

CANADA / JUDGMENT

Jacobs v. Basil

2017 BCSC 1339

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Supreme Court of British Columbia

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2017 BCSC 1339 Jacobs v. Basil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jacobs v. Basil,

2017 BCSC 1339

Date: 20170731

Docket: S50828

Registry: Vernon

Between:

Richard Anthony Jacobs

Plaintiff

And

Joshua Alexander Basil, James Dylan McRae Basil,

Mark Ndan Klock and Quality Drive Away Inc.

Defendants

Before: The Honourable Mr. Justice Abrioux

Reasons for Judgment

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Place and Date of Trial:

Kamloops, B.C.

February 7-10,14-17 and 20-22, 2017

Place and Date of Judgment:

Vernon, B.C.

July 31, 2017

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I. INTRODUCTION

- [1] This proceeding arises out of two motor vehicle accidents which occurred on February 26, 2011 near Yahk, British Columbia.
- [2] Yahk is a remote unincorporated hamlet located 64 kilometers southwest of Cranbrook, and 41 kilometers southeast of Creston, along Highway #3 (the "Highway").
- [3] On February 26, 2011, there was no cellular reception in Yahk.
- [4] Since several of the parties and persons involved bear the same surname, I shall, for the most part, refer to them by their first names and intend no disrespect by doing so.
- [5] In the early morning hours of February 26, 2011, the plaintiff was a rear passenger in a 1991 Ford Explorer (the "Explorer") owned by the defendant, Joshua Basil ("Joshua"). The plaintiff was wearing a seatbelt.
- [6] The Explorer was traveling back to Creston from Cranbrook, when it left the Highway near Yahk and rolled over into a snow-covered ditch ("Accident #1").
- [7] Joshua is not prepared to admit that his brother, the defendant James Basil ("James"), was the driver of the Explorer at the time of Accident #1. If the court were to find that James was the driver, then Joshua denies that James was in possession of and operating the Explorer with his consent. Joshua was not in the Explorer at the time of Accident #1.
- [8] Following Accident #1, the plaintiff, together with one of the other occupants, returned to the Highway on foot in order to seek assistance from passing vehicles. The identity of the person with him is in issue.
- [9] The defendant Mark Klock ("Klock") was driving a 1999 Ford F-350 Super Duty Pick-Up Truck, bearing Indiana licence plate 189658, which was towing a fifth wheel travel trailer (the "Klock Vehicle"). The Klock Vehicle was travelling eastbound on the Highway towards Cranbrook, being en route to Coaldale, Alberta.

- [10] The plaintiff was a pedestrian on the Highway when he was struck by the Klock Vehicle ("Accident #2").
- [11] The location of both Accidents #1 and #2, which will collectively be referred to as the "Accidents" where appropriate, was approximately 10 miles from the border crossing between Washington State and British Columbia. Accident #2 occurred approximately 15 minutes after Klock crossed the border.
- [12] The plaintiff experienced some pain and discomfort to his chest and collarbone as a result of Accident #1. Whether the plaintiff sustained a mild traumatic brain injury in Accident #1 and/or Accident #2 is in issue, as is the extent of that injury. It is not in dispute that the plaintiff sustained significant internal and orthopaedic injuries as a result of Accident #2.
- [13] The issues which arise include:
- who was the driver of the Explorer at the time of Accident #1?
 - if the driver was James, had he acquired possession of the Explorer with the express or implied consent of Joshua?
 - are Klock and/or the driver of the Explorer and/or Joshua (as the owner of the Explorer) and/or the plaintiff liable for Accident #2, and, should apportionment be necessary, to what extent should liability be apportioned as between the parties that the court finds were liable for this accident?
 - an assessment of the plaintiff's damages and an apportionment of those damages between Accidents #1 and #2, should that be required.

II. THE PLAINTIFF'S BACKGROUND PRIOR TO THE ACCIDENTS

- [14] Mr. Jacobs was born on April 7, 1991 in Creston, British Columbia, and is a member of the Lower Kootenay Band (the "LKB"). He was 19 years old at the time of the Accidents and was 25 years old at the time of the trial.
- [15] In his written submissions, Mr. Jacobs' counsel states that the plaintiff "was an aboriginal young man in his late teens at the time of the accidents and had faced a somewhat troubled and negative upbringing".
- [16] He lived with his parents, Paula and Richard Jacobs, until they separated. He has a brother Francis ("Frankie"), who is two years older than him, and who has been employed full time for a number of years by Brightline Holdings Ltd., a manufacturing company located in Vernon, B.C. Frankie has earned between \$25,000 and approximately \$30,000 over the past several years working as a cashier and making cleaning products.

- [17] The plaintiff's parents separated as he was entering preschool. He and his brother then lived on the LKB reserve (the "Reserve") with their maternal grandparents. Their grandfather owned a company that made teepees and various artifacts. He was a highly respected member and leader of the LKB.
- [18] Mr. Jacobs said that his parents had problems with alcohol abuse. Following the separation, his mother resided with family in Washington State before moving to Vernon, B.C. Mr. Jacobs and his brother would visit her there. She would also come to Creston from time to time to see her children but essentially he and his brother were raised by their grandparents from an early age. Over the years he had little contact with his father, who had also moved to the United States.
- [19] Mr. Jacobs described what was generally a positive home environment with his grandparents. He stated that he learned much of his culture from his grandfather.
- [20] His mother has resided with family in Vernon for many years where she has been regularly employed as a chambermaid. The plaintiff went and lived with her for various periods during his late teens and also after the Accidents. He has been living with her essentially full time since 2013.
- [21] The plaintiff described a predominantly happy life in his early school years. He did well in sports and had many friends.
- [22] At the age of 12, the plaintiff started drinking alcohol on a progressively regular basis. This continued to increase during his high school years. He stated he had difficulties with depression. He did not perform well academically at high school and had problems with absenteeism. He also received counselling for his alcohol problems.
- [23] Mr. Jacobs' difficulties at school increased when he left the LKB elementary school, located on the Reserve, to attend high school in Creston. He stated that he and his friends from the Reserve were subjected to racist behavior from the non-indigenous students and also certain teachers. He said this negatively impacted his desire to do well at school; he did not want to do the work and generally felt angry at the world. As a result there were discipline problems and he was suspended on several occasions, although he could not recall how often this occurred.
- [24] By grade 9 he would attend school for only part of the day, spending the remaining hours wandering around town, usually on his own.
- [25] Mr. Jacobs stated that by the time he was in grade 10, he was having significant academic difficulties. He was taking grade 8 maths for the third time and was feeling very depressed. His grandfather suddenly passed away and the loss was very significant to him, since he looked up to him. Mr. Jacobs also indicated that his grandfather had supported him and believed in him. A year later, his grandmother passed away, which was also very troubling for him.

- [26] The plaintiff then decided to move to Vernon to be with his mother. His father had offered him a home in Ohio but Mr. Jacobs considered that he had no real choice but to move to be with his mother. He was 16 years old at the time.
- [27] He stated that he had always been in extremely good physical health growing up. He continued to consume alcohol on a regular basis during his high school years. He also consumed marihuana as part of socializing with his friends. He remained depressed and was not receiving any counselling. He said that he thought he would not be believed if he explained his problems to a counsellor. He had considered suicide and had attempted to do so on two occasions. He also had one close friend who committed suicide when he still lived in Creston and this affected him as well.
- [28] Mr. Jacobs stated that upon his arrival in Vernon, he received no support for his personal difficulties from his mother. He would spend great portions of the day alone on his computer.
- [29] When he was 17, he registered at the Open Education Centre in Vernon hoping to be able to complete his Grade 10. His registration was terminated when he stopped attending.
- [30] From an employment perspective, Mr. Jacobs did have some sporadic opportunities prior to the Accidents. He enjoyed working with his hands and being outdoors. He participated in a program for indigenous youth while still living on the Reserve. He also worked sporadically as a dishwasher. He applied for a job at a Tim Hortons in 2011, prior to the Accidents, but was unsuccessful.
- [31] A year before the Accidents, Mr. Jacobs was in a steady relationship with his girlfriend. He was 19 years old, she was 17. They had a child in February 2010. His girlfriend wanted to keep the baby and he wanted to support her, so the relationship continued. They moved into his girlfriend's mother's apartment. He would assist with taking care of his son but he does not believe that he was looking for work at that time.
- [32] Mr. Jacobs testified that both families were very supportive after his son was born but his alcohol problems continued. He described himself as having very low self-esteem and as feeling "useless" for not being able to provide for his family.
- [33] In the latter part of 2010, without any warning, Mr. Jacobs' girlfriend moved to Ontario with their child. He was able to talk to her on the telephone but she would not tell him where she was. He found this to be very upsetting. He was in this emotional state when he decided to return to Creston to visit friends in early February 2011.

III. THE ACCIDENTS

A. The Circumstances Prior to Accident #1

- [34] The plaintiff was one of four persons in the Explorer: Christopher Krisher, Jonathan Basil and James Basil were the other occupants. The four occupants of the Explorer will collectively be referred to as the "Explorer Passengers", and will individually be referred to by their first names.
- [35] Both the plaintiff and Jonathan gave evidence that at some time on February 25, 2011, James arrived at the residence of Dallas and Mary Basil which is located on the Reserve. Both agree that James was driving the Explorer when he arrived at the residence.
- [36] James proposed driving to Cranbrook to meet friends. The plaintiff, Jonathan and Chris joined him for this trip.
- [37] Both the plaintiff and Jonathan gave evidence that they, along with Chris, drank beer on the trip to Cranbrook.
- [38] There is some disagreement in the evidence with respect to whether the Explorer Passengers socialized with friends in a 7-Eleven parking lot, or attended various residences in Cranbrook. They may also have attempted to follow others to a hot springs. In any event, the evidence is clear that they consumed alcohol throughout this period.
- [39] Jonathan observed James with beer while the Explorer Passengers were in Cranbrook.
- [40] At some point, the Explorer Passengers headed back home to Creston. The plaintiff, Jonathan and Chris each gave evidence that they were sleeping or passed out for portions of this trip.
- [41] The plaintiff gave evidence that he was "drunk" at this time.
- [42] On the return trip, the Explorer crossed the eastbound lane of traffic, left the Highway and likely rolled over, although the number of times is uncertain. The Explorer came to a stop in a snow-covered ditch near the gas station in Yahk.
- [43] The plaintiff's evidence was that he "came to" after the Explorer had stopped in the ditch. He also used the expression "woke up" in his testimony.
- [44] Jonathan's evidence was that he "woke up" in the rear cargo/trunk area of the Explorer after the vehicle came to a stop in the ditch. Jonathan claims to have kicked out a window in order to exit the Explorer.
- [45] Chris' evidence was that he was very intoxicated and was sleeping on and off on the trip back to Creston. He too woke up after the Explorer had stopped in the ditch.
- [46] The plaintiff's evidence was that when he woke up, the other three passengers were outside and were attempting to push the Explorer out of the ditch and back onto the Highway. The plaintiff eventually joined in those efforts.

