and that was the primary reason for its construction. Further, the Plus 15 is the only access to the Canyon Meadows C-Train Station from the Canyon Meadows parkade. Finally, the only way for the public to access the Canyon Meadows C-Train station is by incoming train or via the Plus 15 from either Canyon Meadows or Lake Bonavista.

[13] Prior to the incident, the City of Calgary had enacted Bylaw Number 4M81 (“Bylaw”), entitled “Being a Bylaw of the City of Calgary to Regulate and Control the Conduct of Passengers on Public Vehicles.” That Bylaw defined the terms “transit property” (any premises owned, used or occupied by the City for transit purposes) and “transit station” (any building or structure owned, used, or occupied by the City for transit purposes which is open to the public). These definitions are sufficiently broad to include the Plus 15 at the Canyon Meadows Station.

[14] The Bylaw listed a number of activities which are prohibited on any property owned or occupied by the City for the purposes of Calgary Transit, including:

- Disorderly behavior;
- Indecent or offensive behavior;
- Fighting; and
- Molesting or interfering with the comfort or convenience of any other person.

[15] The Bylaw also empowered transit officials, through their employees (Calgary Transit peace officers), to exercise control over persons on the premises and the activities that they are engaged in by granting them the ability to lay charges under the *Provincial Offences Procedures Act*, RSA 2000 c P-34.

[16] Further, Calgary Transit Peace Officers were trained to respond and deal with these behaviours. Calgary Transit surveillance video monitoring personnel were also trained to observe, react, and respond to these behaviours.

[17] All of this was for the purposes of meeting Calgary Transit’s mandate, which is to provide for the public security needs of Calgary Transit customers and employees by:

- Assisting the Calgary Police Service (“CPS”) in deterring criminal activity, arrest persons found committing a criminal offence on or in relation to Calgary Transit facilities, vehicles or property;
- Promoting public safety on Calgary Transit property, vehicles, and facilities; and
- Promoting positive customer and community relations.

[18] The breadth of the Bylaw establishes the responsibility the City took in relation to the public at large in its use of property owned or occupied by the City for the purposes of Calgary Transit.

[19] Accordingly, the evidence satisfies me that the City was in physical possession of the premises and therefor had responsibility for and control over the condition of the premises, the activities conducted on the premises, and the persons allowed to enter the premises. As a result, the City was an occupier of the Plus 15 on January 1, 2007.

[20] I reject the City's argument that the Plus 15 was a highway (or a sidewalk encapsulated in the term highway), public street or recreational trail and thereby exempt from the provisions of the *Occupiers' Liability Act*.

[21] There is no definition of the term "highway" in the *Occupiers' Liability Act*. The City relies on the definition contained in the *Traffic Safety Act*, RSA 2000 c T-6. A simple reading of the definition of "highway" in the *Traffic Safety Act* requires ordinary use of the thoroughfare for the passage or parking of vehicles. It is clear that the Plus 15 is neither a conduit for vehicular traffic nor can vehicles park on or adjacent to it. The reference to "sidewalk" as contained in that definition can neither be read separately from the entirety of the definition (as part of a highway adapted to the use of pedestrians, which the Plus 15 is not) nor read into the provisions of the *Occupiers' Liability Act* which exempt application of the statute to highways.

[22] With respect to the private street exemption, the definition of a private street by necessity excludes streets vested in a municipality. Although describing the Plus 15 as a street, in my view, would be stretching the definition of street, road, lane or track (as set out in s. 78 of the *Law of Property Act*, RSA 2000 c L-7) the fact is that the City owns the Plus 15 and its purpose is to provide public access to the Canyon Meadows C-Train Station and between the neighbouring communities of Canyon Meadows and Lake Bonavista. It is therefore not private.

[23] Finally, in relation to the recreational users exemption, that section of the Act only applies to specific types of premises (rural premises, golf courses, utility rights of way and recreational trails reasonable marked as such), none of which would capture the purpose and nature of the Plus 15.

