

CANADA / JUDGMENT

McCormick v. Plambeck

2020 BCSC 881

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 881 McCormick v. Plambeck

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McCormick v. Plambeck,

2020 BCSC 881

Date: 20200612

Docket: S148167

Registry: Vancouver

Between:

Calder McCormick

Plaintiff

And

Ryan Paul Plambeck, Deceased, Stephen Patrick Pearson, Lidia Diana Pearson, Alan Francis Coupland and Joy Coupland

Defendants

Ryan Paul Plambeck, Deceased, Stephen Patrick Pearson, Lidia Diana Pearson, Megan Coupland, Andrew Coupland, Alan Francis Coupland and Joy Coupland

Third Parties

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff:

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Counsel for the Defendants/Third Parties Stephen Patrick Pearson and Lidia Diana Pearson:

J.A. Doyle

J.G. Smith

Place and Date of Trial:

Vancouver, B.C.

February 19-21, 24-28, 2020

March 2-4, 6, 10, 13, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 12, 2020

- [1] In the early morning of September 16, 2012, following a party at the home of the defendants Stephen Patrick Pearson and Lidia Diana Pearson ("the Pearsons"), a 1992 Subaru motor vehicle left the roadway on North End Road on Salt Spring Island ("the accident"). After leaving the roadway, the vehicle crashed into the woods beside the road.
- [2] The Subaru was owned by the defendants Megan and Andrew Coupland ("the Couplands"). The driver of the Subaru, the defendant Ryan Plambeck ("Ryan"), was killed in the accident, and the plaintiff, a passenger in the vehicle, sustained serious injuries.
- [3] The plaintiff has settled his claims against the Couplands and Ryan, but seeks a finding of liability for the accident against the Pearsons on the basis of what is referred to in a number of authorities as "social host liability".

Background

- [4] The plaintiff was born on March 24, 1995. He is one of three children of his parents Michael McCormick and Cornelia Jones. His older sister is Sarah, and his twin brother is Tom. He also has an older half-sister, Charlotte Jones, from his mother's prior relationship. His family had lived on Salt Spring Island since the time of his birth.
- [5] At the time of the accident, the plaintiff lived with his family on Fruitvale Road on Salt Spring Island.
- [6] The plaintiff's parents, his twin brother Tom, and his older half-sister Charlotte all testified at trial. I will refer to the plaintiff's parents as Mr. McCormick and Ms. Jones, respectively. Meaning no disrespect, but to avoid confusion, I will refer to his siblings by their first

names.

Alcohol and Marijuana Consumption on Salt Spring Island

- [7] Salt Spring Island is one of the Southern Gulf Islands. It was described by a number of witnesses as a "laid-back" community, where the lifestyle is slower paced than in larger urban centers. Several witnesses commented on the habit of many on the Island leaving their homes and vehicles unlocked, and of some leaving car keys in unlocked vehicles.
- [8] In 2012, The use of marijuana and the consumption of alcohol by minors was apparently widespread, and condoned by many Salt Spring Island parents, despite the illegality of the use of the former at the time of the accident, and the prohibition of the latter pursuant to s. 33 of the Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267, in force at the time of the party.
- [9] Prior to 2012, when the plaintiff and his brother were in grades 8 and 9, they worked at Blackburn Meadows Golf Club in the clubhouse. They also cut lawns and did other labouring jobs at the Golf Club. The plaintiff worked at Moby's Pub in the kitchen around grade 9, and in the kitchen of the Harbour House Hotel in grade 11. Prior to the accident, the plaintiff worked for a neighbor, Vernon Smith, doing odd jobs. He also did some landscaping for an individual named Barry Haines working on the "rich homes", and did some work for Dave McLeod including carpentry.
- [10] At the time of the accident, the plaintiff was 17 years of age and about to begin grade 12 at the Gulf Islands Secondary School. His interests included BMX biking, disc golf, photography, and he regularly frequented the local skate park. To his mother's knowledge, the use and sale of alcohol and marijuana were regular activities at that park.
- [11] Prior to the accident, he had commenced a work experience program in high school and began gaining hands on experience working for carpenters as an apprentice. He also worked on building a new library on Salt Spring Island.
- [12] Mr. McCormick testified that prior to the accident, the plaintiff had reached a point where he was not interested in classroom, sit-down type work. He had two classes that he needed to finish in order to graduate from secondary school, but had expressed a desire to "move on". To that end, he had enrolled and been accepted into the Camosun College Red Seal carpentry program. He was scheduled to begin grade 12 classes, the week following the accident.
- [13] The plaintiff testified that his dream was to finish high school a semester early and start working as a carpenter. His parents had told him that a trade was a wonderful place to start in life and one would make good money and enjoy the work.