[47] Both the plaintiff and Jonathan gave evidence that the Explorer Passengers eventually came to the conclusion they would be unable to get the Explorer back on the Highway.

[48] At some point, the Explorer Passengers decided to attempt to flag down a passing motorist for assistance.

B. Liability for Accident #1

[49] James did not appear in the proceeding, nor did he testify at the trial.

[50] Joshua's position is that there is very little direct evidence on the issue regarding liability for Accident #1. He argues that the evidence of the plaintiff and that of Jonathan and Chris must be viewed with much skepticism. That is because, generally speaking, their memories are poor and alcohol was clearly a factor in the activities of February 25-26, 2011. He says the evidence, at best, is circumstantial and it is unclear as to who was driving.

[51] I disagree. While there are some frailties in the evidence on the issue of who was driving the Explorer at the time of Accident #1, I am satisfied that the plaintiff has established that it is more likely than not that James was the driver. That is because the evidence includes:

- the plaintiff, Jonathan and Chris testified that James picked up the group from Dallas Basil's house on the evening of February 25, 2011. He was driving the Explorer;

- although other individuals may have been passengers in the Explorer at various points on February 25 and 26, 2011, Jonathan, Chris and the plaintiff stated that only the original 4 (James, Jonathan, Chris and the plaintiff) were in the Explorer when they began the drive home to Creston;

- the plaintiff testified that he remembered putting his seat belt on in the Explorer, at some point after leaving Cranbrook. He said that he did this because the Explorer "jerked" and startled him awake. He recalled that James was driving at that time;

- Jonathan, Chris, and the plaintiff each testified that they were sleeping or passed out at the time of Accident #1; and

- James made an admission against interest to his brother Joshua, after Accident #1, telling him that he had "flipped" the Explorer.

[52] There is no evidence that anyone other than James, Jonathan, Chris and the plaintiff were involved in Accident #1 or were in the Explorer at the time of this accident.

[53] I have also concluded that the plaintiff has established a prima facie case of negligence against James. Accident #1 was a single vehicle accident which involved the Explorer leaving its lane of travel, crossing the Highway and rolling over before coming to rest in a snowbank. There is also evidence of alcohol consumption by James prior to Accident #1. This evidence included Jonathan stating that he observed James drinking beer at various times while they were socializing in Cranbrook. The plaintiff, Jonathan and Chris also testified that James purchased either a 24-pack or a 30-pack of beer, which the Explorer

Passengers drank while he drove them to Cranbrook. There is also the evidence of Mr. Ken Smith, who interacted with the plaintiff when he was on the Highway, which was to the effect that the person with the plaintiff, who I conclude was James, smelled of alcohol and was intoxicated.

[54] Accordingly, the plaintiff has established a prima facie case that James breached his duty to the occupants of the Explorer, including the plaintiff, by failing to keep the vehicle on the Highway.

[55] A prima facie case of negligence having been established, it is for James or Joshua to rebut that presumption and neither has done so. See *Fontaine v. B.C. (Official Administrator)* [1998] 1 S.C.R. 424 and *McKenzie v. Mills*, 2013 BCSC 1505 at paras. 30-32.

[56] Accordingly I find James 100% liable for Accident #1.

C. Did James Basil Have the Expressed or Implied Consent of Joshua Basil to Operate the Explorer?

[57] The next issue is whether James had Joshua's expressed or implied consent to drive the Explorer at the time of Accident #1.

[58] It is for the plaintiff to establish that James had Joshua's express or implied consent to drive the Explorer: *Morris v. Morris*, 2009 BCSC 1567, at para. 15.

[59] If he is able to do so, then Joshua is vicariously liable for James' negligence pursuant to s. 86 of the Motor Vehicle Act, R.S.B.C. 1996 c. 318, as amended (the "Act").

[60] At the time of Accident #1, Joshua lived at a residence on Mallory Place, which is located on the Reserve.

[61] Joshua was the registered owner of the Explorer although he also owned another vehicle, which he drove for his own use. The address of the registered owner on the Explorer's insurance document, however, was the address of his mother's residence located elsewhere on the Reserve on Simon Road. As a child, Joshua had lived most of the time at his mother's residence on Simon Road.

[62] James habitually lived at his mother's residence, although he had been serving a custodial term of imprisonment until a few months prior to Accident #1.

[63] Johnathan Basil, who is James' and Joshua's cousin, testified that he had seen James driving the Explorer around the Reserve many times prior to Accident #1. Johnathan estimated that he saw James driving the Explorer approximately twice a week. He stated that he never asked James who owned the Explorer nor did James tell him that the vehicle was owned by someone else.

- [64] Chase Louie, who was 20 years old at the time of the trial and 14 years old at the time of Accident #1, also lives on the Reserve. He testified that in 2011 he knew James very well, that they played music together and would "hang around", which included drinking, when he lived on the Reserve. He also lived with James from time to time, but could not recall if this was the case in February 2011.
- [65] He stated that prior to Accident #1 he had seen James drive the Explorer. He did not know if James had a driver's licence. On many occasions he had been a passenger when James was driving the vehicle and when they had gone to pick up friends and liquor. He said he was a passenger in the Explorer when James was driving in the two months prior to the Accidents. He indicated that he did not know who owned the Explorer but that he had never seen Joshua drive it. He also knew that Joshua had his own vehicle, which was a white truck.
- [66] Mr. Louie also said that he believed he had seen the Explorer at James and Joshua's mother's home on the Reserve after the Accidents.
- [67] Joshua stated that his residence on Mallory Place, where he lived with his wife and daughters, is a 10-15 minute walk from his mother's home. The principal vehicle he drove was a red Dodge Caravan. He used the Explorer from time to time for driving around the Reserve. He had purchased it during the summer of 2010 for \$500. The only reason it was insured was that he had to cross the Highway to get to the "flats", being another portion of the Reserve. He said that for the past four to five years he has also owned a white pick-up truck.
- [68] He stated he left a set of keys for the Explorer for safekeeping with his mother since he had a habit of locking himself out of the vehicle.
- [69] Joshua testified that as of February 2011, he did not authorize anyone, including his mother, to drive the Explorer. In particular he did not authorize James to drive that vehicle. He thought James was a "horrible driver", and knew he did not have a valid driver's license as a result of many outstanding fines. He was not aware of his brother driving the Explorer in the six months prior to the Accidents. James had never asked him for permission to drive the Explorer or to be given its keys.
- [70] Joshua was aware that James had been incarcerated for just less than a year and was released, he believed, in October 2010.
- [71] In his direct examination Joshua testified that on the day before the Accidents, that is February 25, 2011, he left his home for the day with his wife and daughters. He was driving the red Dodge Caravan. The Explorer was parked in his driveway when he left. They intended to spend the day in Cranbrook and return home that evening. He had car trouble and so they stayed in Cranbrook overnight, returning to Creston the next day.
- [72] According to Joshua's evidence at the trial and excerpts of his examination for discovery, which were read in to the record as part of the plaintiff's case, Joshua first learned of the Accidents upon his return to Creston. The Explorer was not in his driveway where he had

left it. He suspected that James may have taken the vehicle. At some point that day he spoke to his mother on the phone. She told him that she had no idea where his vehicle or his brother was. He says he telephoned the Creston RCMP late in the afternoon and was told they would keep an eye out for the Explorer. There is no record in the police files of that call being received.

[73] He went to his mother's residence the next day. The first person he saw was James, who apologized:

He said that "we got in an accident". "I got mad at him and asked them what they did and he said they took a trip to Cranbrook and on the way back he flipped his truck in Yahk I don't know who was driving. He didn't tell me. He would not tell me".

[74] Joshua also said that he did not report the accident, being Accident #1, to ICBC at the time. He had minimum insurance coverage and assumed the vehicle would be sold for parts.

[75] The plaintiff and Klock's position is that, at the very least, James had Joshua's implied consent to drive the Explorer. They point to the numerous instances when James was observed driving the vehicle and the fact he had access to the keys left with their mother. They also submit that Joshua's account of what occurred after he became aware of Accident #1 is not credible.

[76] While each case is highly fact specific, the circumstances before me are somewhat similar to those in *Simon (Guardian ad litem of) v. Portsmouth*, 2010 BCSC 134 [Simon]. There, Justice Joyce found that:

[79] In my opinion, the plaintiff cannot succeed in establishing expressed consent. There is no evidence, as opposed to mere conjecture, that Ms. Bostock expressly gave her son permission to drive her car on the day in question. In my view, if she was aware of his driving the car on previous occasions, that knowledge does not constitute expressed consent to drive the car on the day of the accident. If consent is to be found, it must be on the basis of implied consent.

[77] In *Simon*, the plaintiff submitted that there was implied consent because Ms. Bostock was willfully blind in not securing the car keys when she knew that the defendant had a propensity to drive illegally, did not follow the rules of the road, drank excessively, had no respect for authority, and that she could not control him. At paragraph 80, the court found, however, that merely providing an opportunity for someone to take a vehicle does not constitute implied consent.