Issue two

[24] The *Occupiers' Liability Act* defines a "visitor" as:

- (i) an entrant as of right;
- (ii) a person who is lawfully present on premises by virtue of an express or implied term of a contract;
- (iii) any other person whose presence on the premises is lawful; or
- (iv) a person whose presence on the premises becomes unlawful after the person's entry on those premises and who is taking reasonable steps to leave those premises.

[25] At the commencement of trial, the parties filed an Agreed Statement of Facts which set out the following facts relevant to Kyle's status as a visitor. Those facts are as follows:

1. On the night of December 31, 2006, Kyle was attending a New Years' Eve party in South Calgary. Chelsea was also attending this party.
2. While at the party, Kyle volunteered to drive Chelsea to pick up her fourteen year old brother, Nathan Cass ("Nathan") from the Canyon Meadows LRT located at in Southwest Calgary ("the LRT Station").

3. Kyle and Chelsea arrived at the parkade for the LRT Station on the east side of Macleod Trail South at approximately 1:30 a.m. AT 1:36 a.m., Kyle and Chelsea were walking across the Plus 15 pedestrian walkway (“the Plus 15”) towards the north entrance of the LRT station.
4. Kyle and Chelsea encountered A.B. near the west end of the Plus 15 near the stairs leading to the entrance of the LRT Station.

[26] During the course of the trial I also heard the testimony of Kyle and Chelsea and watched video surveillance footage evidencing the assault. The direct testimony of Kyle and Chelsea confirmed the reason for their attendance on the Plus 15 that evening. They each identified themselves on the video surveillance footage as they walked across the Plus 15 and were accosted by A.B. Both provided consistent evidence as to the time of the encounter, the initial location of the encounter with A.B. and the terminal location of the assault. I accept that Kyle was walking across the Canyon Meadows Plus 15 for the purpose of travelling to the Canyon Meadows C-Train Station to pick up Chelsea’s younger brother. As such he was a person whose presence on the premises was lawful and was therefore a visitor pursuant to the Act.

Issue three

[27] As a result of my findings above, the City owed Kyle the duty of care set out in s. 5 of the *Occupiers’ Liability Act*:

“An occupier of a premises owes a duty to every visitor on an occupier’s premises to take such care as in all the circumstances of the case was reasonable to see that the visitor was reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there.”

As prescribed by the Act, that duty of care extends to the condition of the premises, the activities on the premises and the conduct of third parties on the premises.

[28] The Alberta Court of Appeal has considered the duty of care in cases of occupiers’ liability in numerous cases. In *Preston v. Canadian Legion of British Empire Service League, Kingsway Branch No. 175, and The City of Edmonton* [1981] AJ No. 913 (QL), the Court held that the *Occupiers’ Liability Act* imposes an affirmative duty on occupiers to make the premises reasonably safe. Further, in *Lorenz v. Ed-Mon Developments Ltd.* (1991), 79 Alta LR (2d) 193 the Court noted that the correct question to consider in deciding whether an occupier has been negligent is whether it could reasonably foresee a risk to a visitor exercising ordinary diligence.

[29] I make the following factual findings as to the condition of, activities on and the conduct of the third parties on the premises on January 1, 2007:

1. The Canyon Meadows C-Train Station was equipped with 25 video surveillance cameras. Twelve were located in the parkade and 13 were focused on the platform, station, station exits and Plus 15. Two cameras were located in proximity to the location of the assault. The first, Camera 7, was located on the underside of a canopy affixed to a support structure or shelter on the Plus 15 and was positioned to provide video surveillance in a westerly direction on the Plus 15 walkway. The second, Camera 10 was located on the east side of the entrance doors of the Canyon Meadows

Station and was positioned to provide video surveillance of the landing immediately outside the entry doors to the station. It provided a primary view in a westerly direction across the landing and toward a handicap access ramp leading to the station.