[78] The legal framework relating to implied consent was summarized this way in *Simon*:

[81] The test for implied consent was set out in *Palsky (Next friend of) v. Humphrey*, [1964] S.C.R. 580, in which the Supreme Court of Canada affirmed the following test stated by Porter J.A. of the Alberta Court of Appeal:

... It seems to me that consent can be implied because it is clear that had it been sought it would have been granted as a matter of course.

[82] In *Godsman v. Peck*, [1997] B.C.J. No. 377 (C.A.) the Court of Appeal concluded that the foregoing remains the applicable test. *Godsman* approved the following analysis of Boyd J. in *Morrison (Committee of) v. Cormier Vegetation Control Ltd. et al.*, [1996] B.C.J. No. 612, at para. 61:

61 The case authorities establish that implied consent will not arise unless it can be said that if permission had been sought, it would have been granted by the owner as a matter of course. The mere possibility that consent would have been granted is not sufficient. In an effort to determine this issue of fact, the court regularly examines all of the circumstances which existed at the time the driver acquired possession of the vehicle including the relationship between the owner and the driver (*Godsman*, *Palsky*, *Usher*); the circumstances in which the owner had given or refused consent in the past (*Godsman*, *Palsky*, *Besse*); any particular circumstances of the driver or the owner (*Usher*); any relevant and particular characteristics of the vehicle (*Palsky*, *Jaroszuk v. Quewezance* (1992) 66 B.C.L.R. (2d) 171 (B.C.C.A.)); and the use to which the driver proposed to put the vehicle (*Palsky*, *Usher*). All of these matters are examined by the court, the relevant time being the time possession of the vehicle was acquired.

While the implied consent test is sometimes described by the courts as an objective test, it necessarily imports a subjective element into that determination. Put another way, would this particular owner, in all of the circumstances, have consented to the driver acquiring possession of the vehicle as a matter of course? If the answer to that question is "yes", then the driver has proven that he or she drove the vehicle with the owner's implied consent.

[83] *Morrison* was reversed on appeal on the basis of express consent (*Morrison v. Cormier Vegetation Control Ltd.*, [1996] B.C.J. No. 2601) but the court did not discuss the issue of implied consent.

[79] When I apply these principles to the circumstances of this case I conclude that the plaintiff has not established that Joshua gave his implied consent to James to drive the Explorer.

[80] There is some evidence which could lead to the conclusion that Joshua gave implied consent to James, such as:

- the number of times James was observed to drive the vehicle;
- Mrs. Basil having a set of keys at her residence;
- James telling his brother "he flipped his truck in Yahk"; and
- Joshua having not directly confronted his brother regarding the issue of consent.

[81] There is also evidence which supports the conclusion that Joshua did not provide implied consent to James. This includes:

- Joshua's evidence regarding his knowledge of his brother's driving record and that he did not have a driver's license; and

- the fact that the brothers did not appear to have a good relationship.

[82] I am also not satisfied that James' statement to Joshua regarding "flipping his truck" and that the presence of large subwoofers, which was indicated by Mr. Louie in his evidence, necessarily means, as is suggested by the plaintiff, that the Explorer was de facto James' vehicle and not Joshua's.

[83] Accordingly, on consideration of all the evidence on this issue, I am not persuaded that the plaintiff has established that, had James asked Joshua if he could drive the Explorer, that the latter "as a matter of course" would have said "yes".

[84] Joshua is thus neither vicariously liable for James' actions either in relation to Accident #1 or to the extent he is found liable in whole or in part in relation to Accident #2, being the next issue which I shall consider.

D. Liability for Accident #2 and Determination of Whether Apportionment is Necessary

1. The Evidence

[85] The scene immediately following Accident #1 is described above at paragraphs 43-47. To summarize, for the purposes of considering the circumstances immediately prior to Accident #2, this scene was as follows:

- the plaintiff, Johnathan and Chris all woke up after the Explorer came to a stop in the ditch;
- the plaintiff was the last passenger to "come to" after Accident #1, at which point he joined in the Explorer Passengers' efforts to push the Explorer back onto the Highway; and
- the Explorer Passengers eventually concluded that they would need to flag down a passing vehicle for assistance.

[86] The plaintiff testified that he went to the Highway alone to flag down help. Jonathan's evidence was that both the plaintiff and Chris went to the Highway to flag down help, while he and James continued to attempt to push the Explorer out of the ditch. They continued to drink beer while doing so.

[87] Chris' evidence was that both the plaintiff and James went to the Highway to flag down help, while he and Jonathan continued to drink beer near the Explorer in the ditch.

[88] Mr. Ken Smith testified at the trial. He was driving a semi-trailer truck westbound on the Highway when he passed the location of Accident #1. He stated that he was flagged down by two men, one of whom was the plaintiff.

[89] Mr. Smith stopped his semi-truck in the westbound lane of the Highway, near where the Explorer had left the Highway and activated his four-way flasher hazard lights.

- [90] Mr. Smith was hauling a 53-foot trailer. He estimated his semi-truck to be 8.6 feet wide, and estimated an average lane width to be 10 feet wide.
- [91] Mr. Smith stated that he spoke to two men standing on the Highway out of his driver-side window. He spoke to one man, while the "man who got hit" was standing behind and to the right of the man he spoke with. Mr. Smith's evidence was that the plaintiff was standing on or near the centre line of the Highway, not in the eastbound lane of travel.
- [92] He recalled that they wanted a ride back to Creston.
- [93] Mr. Smith said that he smelled alcohol on the breath of the man he spoke with through his driver-side window. He formed the impression that both men were intoxicated.
- [94] Mr. Smith then saw a truck, which turned out to be the Klock Vehicle, approaching in the eastbound lane. He warned both men and told them to step closer to his semi-truck.
- [95] He then observed the plaintiff and the other man step closer to the semi-truck.
- [96] Mr. Smith, who is a professional driver, estimated that the Klock Vehicle was approximately one kilometre away when he first saw it after it exited an "S"-curve. He estimated that the Klock Vehicle was traveling at or about 50 kilometres per hour, which was 10 kilometres per hour below the speed limit at that point.
- [97] The plaintiff testified that he heard a voice tell him to get off the road, and without looking he ran to cross the Highway.
- [98] Questions and answers which were read in from Joshua's examination for discovery were that James told Joshua:

Well that When James told me. He told me that Ricky wandered onto the road and he said get the fuck off the road and he turned around and looked at him. And he got hit by a car right when he turned around and I said okay. And then he said that guy took off.

- [99] Mr. Smith stated that, as the Klock Vehicle approached, he observed the plaintiff turn or stumble into the eastbound lane of the Highway; "one moment he was there, then he was gone".
- [100] As it passed Mr. Smith's semi-truck, the Klock Vehicle struck the plaintiff in the eastbound lane of the Highway.
- [101] According to Mr. Smith, the other person who had been speaking to him remained standing close to the semi-truck and was not struck by the Klock Vehicle.
- [102] The plaintiff read in certain portions of Klock's examination for discovery. Klock acknowledged that he was a professional driver and realized he was approaching a potentially hazardous situation that required him to be in an alerted state and to be vigilant for people on the highway.

[103] Klock did not stay at the scene of Accident #2 even though it must have been obvious to him that an accident had occurred. Mr. Smith observed the Klock Vehicle stop a distance away from the accident scene before continuing eastbound on the Highway.

[104] At the conclusion of the plaintiff's case, Klock's counsel sought to have the claim against him dismissed on the basis of insufficient evidence. I dismissed that application. Klock did not testify at the trial.

[105] Dennis Chimich, a biomechanical engineer, was called by the plaintiff to provide opinion evidence on the biomechanics behind the plaintiff's injuries. His conclusions included:

- based on the plaintiff's injury pattern and severity, the impact speed of the Klock Vehicle was likely around 40 km/hour or greater; and
- considering a 50% fatality risk as a peak exposure for the plaintiff, an upper bound impact speed for the Klock Vehicle may be in the range of about 50 km/hour or less.

[106] On cross examination Mr. Chimich agreed that the plaintiff's position at the time of impact would change his analysis. Specifically had the plaintiff been running or jumped up at the time of impact, the severity of the impact forces required to cause the orthopedic injuries to the leg would have been greater, that is, the Klock Vehicle would have to have been traveling at a higher speed at impact.

2. The Parties' Positions

[107] The plaintiff's position can be summarized as follows:

- the chain of causation between Accident #1 and Accident #2 was not broken by an intervening event. The plaintiff was on the Highway to flag down help. His position was akin to being a "rescuer" and James is liable for Accident #2, in that his actions in relation to Accident #1 placed the plaintiff in a hazardous situation;
- Klock is also liable. He was driving too quickly for the road conditions. He was approaching a clear hazard and ought to have seen the two people on the Highway; and
- the plaintiff is not contributorily negligent with regards to Accident #2. He was suffering from the effects of Accident #1, in particular a concussion, and followed James' instructions to get off the road. In the alternative, his conduct was less blameworthy than the actions of James and Klock, with the latter being primarily responsible on the relative blameworthiness analysis.

[108] James' position includes:

- there was a significant time gap between the Accidents and there is no evidence that the plaintiff was injured or concussed in Accident #1;
- when the plaintiff was on the Highway, one or two vehicles passed by before Mr. Smith stopped and the plaintiff was not hit by them; and

· the plaintiff was clearly in a position of safety immediately prior to Accident #2. He is entirely responsible for placing himself in a hazardous situation by taking an independent and voluntary action.