2. The footage from all surveillance cameras in the Calgary Transit C-Train system (337 cameras) were fed to a central “Operations Control Room” located at Victoria Park Station. There, two employees were responsible for monitoring 42 display monitors. The images from the 13 cameras located at the Canyon Meadows C-Train Station (including Cameras 7 and 10) were displayed on two of the 42 display monitors. The images were displayed in a rotating sequence, changing every 3 to 4 seconds. Video monitoring personnel seated approximately 10 feet from the monitors were tasked with, amongst other things, constant and active surveillance of monitors to look for anything abnormal, or for Transit Bylaw infractions, requesting assistance from Protective Services Officers, EMS or Calgary Police Service, reporting crimes against the public or patrons, and communicating with Protective Services officers, EMS, Fire and Calgary Police Service when necessary.
3. The Plus 15 was illuminated by overhead lighting. There is no evidence as to the nature of the lighting in place or its illuminating power at January 1, 2007. Between 2005 and 2015 the lighting was changed to LED lighting. This may have been as a result of a system-wide infrastructure upgrade or in response to the recommendations contained in the 2009 InterVISTAS safety audit report.
4. Calgary Transit employed 46 Protective Services Officers to service the entire C-Train system. Those officers worked in teams on a specific rotating schedule. December 31, 2006 fell on a Sunday. The Alpha Team, consisting of 11 members was assigned to work shifts on Friday, December 29, 2006 and Saturday, December 30, 2006 from 6:00 p.m. to 3:15 a.m. On December 31, 2006 they were assigned to work a shift from 3:30 p.m. to 12:45 a.m. On December 31, 2006 the Alpha Team was one officer short. In addition to the Alpha Team, a Graveyard Shift of two officers worked on December 31, 2006 from 10:00 p.m. to 7:15 a.m. As a result, between 10:00 p.m. and 12:45 a.m., 12 officers were responsible for patrolling the entire Calgary Transit C-Train system and after 12:45 a.m. only two officers were left on duty. These shifts reflected typical Friday, Saturday and Sunday shifts. There was no modification made to the schedule in light of the fact that Sunday was New Year’s Eve. It was the responsibility of Protective Services Officers to patrol Calgary Transit facilities, vehicles and property, deal with unruly persons and groups, deal with intoxicated persons, report all criminal activity to the Calgary Police Service, assist the Calgary Police Service in deterring criminal activity, arrest persons found committing a criminal offence (indictable or summary conviction) or in relation to Calgary Transit facilities, vehicles and property and enforce the Transit Bylaw.
5. The City does not keep statistics as to general ridership numbers due to the existence of transit passes. No statistical evidence was available as to historic or typical New Year’s Eve ridership. Such statistics cannot be gathered due to the free fare evening. Calgary Transit provided free services on New Year’s Eve and had a campaign to

encourage transit ridership on that night. Yontz testified to the fact that New Year's Eve has always been a free fare evening and there was a well-publicized campaign to encourage people to not drink and drive and to use transit to go places. Yontz was adamant when cross examined at trial that based on his previous experiences working on New Year's Eve that it was not a "busy" night and that the trains ran a typical Sunday schedule that year despite it being New Year's Eve. His evidence was contradicted on both points. As to the busy nature of the evening there was contradictory evidence read in from the Questioning for discovery of other Calgary Transit employees and adopted by the City as its evidence. That testimony is equally binding on the City and was to the effect that New Year's Eve was one of the busier nights of the year or was a bit busier than other nights of the year. The video surveillance demonstrated that the trains were still running at 2:18 a.m., contradicting Yontz's testimony that the last train would have gone into storage for the evening at 1:30 a.m., the typical Sunday schedule. The video surveillance footage viewed also shows reasonably heavy foot traffic on the Plus 15 before and during the assault. I am satisfied that New Year's Eve was a busy ridership night as compared to a typical Sunday given that trains ran longer than typical hours to accommodate the ridership which was encouraged by the City.

6. Calgary Transit did not have a written "Special Events Policy" dealing with events of increased ridership although they did informally deploy a greater number of Protective Services Officers during Stampede, after hockey games and the like to deal with crowd control and intoxication.
7. Calgary Transit did prepare regular Transit Crime Reports. Those reports indicate that assaultive crimes had increased on a system-wide basis over the years 2003, 2004 and 2005. Crimes against the person committed at the Canyon Meadows premises had increased from 2 to 6 between December 2005 and December 2006. In 2006, crimes against the person represented 18.75% of all crimes committed at the Canyon Meadows premises. In 2006, the highest rate of criminal activity took place on the C-Train, between the hours of 11:00 p.m. and 2:00 a.m.
8. A.B. was known to Calgary Transit Protective Services Officers. On May 6, 2005 he climbed the chain link fence at the Anderson LRT station and fled from the officers. No criminal or bylaw charges were laid. On September 9, 2006 he was observed to strike another male at Sunnyside LRT station and then pushed one of the officers when he was advised he was under arrest. He was convicted on November 6, 2006 for unlawfully resisting a peace officer in the execution of his duties and was sentenced to 9 months' probation. On January 1, 2007 he was not under any release or probation conditions prohibiting or restricting his use of transit or presence in LRT stations.
9. Calgary Transit did not have a Banning Policy or Trespass Ban Policy in place on January 1, 2007.

[30] As previously noted, Kyle was assaulted on the Plus 15. Certain facts with respect to the assault were agreed upon by the parties. I also heard testimony as to the assault from Kyle and Chelsea, watched the video surveillance footage, and reviewed various exhibits both agreed upon by counsel and entered during the course of trial, some of them for the proof of the truth of their contents. I find the following facts with respect to the assault:

1. Kyle and Chelsea encountered A.B. near the west end of the Plus 15 near the stairs leading to the entrance of the LRT Station.
2. As Kyle and Chelsea approached A.B., A.B. confronted Kyle and pushed him. Kyle kept walking and tried to ignore A.B. Then A.B. pushed Kyle again and took a swing at him at which time Kyle started fighting back. Another male, eighteen year old D.L., a friend of A.B., stepped in and pulled Kyle away from A.B. D.L. then began punching the side of Kyle's head and Kyle ended up fighting both A.B. and D. L. During the fight, Kyle was knocked to the ground and he believes he lost consciousness. A.B. continued to punch and kick Kyle repeatedly in the head while he was on the ground.
3. Multiple other assailants attacked Kyle while he was on the ground.
4. The assault was sudden and unprovoked. Kyle was unknown to A.B. and D.L.
5. The initial encounter on the Plus 15 occurred at 1:39:56 a.m. The video recording ends at 1:59:58 a.m. Due to the poor quality and grainy nature of the video surveillance from Camera 7 it is difficult to tell when the attack ended. Camera 10 was not positioned so as to capture any portion of the assault. There were no other cameras which captured any portion of the assault. Approximately 6 minutes elapsed from the point of the initial encounter to Kyle falling to the ground and another approximate 15 minutes elapsed from the point he fell to the ground to the end of the tape. A melee of kicking around him appears to continue to the end of the tape. I am satisfied that the assault lasted for nearly 20 minutes.
6. The assault went unnoticed by video surveillance monitoring personnel. In fact, the assault did not come to the attention of Calgary Transit until reported to them by Kyle's father two days later.
7. At the time of the assault, the two on duty peace officers were attending to an incident at Southland Station, approximately 4 to 6 minutes away from the Canyon Meadows C-Train Station.
8. Constables Payne and Mair of Calgary Police Service arrived at approximately 2:00 a.m. in response to a 9-1-1 dispatch. They found Kyle at the west end of the Plus 15. They took a statement from Chelsea wherein she did not identify either of the assailants.
9. EMS arrived at 2:19 a.m. They transported Kyle to the Foothills Hospital head trauma unit where he remained for several hours.

10. Kyle suffered severe injuries as a result of the assault including: a severe concussion, broken orbital bones, and multiple fractures to his face. His cheeks and lower left lip were cut and required 40 stitches. His eye was badly bruised and several teeth were damaged.
11. After reviewing Calgary Transit security camera footage, peace officers with Calgary Transit identified A.B. and C.B. as potential assailants.
12. On January 10, 2007 Chelsea was interviewed by CPS officers and positively identified A.B. as one of the assailants along with D.L.
13. A.B. pleaded guilty as a youth to aggravated assault and was given a one-year sentence in open custody. D.L. pleaded guilty to simple assault and received a forty-five day closed custody sentence and six months' probation.