[109] Klock's position includes:

- the plaintiff is wholly at fault for his injuries arising from Accident #2. He did not cross Klock's path in a reasonable manner; rather he ran into his lane of travel without looking for what was a clearly visible hazard;
- in the alternative, James is also wholly or partially liable since his negligence exposed the plaintiff to a risk of harm that materialized;
- Klock is not negligent in whole or in part. The plaintiff has failed to establish that Klock saw or ought to have seen the plaintiff prior to Accident #2. Even if he ought to have seen the plaintiff, he would have seen the plaintiff in a position of safety next to the Smith's semi-trailer; and
- in any event, even if Klock ought to have been travelling at a slower speed, the plaintiff has not established that Klock could have avoided the accident or lessened its impact.

3. Legal Framework

[110] In so far as James' potential liability is concerned, the chain of causation between two successive events and whether it is broken by an intervening act should be considered within the parameters of reasonable foreseeability.

[111] In *Chan v. Insurance Corporation of British Columbia*, 2000 BCSC 1229, the plaintiff was involved in a hit and run accident as she drove home in the early morning hours. Immediately following the accident, she exited her vehicle and, against the "don't walk" sign ran across the road toward a witness who was standing on the corner. The witness pointed the plaintiff to the location of the unidentified vehicle which had stopped a short distance away. Again against the "don't walk" signal and without looking out for traffic, the plaintiff was struck by another vehicle in the roadway when she, in an attempt to identify the vehicle that had hit her, ran in the direction of the unidentified vehicle.

[112] In considering whether or not the chain of causation between the first and second accidents was broken, Justice Holmes referred at paragraph 50 to the following passage from the decision of the Court of Appeal in *Reid v. Chovanec*, [1983] B.C.J. No. 1583 (BCCA):

Nowadays it is no longer open to serious question that the operation of an intervening force will not ordinarily clear a defendant from further responsibility, if it can fairly be considered a not abnormal incident of the risk created by him - if, as sometimes expressed, it is part of the ordinary course of things.

[113] Justice Holmes went on to conclude at paragraph 62, that in the circumstances of the case at hand, it was foreseeable or "within the ordinary course of things that the negligent conduct of the unknown motorist could create alarm, panic, and urgency in a traumatized victim..."

[114] The law concerning rescuers is also of assistance in considering the issue of the chain of causation. In *Smith v. Tucker*, 2007 BCSC 489, Justice Russell at paragraph 24, relied on a previous judgment of this court for a summary of the law relating to rescuers:

In [*Toy v. Argenti* (1979), 17 B.C.L.R. 365 (S.C.)] Esson J. (as he then was), adopted as the law in B.C. the test in *Steel v. Glasgow Iron & Steel Co. Ltd.*, [1944] S.C. 237:

- (1) The intervention of human action does not necessarily per se break the chain of causation between the negligence and the injury sustained.
- (2) To entitle the sufferer to damages, such intervention must have been reasonable and such as might have been in the contemplation of the wrongdoer.
- (3) In determining what is reasonable in the circumstances the interests sought to be protected must be measured in comparison with the risks involved in the action taken.
- (4) If the action taken is reasonable, the injured person will not be debarred from recovering damages by his not having adopted the best possible course in the circumstances, or by his having made a mere error of judgment: but he will be debarred if his action is unreasonable and unwarrantable and outside the exigencies of the emergency; and
- (5) It is not essential that the action should have been taken on the impulse of the moment.

To that list of points he added a sixth:

as the instinct to save human life is greater than the instinct to save property, a hazardous intervention for the former purpose is more likely to be a natural and probable consequence of a negligent act than one for the latter, and in the reasonable contemplation of the wrongdoer.

[115] Justice Russell concluded at paragraph 25:

Thus, it is clear that a rescuer is entitled to claim damages from a negligent actor who creates a risky situation that invites rescue.

[116] The law governing the issue of liability as between pedestrians and motorists is found both in the provisions of the Act and in the authorities dealing generally with the duty of care owed by motorists in relation to pedestrians. The content of the duty of care is to be determined both by any relevant statutory provisions and by the common law: *Hmaied (Litigation Guardian of) v. Wilkinson*, 2010 BCSC 1074, at para. 21; *Russell v. Parks*, 2014 BCCA 104, at para. 15.

[117] Pedestrians and drivers owe a common law duty to take reasonable care for the safety of others and themselves when using a roadway: *Wotherspoon v. Hameluck*, 2014 BCSC 2137, [*Wotherspoon*], at para. 16.

- [118] The standard of care to be applied to drivers is that of a reasonably prudent motorist in light of all the circumstances. Motorists are not required to anticipate all foreseeable road hazards, but only those that are reasonably foreseeable. The standard of care of a driver is not one of perfection, but whether the driver acted in a manner in which an ordinarily prudent person would act: *Hadden v. Lynch*, 2008 BCSC 295, at para. 69.
- [119] A driver's obligation to take evasive action to avoid hitting a pedestrian only arises when he or she becomes aware, or ought to have become aware, that the pedestrian was not going to obey the law: *Beauchamp v. Shand*, 2004 BCSC 272, at para. 33.
- [120] In *Wotherspoon* at paragraph 20, Chief Justice Hinkson stated that the party with the right of way is entitled to assume that other highway users will obey the rules of the road and that drivers are ordinarily entitled to expect that adult pedestrians "will not jump out directly in front of them as they are proceeding lawfully along their way". I note that *Wotherspoon* was a case to which section 179(2) of the Act applied, which is not the situation here.
- [121] The mere fact that a motorist does not see a pedestrian before striking him is not in itself sufficient to establish that the driver failed to keep an adequate lookout. The motorist is required to operate his vehicle so that he will be able to avoid striking a pedestrian who is crossing his path in a reasonable manner: *Pinsent (Guardian ad litem of) v. Brown*, 2013 BCSC 794, at para. 34.
- [122] The applicable sections of the Act are:
- Careless driving prohibited
- 144 (1) A person must not drive a motor vehicle on a highway
- (a) without due care and attention,
 - (b) without reasonable consideration for other persons using the highway, or
 - (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

Rights of way between vehicle and pedestrian

179 (1) Subject to section 180, the driver of a vehicle must yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that he or she is in danger.

- (2) A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.

Crossing at other than crosswalk

180 When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle

Duty of driver

181 Despite sections 178, 179 and 180, a driver of a vehicle must

- (a) exercise due care to avoid colliding with a pedestrian who is on the highway,
- (b) give warning by sounding the horn of the vehicle when necessary, and
- (c) observe proper precaution on observing a child or apparently confused or incapacitated person on the highway.

[123] I have referred to section 179(2) of the Act above only for the reason that both James and Klock refer in their submissions to the plaintiff leaving a "place of safety". This subsection does not apply in the circumstances of this case since the plaintiff was not at a "curb or other place of safety" as that phrase has been interpreted by the Court of Appeal in *Russell v. Parks*, 2014 BCCA 104.

[124] The issue of "place of safety", however, still needs to be considered based on the application of common law principles.

[125] In any event, as Justice Lowry recently stated in *Ilett v. Buckley*, 2017 BCCA 257:

[21] In citing the provisions of the Act as she did, the judge recognized the duty of care in negligence law, as embodied in the statute, that Ms. Buckley owed to other users of the highway to drive her vehicle with due care and attention and that Mr. Ilett was duty bound to ride his bicycle in the same way. Specifically, as stated, she was to drive and he was to ride with reasonable consideration for others and at a speed that was not excessive relative to the road, traffic, visibility, or weather conditions. Accepting that to have been the duty that was owed (being a question of law), the judge had then to determine whether each had discharged their duty by meeting what she determined to be the standard of care (a question of mixed fact and law). As discussed in *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670, breach of the provisions of the Act that prescribe how the duty of care is to be discharged does not necessarily amount to negligence in the sense of being a breach of the standard of care in the given circumstances, rather such may be a factor to be taken into account in determining the requisite standard (see pp. 675-676 and 687-688). As this Court said in *Salaam v. Abramovic*, 2010 BCCA 212:

[18] While the statutory provisions provide guidelines for assessing fault in motor vehicle accident cases, they do not, alone, provide a complete legal framework.

* * *

[22] In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not

eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way.

[126] The relative blameworthiness of the parties is also very much an issue in this case.

[127] In *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 (C.A.), the Court of Appeal made it clear that apportionment involves an examination of the degree of fault of the negligent party. It is not an exercise based on causation or the degree to which it might be determined that a particular negligent act or negligent party caused the injury.

[128] In *Aberdeen v. Langley (Township)*, 2007 BCSC 993, varied on other grounds 2008 BCCA 420, Justice Groves identified at paragraphs 62-63 a non-exhaustive list of factors that may be of assistance in assessing the nature and degree of departure from the standard of care in order to determine the appropriate apportionment of liability between the parties:

1. the nature of the duty owed by the tortfeasor to the injured person...;
2. the number of acts of fault or negligence committed by a person at fault...;
3. the timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as result of the initial fault...;
4. the nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy... Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis...;
5. the extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy...;
6. the gravity of the risk created;
7. the extent of the opportunity to avoid or prevent the accident or the damage;
8. whether the conduct in question was deliberate, or unusual or unexpected; and
9. the knowledge one person had or should have had of the conduct of another person at fault.

4. Analysis and Conclusions

[129] I was referred by counsel to many authorities in support of their various positions and arguments. It is clear that the analysis I must undertake is highly fact specific. Without listing all the authorities to which I was referred, I was assisted, in addition to those I have already mentioned, by the reasoning in, amongst others:

- *Kaiser v. Williams*, 2015 BCSC 646 [Kaiser];

- Simpson v. Baechler, 2009 BCCA 13;
- Chambers v. Goertz, 2009 BCCA 358 [Goertz];
- Scurfield v. Cariboo Helicopter Skiing Ltd., 74 B.C.L.R.(2d) 224 (C.A.) [Scurfield];
- Kaila v. Sekhon, 2006 BCSC 1654; and
- Baptiste v. Cahoose et al, 2002 BCSC 175.

[130] Kaiser, like Wotherspoon considered section 179(2) of the Act but both of these cases, in my view, are of assistance in analysing the common law standard of care, which applies to both pedestrians and motorists.