[31] In terms of the standard of care to be met by the City and Calgary Transit in discharging the common duty of care, each of the parties led expert evidence. The purpose of expert evidence is to assist the Court in areas outside the scope of a lay observer. I would note that a number of matters were within the scope of lay observation. Those include: the quality of video surveillance, the sufficiency of staffing, and in particular the sufficiency of staffing having regard to the City's own practices at the time of the event. To the extent that lay observations could be made, I have considered those in the context of the expert evidence.

[32] Kyle called Dr. Randall Atlas. Dr. Atlas was qualified to provide expert evidence on the following:

1. Security, Crime Prevention Through Environmental Design and situational crime prevention in relation to premise, including, but not limited to, as relates to the design and operation of public transportation and transit systems;
2. The standard of care to be employed in relation to the design and implementation of security systems and operations, including for premises and for public transit, and transportation systems, and including, but not limited to:
 - (i) Mechanical surveillance, including video and CCTV security;
 - (ii) Lighting analysis;
 - (iii) Staffing, scheduling, and operational plans, including special events;
 - (iv) Trespass and ban policies and practices; and
 - (v) Security risk and CPTED assessments.

[33] The City called Dr. Kelly Sundberg. Dr. Sundberg was qualified in criminology with a specialization in environmental criminology, including, but not limited to:

1. Crime reduction through design;
2. Criminological theory;
3. Canadian policing practices and staffing; and
4. Canadian security standards.

I accept and prefer the evidence of Dr. Atlas as to the standard of care for the simple reason that he provided an opinion which was grounded in the evidence presented and rested on hypotheticals which are consistent with the facts proven. Dr. Sundberg's opinion, on the other hand, was of limited assistance in reaching any conclusions in this matter, primarily, as it failed to address the conditions which existed at the time of the assault. His assessment of the station premises was conducted after the 2009 IntraVISTAS safety audit report had resulted in lighting and video surveillance modifications. He assumed the location of the assault only in relation to the initial attack, and he posited that it was a consensual fight, as opposed to a criminal event. Finally, his report only addressed the prevention of the assault and not the failure of the system to observe and respond to the event as it occurred.

[34] The theory Crime Prevention Through Environmental Design ("CPTED") is a concept which has been utilized since the 1970's in relation to security risk assessments and security mitigation strategies. The theory of CPTED is that proper design and effective use of the built environment (natural sightlines, access control and territoriality) in combination with other features (proper lighting, video surveillance, and the presence of security personnel) can effectively reduce incidents of criminal activity.

[35] Kyle argued that the standard of care to be employed by the City in the construction, design, and maintenance of its transit systems, including the Canyon Meadows C-Train station, was in accordance with CPTED principles. The City argued that CPTED was not an accepted Canadian standard, and even if employed by the City in 2009, in the IntraVISTAS Report did not reflect the standard of care in 2006.

[36] CPTED was recognized by the City as a standard for station design prior to January 1, 2007, as evidenced in the Hubbell Report prepared prior to April 2006. CPTED was utilized by the City in the February 2009 InterVISTAS safety audit conducted after the rape and murder of Arcelie Laoagan, to assess the overall sufficiency of the safety and security of Calgary Transit. The recommendations arising from that report, as they relate to issues of lighting, video surveillance and personnel have been implemented by the City. Given the City's own use of CPTED in review of transit practices predating Kyle's assault, and its acceptance of that standard in the 2009 safety audit, I am satisfied that CPTED principles, in combination with other features including lighting, video surveillance, and staffing, represent the standard of care to be employed by the City of Calgary in the design, maintenance, and staffing of its transit facilities, including the Canyon Meadows C-Train station.

[37] The fact that the City, in the initial construction of the station in 2001, installed lights, video surveillance equipment, and employed monitoring personnel and peace officers reflects their recognition of the duty of care owed to users and the need to deter, prevent, observe, and respond to crime.