[131] In Scurfield, the plaintiff's husband was killed in an avalanche on a helicopter skiing trip organized and guided by the defendants. Contrary to the guide's instructions, the deceased went across a dangerous slope without waiting for instructions that it was safe to do so. An avalanche occurred. Others in the group saw the avalanche starting and called out for the deceased to stop, but he did not listen and proceeded, which resulted in his death. The Court of Appeal held that the husband's death was the result of his ignoring the obvious and avoidable danger for which he had been forewarned and dismissed the claim with Justice Taylor stating at paragraphs 14 and 15:

[14] At that point Mr. Scurfield faced no unknown or unavoidable hazard. He was in a position of safety. He had only to stop and wait until the avalanche was over and he could have traversed the slope with no risk at all. All this would have been apparent to any alert skier of his ability and knowledge.

[15] This is not a case of Mr. Scurfield having had a "last clear chance" to avoid a peril created by the defendants. Insofar as the defendants had a duty to protect Mr. Scurfield from an unreasonable risk of unavoidable avalanche, that risk was over once the hazard had become obvious and avoidable.

[132] When I apply the legal framework to which I have referred to the circumstances of this case, I find both James and Klock negligent with respect to Accident #2. I also find the plaintiff contributorily negligent.

[133] My reasons and findings of fact for this conclusion are:

James Basil

- his negligence in causing Accident #1 placed the plaintiff in a position where it was foreseeable or "within the ordinary course of things" that the plaintiff would go on the Highway in an attempt to obtain assistance from passing vehicles. This is particularly the case when one considers that, at the time of the Accidents, there was no cellular phone reception in Yahk;
- I find that James was the other pedestrian on the Highway with the plaintiff; and

· although both James and the plaintiff were in a "place of safety" next to Mr. Smith's semi-trailer, James told the plaintiff to get off the road. While, for the reasons I shall outline below, I find that the plaintiff did not sustain any serious injuries in Accident #1, I find that James' "instruction", for lack of a better expression, delivered by a man who was bigger, physically, than the plaintiff, likely added to an uncertain and confusing situation, which followed an accident caused by James' negligence.

Klock

- Klock, who is a professional driver, had the better part of one kilometre to observe and evaluate an upcoming potentially hazardous situation;
- while his speed at the time of impact was likely below or even well below the speed limit, the early morning time of the accident and the presence of the Smith vehicle occupying most of the westbound lane with its hazard lights flashing ought to have reasonably put him on a high state of alertness which would, or should have, included the possible presence of pedestrians on the Highway, who were clearly there to be seen had he been paying proper attention;
- Klock was not driving with due care and attention and was in breach of section 181 of the Act and his duties at common law in that regard;
- there is also the fact that the point of impact between the Klock Vehicle and the plaintiff establishes that the plaintiff had crossed a significant portion of the eastbound lane when he was hit; and
- I also draw an adverse inference from the fact Klock left the scene of the accident.

[134] In Goertz, the Court of Appeal upheld the trial decision where it was implicit that the common law rule, which is set out in the seminal case of *Walker v. Brownlee*, [1952] 2 D.L.R. 450 (S.C.C.), is to the effect that a driver must be proceeding lawfully at the time of the accident in order to be entitled to exercise his right of way.

[135] In the Goertz trial decision, which is indexed at 2008 BCSC 394, Justice Humphries in assessing liability 30% against the Goertz through vehicle stated:

[69] Ms. Goertz had an obligation, once she knew a pedestrian was on the highway, even if she had the right of way, to exercise due care to avoid the pedestrian (s. 178(a)). While counsel for Ms. Goertz argues correctly that no duty arose under this section until she could see the pedestrians, and by that time it was too late to do anything, her fault is more general.

[70] She approached the area at or near the speed limit, taking her foot off the accelerator and letting the car decelerate on its own. She continued to drive when she could not see ahead into her lane beyond the high beams of the taxi. She was alerted by the taxi being stopped to the irregularity of the situation; she knew taxis pick up and drop off passengers. She did not expect people to be in the area but admitted that the presence of a taxi could signal the presence of people. Despite not being able to see the area into which she was driving in this

irregular situation, she continued on without braking or sounding her horn. She took some precautions, taking her foot off the accelerator and covering the brake, but they were insufficient to prevent her from driving blindly beyond the high beams at a speed somewhere around the speed limit of 60 kph. She had a common law duty to drive with due care for the safety of others that she could reasonably have in her contemplation, and she breached that duty by driving forward at that speed when she could not see into the lane ahead, an action that makes a clear risk of harm foreseeable. She should have slowed to a speed that would have allowed her to approach the blind area with appropriate caution for whatever lay ahead, including the safety of persons who could foreseeably be at or near a taxi. By failing to do so, she breached her duty to drive with due care for the safety of others. That breach was a contributing cause of the accident. I find that Ms. Goertz was negligent.

[Emphasis added]

[136] In this case, I do not have the benefit of Klock's evidence as to his perspective on what occurred in the time frame leading up to Accident #2, apart from what was read in from his examination for discovery. But in my view, the comments of Justice Humphries are applicable to Klock. He was not proceeding lawfully prior to Accident #2 in that he was driving without due care and attention in the presence of reasonably foreseeable danger. He was not entitled to assert a right of way either pursuant to section 180 of the Act or at common law. And even if he did have the statutory right of way, this did not absolve him from his common law duty to drive with due care and attention.

The Plaintiff

- I find that he was impaired when he returned to the Highway after Accident #1;
- he attempted to cross the Highway after receiving and acting on a warning from Mr. Smith that the Klock Vehicle was approaching;
- he attempted to cross the Highway in front of the approaching Klock Vehicle, which was clearly there to be seen;
- he left a place of safety, being next to the Smith vehicle in the westbound lane of the Highway, and ran into the path of the Klock Vehicle, which had the prima facie right of way if Klock was proceeding lawfully (which he was not); and
- in all the circumstances, he failed to take reasonable steps for his own safety.

[137] I do not accept the defendants' arguments that the reasoning in Scurfield should result in the plaintiff's action being dismissed. In that case the initial act which set the chain of events in motion was the plaintiff's failure to adhere to the instructions of the guide.

[138] I am of the view that the plaintiff's actions in following James' direction to get off the road and subsequently running in to the path of the Klock Vehicle, after previously following Mr. Smith's warning to move closer to his semi-trailer, is significantly blameworthy conduct.

- [139] The issue then becomes how liability should be apportioned in light of the Aberdeen factors.
- [140] I have concluded that each of James, Klock and the plaintiff bear significant responsibility for what occurred in Accident #2.
- [141] James' responsibility for Accident #2 arises from his operation of the Explorer, likely while impaired, which created a serious risk to his passengers. This risk culminated in Accident #1, which was the first act in time in the chain of events that lead to the plaintiff being on the Highway since, as there was no cellular phone reception in the area at that time, flagging down passing motorists was the only way to get assistance. This conduct was compounded by telling the plaintiff to "get the f-- off the road". I can only assume that, as a result of the language used, this was communicated in an aggressive as opposed to a calm manner, which contributed to the plaintiff acting as he did.
- [142] Klock's responsibility for Accident #2 arises from not paying proper attention to an approaching hazardous situation and driving without due care and attention under all the circumstances.
- [143] The plaintiff's responsibility is due to his decision to run across the Highway without looking and, as a result, running into the path of an approaching vehicle. While he may have been influenced by James' "instruction", he clearly had the opportunity to avoid placing himself in a position of serious danger by simply staying where he was.
- [144] The situation here is somewhat, but not completely, akin to Goertz. In that case the plaintiff was found 60% responsible, the Goertz through vehicle was found 30% liable, with the remaining 10% responsibility against the stopped taxi cab. Under all the circumstances, applying the Aberdeen factors as best I can, I find Klock and James each 25% responsible and the plaintiff 50% responsible for Accident #2.

IV. ASSESSMENT OF DAMAGES

A. Post-Accident Events

- [145] It was the plaintiff's evidence that he experienced some pain and discomfort to his chest and collarbone area after exiting the Explorer following Accident #1.
- [146] He was hospitalized for 11 days at Foothills Hospital in Calgary before returning to Vernon where he has resided for the most part since that time. He has lived primarily with his mother but has spent periods of time homeless.
- [147] He and members of his family, including his mother and brother, testified that he has chronic pain in his right leg, right hip and back. He frequently refrains from engaging in activities due to pain and will sometimes fall because his knee gives out. The plaintiff testified that at times his pain is so severe he cannot stand or walk for more than a couple of hours.

- [148] Mr. Jacobs has not worked nor made attempts to pursue his education since the Accidents. He and certain of the lay witnesses testified that he no longer leads the active lifestyle which was the case prior to the Accidents. Mr. Jacobs stated that he was very active in taking care of his infant son until shortly before the Accidents and now has difficulty going up stairs.
- [149] The plaintiff and witnesses who testified on his behalf also spoke to the changes in his emotional state. Prior to the Accidents he was more interested in spending time with his family and friends. Since then he has become quiet and withdrawn, less interested in spending time with others and apathetic toward activities that he used to be interested in, like playing basketball. He is isolated from his immediate family with whom he lives.
- [150] The plaintiff says that the Accidents have significantly affected his career goals. The Accidents also had a severe negative impact on his family relationships as he was unable to go and see his young son who unfortunately passed away a few months ago.
- [151] The plaintiff says that at 25 years of age, he has aged well before his time. The current state of his knee impinges upon his ability to engage in any of the activities that an average 25-year-old man would enjoy, including working, playing sports and spending time with friends. In addition, even if he gets his right knee fixed (after at least two more surgeries), he will still be limited, may still experience pain in the knee and faces the likelihood of osteoarthritis in the knee to go along with the problem in his right hip.
- [152] According to the plaintiff, before the Accidents, he was a young man who was on the path to getting his life back on track. He had had a child and had been a responsible and involved parent to his son and had been actively involved in his care. His physical capability and skills with hands-on things were present to help him get settled into employment and to have a role in his young son's life, which he was unable to realize in part due to the Accidents.
- [153] The medical evidence included the following:
- Dr. Brian Day (orthopaedic surgeon called by the plaintiff)
- he assessed the plaintiff on June 22, 2016, that is, more than five years after Accident #2;
 - he stated the plaintiff's femur fracture was treated appropriately by internal fixation with an intramedullary ("IM") rod and distal and proximal locking screws;
 - the plaintiff will require arthroscopic repair and reconstruction of his knee ligaments;
 - while the plaintiff's right knee function will not be restored to normality, there will be functional improvement to a significant degree by further surgical treatment;

- the plaintiff's knee instability and the probable articular cartilage damage he sustained, means that he is at high risk of developing osteoarthritis in later years; although a definitive prognosis about the plaintiff's right knee function is not possible until surgery and rehabilitation occurs; and
- further articular cartilage damage could have been caused post-accident by the plaintiff walking for several years on an unstable knee.