[38] Based on CPTED principles, generally speaking, the Canyon Meadows C-Train station should have been designed, built, and maintained with sufficient lighting, video surveillance, staffing levels, and legal authority to deter and prevent crime, or allow its detection and an appropriate and timely response thereto.

[39] Even if the standard of care is less than what CPTED would demand, I am still satisfied that at a minimum the duty of care owed by the City would include the installation and maintenance of sufficient lighting, video surveillance, and staffing levels to deter crime or allow its detection and an appropriate and timely response thereto.

Issue four

[40] I find that the City failed to meet the standard of care of a municipality in providing a safe and secure transit environment, and therefore breached the duty of care owed to Kyle. In particular, I find that the Canyon Meadows Plus 15 had deficient video surveillance and lighting on January 1, 2007. The combination of these deficiencies resulted in an inability on the part of video surveillance operators to take notice of the assault and dispatch transit officers or CPS to the scene of the assault. In addition, the transit system as a whole was understaffed by peace officers on that date. I will deal with each of these breaches in turn. I do not find the failure to perform an earlier safety audit or the absence of a trespass ban or special events policy to be breaches of the duty and standard of care.

1. Video surveillance and lighting – having reviewed the video surveillance, and particularly that of Camera 7, it is apparent that the combination of camera placement, low light, and poor quality video made it impossible to readily observe the assault that occurred, despite its duration and the number of persons involved. Although, better camera placement, quality lighting and cameras may not have prevented the initial assault, it certainly would have allowed the observation of a violent assault lasting up to 20 minutes and involving multiple assailants.
2. Video monitoring system and personnel – The city employed an insufficient number of personnel to observe 42 monitors providing imagery from 332 cameras at rapid intervals. Combined with the poor quality of the video, the rapid change in images on small screens compounded the problem with detection of the assault as it occurred. The fact that the assault was not observed at all by video monitoring personnel despite its length evidences that the system and personnel were insufficient to allow detection. Furthermore, it was reasonably foreseeable that a system which failed to allow any detection of an incident of this length and severity increased the risk of harm to visitors.
3. Understaffing of peace officers – the City employed 12 officers to man the entire C-Train station between the hours of 6:00 p.m. and 3:15 a.m. on Friday December 29th, 2006, and on Saturday December 30th, 2006. These were Friday and Saturday evenings. This reflects the standard of care they employed on weekends. Yet on New Year' Eve, a night on which the City encouraged ridership, provided free fares, and longer hours of accessibility, they reduced the total number of officers to two after 12:45 a.m. Having found as fact that New Year's Eve was busier than an average Sunday night, the failure to properly man the system with peace officers reflects a marked departure from the City's own weekend standard and a departure from any reasonable standard of care, having regard to the increased ridership, encouraged ridership, and free fare. The absence of a sufficient complement of peace officers resulted in there being no deterrence present at the Canyon Meadows C-Train Station immediately prior to the assault, and an absence of any response as the assault progressed. The increased risk of harm to visitors arising from an insufficient peace officer complement was reasonably foreseeable having regard to the City's own staffing practices on weekends and the encouraged and increased New Year's Eve ridership.

4. Failure to perform an earlier safety audit – although I am satisfied that CPTED was an appropriate standard by which to design and maintain a transit facility such as the Canyon Meadows C-Train station, and indeed the City acknowledged the importance of CPTED in the April 2006 Hubbell Report and expressed adherence to that theory as relates to crime prevention, there is no evidence before me to establish whether the station was built to meet that standard in 2001 or what the standard time frame for facility maintenance review would be. Accordingly, I am unable to conclude that the failure to perform an earlier safety audit was a breach of the standard of care.