Dr. Giantomaso (physical medicine and rehabilitation called by the plaintiff)

- he assessed the plaintiff on December 19, 2015. He prepared two reports, the second being authored after Mr. Jacobs was diagnosed with the knee ligament injury, which Dr. Giantomaso did not diagnose in his assessment;
- he made a number of observations with respect to the plaintiff's physical state at the time of the first assessment, including some muscle spasm in his mid- to upper-back;
- almost five years post-accident, the plaintiff suffered from chronic pain in the thoracic spine, hip and knee in addition to instability of the right knee;
- he was of the opinion that the plaintiff was likely to have ongoing pain into the future;
- the plaintiff could expect improved function and reduced pain symptoms post knee surgery; specifically, with a stable knee, he would "definitely" be more employable;
- the extent of the plaintiff's recovery would depend on his adherence to a pre- and post-surgical plan of therapy; and
- a mild traumatic brain injury was sustained in Accident #2, which was "basically resolved" by December 2015 when he assessed the plaintiff.

Dr. Piseky (orthopaedic surgeon called by the defence)

- he assessed the plaintiff on October 17, 2016, and was advised by him that his main ongoing focus of concern from the injuries he sustained in the Accidents was his right knee and the tendency to experience knee dislocations;
- he was of the opinion that the plaintiff had sustained a tear of the anterior cruciate ligament (the "ACL"), the medial collateral ligament (the "MCL"), and the medial meniscus;
- he did not see any "definite signs of osteoarthritis at this time but was of the opinion that the plaintiff had a 30-50% risk of developing osteoarthritis in the future with the risk being better quantified once a surgeon was able to visualize the interior of the knee joint";
- arthroscopic surgery to reconstruct the right knee ligaments was required; and

· he was of the view that the plaintiff did not have adequate rehabilitation after the Accidents, having only seen a physiotherapist on a single occasion. He opined that ongoing physical activity may be doing further damage to the joint itself.

B. Causation and Findings of Fact re Injuries

[154] In *Karim v. Li*, 2015 BCSC 498, at paragraphs 90-101, I summarized certain of the applicable principles which I shall not repeat in these reasons.

[155] Based on the agreed statement of facts and the medical evidence, which was to the effect that the plaintiff's internal and orthopaedic injuries were likely caused by Accident #2, I find that the plaintiff sustained serious injuries in Accident #2, which included:

- right transverse process fractures of C7, T1 and L5;
- bilateral pneumothoraxes and right pulmonary contusion;
- fractures of the right 1st, 5th, and 6th ribs;
- contusion and laceration of the liver;
- right adrenal hematoma;
- right anterior column acetabular fracture;
- right sacral fracture;
- right femur fractures;
- injuries to the ligaments of his right knee involving the ACL, the MCL, and the medial meniscus; and
- a mild traumatic brain injury or "concussion".

[156] Furthermore, I do not find that any causal link, from an injury perspective, has been established between the effects of Accident #1 and Accident #2 such that the losses suffered could be found to be indivisible. The principles regarding divisible and indivisible injury are summarized by Justice Kelleher in *Danicek v. Alexander Holburn Beaudin and Lang*, 2010 BCSC 1111, at paragraphs 210-212 [Danicek].

[157] Accidents #1 and #2 "did not produce overall or global symptoms that are difficult if not impossible to separate": *Danicek* at para. 222.

[158] Rather, I find that in Accident #1 the plaintiff suffered relatively minor soft tissue physical injuries, which resolved within at most a few weeks. These injuries were divisible and of a different nature from those suffered in Accident #2: *Danicek* at para. 223.

[159] In so far as the allegations of a mild traumatic brain injury ("MTBI") are concerned, I reach the following conclusions:

- (a) the plaintiff has not established that he sustained a concussion or MTBI in Accident #1. His accounts of the Accidents indicate that he had been drinking and was sleeping when Accident #1 occurred. There is insufficient evidence in his reports to others and his evidence at trial from which it can be concluded that he likely sustained an MTBI in this accident;
- (b) while Dr. Giantamaso has opined that the plaintiff sustained an MTBI, this is said to be causally related to Accident #2;
- (c) when I consider the mechanics of the Accidents and, in particular, a collision between the pedestrian plaintiff and the Klock Vehicle and the forces of impact which were required to cause the plaintiff's serious orthopaedic and internal injuries, I conclude that it is more likely than not that the plaintiff did sustain an MTBI in that accident. The fact he had, for all intents and purposes, a normal Glasgow Coma Scale, at the time of arrival of the paramedics does not alter this conclusion;
- (d) from Dr. Giantamaso's evidence, I find that the effects of the MTBI sustained in Accident #2 were not of a significant nature since they were not dealt with to any noteworthy degree in his report or testimony.

C. Cultural Factors

[160] The plaintiff made an extensive written submission that the court should consider "cultural bias" factors in its assessment of the damages. In particular it was submitted that:

cultural bias "needs to be considered in not only assessing this evidence, but also awarding compensation to the plaintiff for his injuries and the consequences of these Accidents".

[161] This portion of the plaintiff's written submission then considers in some detail authorities that have reviewed this issue in a criminal law context such as *R. v. Williams*, [1998] 1 S.C.R. 1128, and *R. v. Gladue* [1999] 1 S.C.R. 688, amongst others.

[162] In oral submissions, Mr. Jacobs' counsel retreated significantly from the breadth of this submission. His argument appeared to finally rest with the proposition that if the plaintiff's cultural background could be causally related to a specific head of damage then the court should take that into account in assessing those particular damages.

[163] At no point did I understand the defendants' position to be what was implied in the plaintiff's submission, that because he was of indigenous heritage the Court should conclude that as part of his original position he was susceptible to a life of alcoholism or other forms of abuse which would likely affect his income earning capacity or things of the like.

[164] Rather, the defendants properly conceded, in my view, that if the plaintiff's cultural background did impact upon a specific head of damages, as it related to him, then the Court could take that into account.

[165] As I will describe below, the plaintiff's indigenous background is specifically addressed by Ms. Chisolm in her cost of future care report in relation to one of the items she recommends for Mr. Jacobs being a case worker.

[166] Apart from that I do not consider the "cultural bias" argument to be appropriate in the assessment of damages in this case.

D. General Damages

[167] The plaintiff submits that his life has been permanently altered by the Accidents, in particular by Accident #2. He acknowledges the difficulties he had in his life prior to the Accidents but argues that his young age and the fact he had recently become a father would likely have resulted in his becoming more responsible over time. He says that to the extent he was "wounded" prior to the Accidents, these events have caused him to age before his time.

[168] Mr. Jacobs says that his significant orthopaedic injuries have resulted in him going from an active and physically active young man to a person who is in a state of chronic pain in his right leg, hip and back. He can now barely walk up stairs.

[169] In addition, it is the plaintiff's position that his pre-existing anxiety and depression have been exacerbated by the Accidents. The Accidents mark a tragic event in his life that he has been unable to overcome. His personal and family relationships have been significantly impaired.

[170] Relying on, inter alia, Schoenarz v. Reeves, 2013 BCSC 1196, and Ishii v. Wong, 2015 BCSC 922 [Ishii], the plaintiff submits that general damages should be assessed at \$150,000.

[171] The Basil and Klock defendants acknowledge the serious physical injuries sustained by the plaintiff in Accident #2.

[172] They submit that Mr. Jacobs has made a good recovery from his internal and orthopaedic injuries and his condition should improve significantly after the recommended knee surgery takes place. They also acknowledge that the plaintiff will require surgery at some time in the future to remove the IM rod in his right femur.

[173] In so far as the plaintiff's emotional difficulties are concerned, they submit that his "original position" includes a history of alcohol and other substance abuse together with suicidal ideation.

[174] Relying on Harvey v. Swyer, 2007 NLTD 129, Isbister v. Delong, 2014 BCSC 1395, and Gravelle v. Seargeant, 2013 BCSC 536 [Gravelle], they submit general damages should be assessed at \$90,000.

[175] In Ishii, Justice Gerow summarized the legal framework as follows:

[127] A plaintiff is entitled to reasonable damages for his or her pain and suffering. The plaintiff should be placed in the same position he or she would have been if the accident had not occurred, but not in a better position: *Parypa v. Wickware*, 1999 BCCA 88, at para. 29.

[128] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court noted that a non-pecuniary award will vary to meet the specific circumstances of each case, and set out the factors to be considered in making such an award as follows:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163, 2005 BCCA 54).

[176] When I apply these factors to this case I conclude that the plaintiff's damages arising from Accident #1 should be assessed at \$5,000, which is in general accordance with the \$3,500 awarded for the second accident in *Gravelle*.

[177] In so far as Accident #2 is concerned, I am of the view that the damages should be higher than those in the authorities upon which the defendants rely but less than those referred to by the plaintiff. I award \$115,000 under this head of damages in relation to this accident.

[178] I will now consider the other heads of damages sought by the plaintiff. In light of my conclusions regarding the effects of Accident #1, any award under these headings relates only to Accident #2, to which I may refer as the "accident".