5. Legal authority – The City had enacted Bylaw number 4MB1. That Bylaw empowered transit officials to deal with disorderly behaviour, indecent or offensive behaviour, fighting, molesting or interfering with the comfort or convenience of any other persons. The Bylaw authorized peace officers to lay charges under the *Provincial Offences Procedure Act* and to observe, respond, and react to such criminal behaviours. I am satisfied that Bylaw number 4MB1 met the standard of care with respect to legal authority to allow the peace officers to address disorderly and criminal behavior. The City had neither enacted a special events policy, nor a trespass ban. I am not satisfied that the standard of care required the City to enact a trespass ban or special events policy, noting only two examples of such policies in the Canadian context without evidence of their particular efficacy. Further, even if the standard of care required such policies, I am not satisfied there is sufficient evidence before me to conclude that a trespass ban would have deterred the presence of A.B. At the time of the assault A.B. was, on all of the evidence, an immature, impulsive youth, under the influence of alcohol. To suggest that a trespass ban would have deterred his presence at the C-Train station and prevented the ultimate assault, in a manner foreseeable to the City of Calgary, would extend the duty of care beyond that which is reasonable. Similarly, a special events policy for New Year’s Eve, while perhaps increasing the officer complement, may not have placed the officers at anywhere other than high-volume centrally-located stations. There is insufficient evidence to allow me to conclude that the use of a special events policy would have resulted in the prevention or deterrence of this attack at this location, particularly in circumstances where lighting, cameras and an ability on the part of video surveillance personnel to observe what was occurring was a condition precedent to timely and effective peace officer response. While I appreciate that Dr. Atlas opined that both of these policies would have prevented the assault, his opinion goes to the ultimate issue before the Court. The assessment of foreseeability can only be made by the finder of fact on all of the evidence.

Issue five

[41] Having determined that the City breached its duty of care to Kyle it is necessary to determine whether that breach caused or materially contributed to his injuries. The Supreme Court of Canada has repeatedly endorsed the “but for” test of causation: *Athey v. Leonati*, [1996] 3 SCR 458; *Resurfice Corp v. Hanke*, 2007 SCC 7; *Clements v. Clements*, 2012 SCC 32. The question to be answered is: but for the City’s breach of the duty of care would Kyle have suffered the injuries alleged at all or to a less severe degree? If so, the City is liable for his

injuries. Causation is a question of fact and does not have to be proven to a level of scientific certainty: *Snell v. Farrell*, [1990] 2 SCR 311.

[42] It is clear from observing the video surveillance evidence, reading the Agreed Statement of Facts, and hearing the testimony of Kyle and Chelsea that the initial attack by A.B. involved punching and shoving. The assault was joined by D.L., who began punching Kyle in the head, and ultimately a blow was delivered by either A.B. or D.L. which resulted in Kyle falling to the ground. Approximately 6 minutes had elapsed from the start of the encounter to the point of collapse. Thereafter he was repeatedly punched and kicked in the head by D.L. and was subsequently swarmed by a group of unidentified individuals who also kicked and punched him. Although the initial assault by A.B. was sudden, I am satisfied that the entirety of the assault occurred over a period of 20 minutes. The location of the assault would have been displayed on the video monitoring screens multiple times during that period. While the assault was occurring, the only team of peace officers on duty were a mere 4 to 6 minutes away at Southland Station, occupied with dispersing a large group of youths.

[43] But for the City's breach of the duty of care as outlined above, I am satisfied on a balance of probability, that the attack would have been observed in its first minute by video monitoring personnel who would have responded in a manner consistent with their training to immediately dispatch peace officers or CPS to the scene. Further, I am satisfied on a balance of probability, that an increased complement of peace officers would have resulted in a timely response and intervention to prevent the ongoing assault.

[44] As such, I am satisfied that but for the City's breach of s. 5 of the *Occupiers' Liability Act*, the assault would have been stopped at an earlier stage and Kyle's injuries would have been less severe.

Conclusion

[45] As a result, I find the City liable for Kyle's injuries.

Costs

[46] The parties may arrange to speak to costs.

Heard on the 11th day of September, 2017 to the 14th day of September, 2017, and the 21st day of September, 2017 to the 22nd day of September, 2017.

Dated at the City of Calgary, Alberta this 19th day of June, 2018.

J.C. Kubik
J.C.Q.B.A.

Appearances:

Trevor R. McDonald and Robert Martz, Burnet, Duckworth & Palmer LLP
for the Plaintiff

Colleen Sinclair and My-Le Lai, City of Calgary Law and Legislative Services
for the Defendant