E. Past Loss of Earning Capacity

- [179] The legal framework which applies to a claim for past loss of earning capacity based on hypothetical events is the same as that concerning a loss of future earning capacity. Any ambiguity on this issue was recently resolved by the Court of Appeal in *Grewal v. Naumann*, 2017 BCCA 158 [Grewal]. In *Grewal* the Court of Appeal reviewed, inter alia, *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, 2015 BCCA 232, and *Ostrikoff v. Oliveria*, 2015 BCCA 351, which suggested that claims for past loss of earning capacity based on hypothetical events should be decided on a balance of probabilities standard. The Court of Appeal rejected this approach.
- [180] Justice Goepel reaffirmed the position taken by the court in *Smith v. Knudsen*, 2004 BCCA 613, stating at paras. 45-49:
- [45] The governing authority in this Court is *Smith v. Knudsen*, 2004 BCCA 613. In *Smith*, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. Rowles J.A. wrote for the court. She explained that the plaintiff in the first instance was required to establish both liability and causation on a balance of probabilities. This required the plaintiff to establish that the respondent's negligence, in whole or in part, caused the accident, and that the injuries the appellant sustained in the accident caused or contributed to the loss for which damages were sought (para. 26).
- [46] Rowles J.A. then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:
- [29] What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
- [47] I note that neither *Reynolds* nor *Ostrikoff* referenced *Smith*. To the extent that those decisions could be read to hold that a past hypothetical event must be proven on the balance of probabilities, they must be regarded as per incuriam.
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140, at para. 32.

- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211, at para. 21.
- [181] While Justice Goepel dissented in the result in *Grewal*, he was speaking for the Court of Appeal on this issue: *Dhaliwal v. Greyhound Canada Transportation Corp.*, 2017 BCCA 260, at para. 29.
- [182] The plaintiff submits that based on the totality of the evidence on this point including:
- that of his brother Frankie, who has been employed full time since 2011 and who earned approximately \$25,000, \$27,000 and \$28,000 in 2014, 2015 and 2016 respectively; and
 - his friend, Chris Krisher, who earns \$17/hour performing physical labour for a winery;
- but for the Accidents, he would have earned some income to the time of the trial, likely from a physical type job, at a wage level likely not better than the minimum wage.
- [183] He points to the fact there is a six year span from when the Accidents occurred to the commencement of this trial and there is a real and substantial possibility that on balance he would have found some sort of employment during that time frame. He submits that having a child was a significant motivating factor for him to seek employment so that he could see his son, whose mother had moved him to Ontario without Mr. Jacobs' consent.
- [184] The plaintiff points to his physical abilities pre-accident and submits that the assessment of his loss should be based on his inability to access entry level physical occupations and relies on the evidence of the vocational expert Jodi Webster to this effect.
- [185] He acknowledges that there was no income earning "track record" to speak of prior to the accidents but submits that his brother's and Mr. Krisher's income during those years can assist the court in assessing the parameters for this loss.
- [186] He submits that a modest sum of \$5,000 (net of tax) per year, for a total of \$30,000 (net) for the six years since the Accidents represents a conservative assessment of what he could have earned to the time of trial date.
- [187] The defendants' position is that there should be no award under this head of damage. Simply put, Mr. Jacobs has not established that but for the accident there was a real and substantial possibility of earning an income prior to the trial. The alleged basis for this award is entirely speculative. In this regard they point to:
- Ms. Webster's opinion that Mr. Jacobs was competitively unemployable prior to the accident;
 - he had taken no steps to find employment for some considerable time prior to the accident with the exception of applying at Tim Hortons;

- the birth of his son did not change his motivation to be employed;
- his longstanding history of depression, alcoholism and mental health issues; and
- he has not made any attempts to find work since the accident. In fact during a period of time when he was homeless in 2012 he was incarcerated as a result of an incident involving a break and enter, assault and uttering threats.

[188] I have concluded that the plaintiff has established the basis for a very modest award for past loss of earning capacity. The fact he was competitively unemployable at the time of the accident does not mean that, in the intervening six year time frame to trial, a real and substantial possibility to earn an income was lost due to the injuries sustained in the accident.

[189] This loss, however, must take into account the plaintiff's pre-accident lifestyle and lack of any real motivation to earn an income. The fact his brother, who had essentially the same upbringing as the plaintiff, was able to earn an income commencing in 2011, initially at minimum wage and then at a higher level, is some evidence of the opportunities available to Mr. Jacobs. Conversely, the fact the plaintiff had not made the efforts of his sibling either prior to or subsequent to the accident militates against an award in the range suggested by his counsel.

[190] Under all the circumstances I award the plaintiff a nominal amount of approximately \$2,500 per year for a total of \$15,000 under this head of damage. This amount is net of taxes in that any tax payable would have been minimal at best.

F. Loss of Future Earning Capacity

[191] The principles to which I have referred apply to this head of damages.

[192] The plaintiff's position is similar to that with respect to the past loss of capacity claim but emphasizes that the plaintiff did have the potential to earn an income prior to the accident and that the injuries sustained will impair his ability to do so in the future.

[193] In his written submission he states:

By any standard, a boy in his teenage years who loses his de-facto parents (his grandfather and grandmother), who had his difficulties with racism in the transition from a reservation elementary school to a provincial based high school, and learning to drink alcohol starting early on at the age of 12, and then suffering a loss of a close friend due to suicide, can all explain the plaintiff's less than stellar pre-accident work history.

There is no question the plaintiff has the potential, with a lot of assistance and care, to overcome or be able to get into the work force given his aptitude with computers. The problem of course is the formal academic and certification requirements for that type of work. The plaintiff concedes that some employment in the future in computers likely represents his residual employability and that at some point with some assistance he will attain some form of employment in that

regard. However, there are significant negative contingencies that attach to that because of his poor track record academically and the barriers that Ms. Webster talked about in terms of getting the certifications that are likely needed to earn a significant wage.

[194] Peter Sheldon, an economist who the plaintiff tendered as an expert witness, provided an income loss multiplier for an annual sum of \$1,000 from the date of trial to age 65, being \$28,857.

[195] Relying on Schoehal, *Gilbert v. Bottle*, 2011 BCSC 1389 [Gilbert], and Terraciano (*Guardian ad litem of*) *v. Etheridge*, [1997] B.C.J. No. 1051, the plaintiff seeks an award of \$450,000 under this head.

[196] The defendants' position is akin to that with respect to the past loss of earning capacity claim, being there should be no award.

[197] In the alternative, they submit that any loss is minimal and at best a modest award of at most \$50,000 would be appropriate. They point to Ms. Webster's evidence, which referred to the many barriers to employment that Mr. Jacobs faced before the accident including:

- his grade 9 education;
- extremely limited work experience;
- poor math skills;
- learning and/or behavioural issues in school;
- large gaps in work history;
- drug and alcohol addiction problems;
- mental health problems;
- neck tattoo;
- has never had a drivers' license; and
- a criminal record.

[198] Ms. Webster also recommended significant interventions including that the plaintiff:

- engage in a short course or practicum (volunteer or work-based) to determine "how he does" with assistance and support with respect to work habits, including in the form of monitoring communications with employers and reviewing work schedules to help him demonstrate "longer term employment habits"; and
- consider Aboriginal Training Programs; however, many of these "programs target occupations and industries that are more labour based" and currently not suitable.

[199] She was also of the view these interventions were also required prior to the accident.

[200] The fact remains that the plaintiff's ability to work but for the accident was largely limited to physical activities unless he upgraded his education. There is also no question that he sustained serious orthopaedic injuries in the accident. While there is medical evidence, which I accept, that the contemplated knee surgery will significantly improve Mr. Jacobs' ability to function, there is still a real and substantial possibility, in my view, that his ability to earn an income has been impaired. This also takes into account the risk of arthritis and the possibility of a total knee replacement at some distant time in the future.

[201] The issue then becomes how best to quantify this loss. In my view, the appropriate approach is that of the loss of a capital asset: see *Perren v. Lalari*, 2010 BCCA 140, at para. 12 and *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 (S.C.), at para. 8.

[202] When I consider:

- the plaintiff's still young age and a realistic working life of 35-40 years in what likely would have been, prior to the accident, physical work;
- the nature of the physical injuries sustained in the accident;
- the prospects for a significant improvement in his condition after the knee surgery;
- the risk of arthritis interfering with his ability to earn an income as he ages;
- a period of time off work after the removal of the rod in his femur;
- his sporadic work history and the considerable obstacles to employment prior to the accident, which rendered him competitively unemployable, which remain thereafter and will continue to be the case unless he upgrades his education and/or becomes motivated to look for work;
- the presence of some, albeit modest, non-physical residual employability in the field of computers;
- the range of potential income as seen by his brother and friend; and
- generally positive and negative economic contingencies

I assess the plaintiff's loss under this head of damages at \$115,000.

[203] While this is substantially less than the awards in *Schoenhalz and Gilbert*, I view the circumstances in those cases as being significantly different from those here.

G. Future Care

[204] Justice Gerow recently summarized the applicable framework in *Paterson v. Hindle*, 2017 BCSC 1104 [Paterson]:

[86] Cost of future care is established if there is a medical justification for the claim, and the claim is reasonable: *Aberdeen v. Zanatta*, 2008 BCCA 420, at para. 42.

[87] In *O'Connell v. Yung*, 2012 BCCA 57, the Court of Appeal discussed cost of future care:

[55] The law is settled as to the appropriate approach to be taken in assessing future care costs. In *Kringle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at paras. 21-22, [2002] 1 S.C.R. 205, referred to by the trial judge, the Court articulated the test:

21 Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

22 The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. Jane Stapleton, "The Normal Expectancies Measure in Tort Damages" (1997), 113 L.Q.R. 257, thus suggests, at pp. 257-58, that the tort measure of compensatory damages may be described as the "normal expectancies' measure", a term which "more clearly describes the aim of awards of compensatory damages in tort: namely, to reposition the plaintiff to the destination he would normally have reached ... had it not been for the tort". The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

[Emphasis in original]

[88] Services that a plaintiff is unlikely to avail themselves of should not be awarded. The assessment of future losses entails a consideration of what will reasonably be required: O'Connell, at para. 68.

[89] As noted in *Harrington v. Sangha*, 2011 BCSC 1035, at para. 153:

Measures that provide some solace but are not likely to result in medical improvement ought to be compensated for under the head of general damages rather than an expense that is compensable as a cost of future care.

[90] In *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135, at para. 13, the court noted that common sense should inform awards of costs of future care

[205] The plaintiff lead evidence on this issue from Ms. Dawn Chisolm, an occupational therapist. In her reports, she outlined a series of recommendations based on different scenarios, including whether the plaintiff would undergo knee replacement surgery. Mr. Sheldon "costed" those recommendations at \$137,000 for the low range of services and support recommended by Ms. Chisolm and \$154,000 for the high end of recommendations.

[206] The plaintiff seeks an additional \$20,000 in relation to items "that are not yet known either for timing or for actual cost". He emphasizes that Ms. Chisolm's evidence is that her recommendations were "conservative".

[207] The defendants' position is that Ms. Chisolm's plan is, for the most part, excessive, duplicative and the required evidentiary medical link to what is recommended is largely not present.

[208] I commence my analysis on this issue by noting that in *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351, Justice Bennett noted:

[31] ICBC says that the trial judge did not examine each request and determine if there was an evidentiary link between the medical assessment and the care recommended by the occupational therapist and rehabilitation consultant. As Garson J.A. said in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, at para. 39:

I do not consider it necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Aberdeen* at paras. 43, 63.

[32] The failure of the trial judge to perform an analysis of each item sought by the plaintiff with respect to whether there was "some evidentiary link between the physician's assessment of pain, disability and recommended treatment and the care recommended by a qualified health professional" was a legal error

[209] When I review Ms. Chisolm's recommendations from this perspective, I agree with the defendants that very few of them are linked to the evidence of the medical specialists, being Drs. Day, Giantomaso and Pisesky.

[210] There are other significant deficiencies in Ms. Chisolm's opinions and recommendations which include:

- she has chosen high priced services, like a private gym rather than the Vernon Aquatic Centre;
- she recommended support and services without determining the plaintiff's original starting point. For example, she did not determine what housework he was typically responsible for before endeavouring to replace it. She also referred to Mr. Jacobs as an adolescent when shortly prior to the accident he had been living with his partner and child;
- she recommended separate kinesiology for different areas of bodily improvement as well as extensive physiotherapy. I agree with the defendants that this does not comport with a common sense approach to rehabilitation and health maintenance;

- in total, Ms. Chisholm recommended 37 to 51 sessions of kinesiology and physiotherapy prior to surgery, when Dr. Pisesky's recommendation was for 8 sessions pre-surgery with a physiotherapist;
- I also agree with the defendants that Ms. Chisholm has costed replacement services and supports that the plaintiff is unlikely to require and which are not linked to the medical evidence. An example is the recommended 41 hours per year of household maintenance and yard work, when the plaintiff leaves the parental home. In fact, even with his unstable knee, the plaintiff has picked up odd jobs doing yard maintenance now, with an unstable knee; and
- some services, such as vocational or educational assistance, have already been provided by Ms. Webster or would have been required in any event prior to the accident.

[211] I also take into account:

- the plaintiff's history of non-attendance at medical appointments and therapy;
- many of the services recommended, such as psychological counselling, a vocational assessment and/or support, academic upgrading and the like, were required prior to the accident although the accident may well have augmented the need for such services;
- the significant improvement that will likely result to the plaintiff's physical capabilities if he undergoes knee surgery; and
- there is no certainty that the plaintiff will require knee surgery by age 50 as postulated by Ms. Chisolm. Based on the medical evidence there is certainly a real risk of such surgery if osteoarthritis develops in the knee.

[212] In my view, the appropriate manner to arrive at an award that is fair to both the plaintiff and the defendants is to consider what I have referred to above in the context of:

- what services are required based on the medical opinions. This includes certain physiotherapy and kinesiology treatments both prior and subsequent to the knee surgery and the removal of the rod in the femur;
- the knee brace(s);
- a modest amount for a case worker. I accept Ms. Chisolm's evidence that Mr. Jacobs' indigenous heritage likely means that he will require assistance to access medical and other support services;
- the recommendations for future moving costs, handyman services and the like should be subject to significant negative contingencies as, at best, in my view, they represent a remote possibility; and
- the costs associated with a total knee replacement, which are between approximately \$4,000 - \$5,500 according to Mr. Sheldon, should also be subject to a significant negative contingency.

[213] When I take all these factors into account, which include both positive and negative contingencies to which I have referred, I conclude that the plaintiff should be awarded \$50,000 under this head of damage which will be available to him over his life time as a "bank" to access as and when the need arises for those items to which I have referred in paragraph 212 above.

H. In Trust Claim for Francis Jacobs

[214] In Paterson, Justice Gerow summarized the applicable principles at paras. 110-111 and I shall not repeat them in these reasons.

[215] The plaintiff seeks \$2,500 on behalf of his brother Francis Jacobs who testified that following the Accidents, he assisted his brother by providing him with money and a place to shower when he was homeless. The plaintiff's evidence was that he had been cut off of social assistance after the accident and that he required his brother's assistance.

[216] When I apply the principles as summarized in Paterson, I do not accept the plaintiff's argument that his brother's assistance for the time he was homeless went "over and beyond what one would expect from a brother who is only a year and a half older than the plaintiff". In fact, based on the relationship between the brothers as they grew up with their grandparents, I have concluded that what Frankie did for his brother during this time frame is exactly what I would expect of an older sibling in that position.

[217] Accordingly, there will be no award under this heading.

I. Special Damages

[218] Although the second amended statement of claim advances a claim for special damages, there was no evidence lead with respect to this issue. Accordingly there will be no award under this heading.

J. Mitigation

[219] The defendants submit that the plaintiff has failed to mitigate his damages. A defendant who alleges a failure to mitigate must prove on a balance of probabilities that the injured plaintiff failed to take reasonable steps to reduce her loss and that if she had taken such steps the loss would have been reduced: *Chiu v. Chiu*, 2002 BCCA 618, at para 57.

[220] In *Jones v. Davenport*; *Jones v. Kretschmer*, 2008 BCSC 18, the test was framed as follows:

[102] The onus is on the defendants to prove the essential elements of this defence on the balance of probabilities. As I understand the law, the essential elements of the defence of failure to mitigate are:

- (a) That a qualified medical expert recommended that the plaintiff undergo a particular form of treatment;

- (b) That the plaintiff failed or refused to take the recommended treatment although it was available to him or her; and
- (c) That the plaintiff's refusal or failure was unreasonable, in that if the plaintiff had taken the recommended treatment, there is some likelihood that he or she would have received substantial benefit from it; and the treatment would not expose the plaintiff to significant risk.

[221] The defendants argue that it was recommended to the plaintiff in 2013 that he see a specialist for his knee and that he did not keep the appointment. They also point to Dr. Giantomaso's evidence that the longer the time between injury and repair, the more "worn out" the knee can become and the greater the risk of osteoarthritis.

[222] It was the plaintiff's evidence that he did not remember being referred to a specialist for his knee although I accept that a letter was sent to him in that regard.

[223] As the Klock defendants note in their written submissions:

383. What the law requires is that the plaintiff makes contextually reasonable and sincere efforts to limit his or her damages and loss. *Qiao v. Buckley*, 2008 BCSC 1782; *Antoniali v. Massey*, 2008 BCSC 1085.

[224] In *Chiu*, Justice Low stated:

[58] A complicating factor in some cases is the ability of the plaintiff, due to cognitive impairment or age, to understand the course of treatment he should reasonably pursue. In the present case, the respondent did not turn 19 until 22 December 1996, almost three years post accident. In addition, there was evidence that he did not have a good grasp of what was wrong with him and why he needed medical attention from time to time.

[225] The defendants must take the plaintiff as they find him. In so far as this particular plaintiff is concerned, this included a young man who had a history of emotional problems, a lack of consistency in his living arrangements and clear difficulties with self-motivation.

[226] In my view, the defendants have not established that it was "contextually reasonable" for the plaintiff to have failed to limit his damage or loss. There is insufficient evidence from which I can conclude that Mr. Jacobs, notwithstanding his age and mental state, "had a good grasp" of the need to follow up with specialists and avail himself of the services available through the public medical health system.

[227] In fact, it is ironic the defendants would take the position they do on this issue. That is because they conceded in regard to the claim for cost of future care that there should be a modest award for a case worker to assist Mr. Jacobs in accessing various health and other services that may be available to him.

V. Conclusions

[228] In summary:

- (a) James Basil is 100% liable for Accident #1 and the plaintiff is awarded \$5,000 in relation to that accident against this defendant;
- (b) liability for Accident #2 is apportioned 25% against James Basil, 25% against the Klock defendants and 50% against the plaintiff;
- (c) damages in Accident #2 are assessed as follows:
 - general damages: \$115,000;
 - past loss of earning capacity: \$15,000;
 - future loss of earning capacity: \$115,000;
 - cost of future care: \$50,000;

Total: \$295,000

- (d) the plaintiff, having been found contributorily negligent in Accident #2, will have several judgments against each of James Basil for 25% of \$295,000 being \$73,750 and the Klock defendants for \$73,750 on the same basis; *Leischner v. West Kootenay Power and Light* (1986), 70 B.C.L.R. 204, at para. 92.
- (e) the parties have leave to make submissions regarding the application of section 83 of the Insurance (Vehicle Act), R.S.B.C. 1996, c. 231.

[229] In light of my findings regarding liability for both accidents, the parties have leave to speak to costs should that be required.

"Abrioux J."

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