- [14] The plaintiff thought that he was in grade 9 when he first met Ryan. The plaintiff thought that Ryan lived with his mother in Chetwynd and on occasion with his brother Kris Plambeck on Salt Spring Island. He described Ryan as coming from a broken family. He thought that Ryan was a year older than him, and was not sure if he had attended the secondary school on Salt Spring Island.
- [15] Ms. Jones thought she first met Ryan the weekend before the party. She said that her intuition told her he was troubled and that he seemed very sad. She said that she told her sons this, and said that troubled people have a way of getting others into trouble.
- [16] Ms. Jones recalled that in the summer of 2012, the plaintiff sold his video game console, as he was becoming more serious about his future. She stated that early in the summer he indicated that he wanted to become a carpenter and begin working.
- [17] Mr. McCormick testified that, prior to the accident, the plaintiff was learning to drive. He was scheduled to take his driving test to obtain his "N" licence three days after the accident. Mr. McCormick had participated in "quite a lot" of driving with his son in preparation for that test and described his son as a "very cautious driver" who was "very wary of the dangers of driving". Indeed, Mr. McCormick was the only member of the family that the plaintiff would drive with. Mr. McCormick stated that he specifically observed that his son would not get in a car without a seatbelt and would not drive if his father did not have his seatbelt on.
- [18] Tom, the plaintiff's twin brother, testified that although their parents did not want him or his brother using marijuana, both smoked marijuana regularly and did so together at home, mostly on weekends.
- [19] Tom said that before the accident, he and his brother and their friends attended parties together and drank alcohol. He said that the plaintiff was similar to his peers with respect to his alcohol consumption.
- [20] Mr. McCormick stated that he knew his sons consumed alcohol and used marijuana but that he and Ms. Jones did not condone it, and, in fact, discouraged it. He stated that there was alcohol and marijuana "everywhere" on Salt Spring Island and it was very much part of the culture. He and Ms. Jones sought to limit their children's exposure to these substances and navigate their teenage years so that the impact of that culture was reduced. He said that he and Ms. Jones were strongly against having underage drinking parties in their home and would not allow one to occur.
- [21] According to Mr. McCormick, the rule at his home was that minors were not allowed to have alcohol, nor were friends permitted to use marijuana. He said that there may have been an instance or two where Gordie Fletcher was invited to have a single beer after finishing working on a shed, but that was an isolated case. Mr. McCormick acknowledged that friends of his sons may have come over and brought alcohol, but he was unaware of this and condemned it. He was also unaware if friends of his boys had come over and used marijuana, but he would not have allowed it had he known.

- [22] Mr. McCormick gave evidence that he suspected the plaintiff would, on occasion, drink beer with his friends when they socialized, but there were limits on who he should associate with and have over. For instance, Kyle Matheson was generally not welcome, although the plaintiff's father could not remember if this was a rule and could not remember if Mr. Matheson had ever actually come over to his home.
- [23] Mr. McCormick stated that his sons were allowed to consume marijuana on the property but not in the house. He did not like it and said that they knew that. They did not do so in his presence, but he thought they would share a joint from time to time when he was not around.
- [24] Mr. McCormick gave evidence that if the plaintiff wanted to drink alcohol or smoke marijuana with friends, he had to do it somewhere other than at his parents' home. This could include at a house, at the beach or in the bush, with or without parents present. Mr. McCormick did not want the plaintiff and his friends doing these activities at a place where he was to be responsible.
- [25] Mr. McCormick testified that while the plaintiff's friends were not encouraged to consume alcohol or smoke marijuana at his house, it might have happened.
- [26] Mr. McCormick gave evidence that he was unaware of the full extent of what he now understands to be the drinking culture on Salt Spring Island prior to the accident. He denied having knowledge that the Pearsons had hosted "drinking parties" in the past, or of his sons attending a "full blown teenage drinking party" prior to September 2012. He said that he was unaware of his sons attending a party and drinking alcohol prior to the accident, but conceded that he knew that they consumed alcohol and used marijuana and understood that it was typical behavior for teenagers.
- [27] Ms. Jones stated that there were to be no parties at their home. There was also to be no serving of alcohol to minors. Ms. Jones gave evidence that she and her partner did not like the idea of drinking parties and discouraged their children from participating in them.
- [28] Ms. Jones stated that she and Mr. McCormick did not buy their sons beer or allow drinking in the home. They knew that drinking parties for minors occurred but were not aware of any specific ones. The boys' friends may have consumed alcohol in their home, but she was not aware of it and discouraged it.
- [29] Ms. Jones stated that she and her partner also did not like marijuana and did not like it being consumed on their property. Ms. Jones stated that there was a "pot culture" on Salt Spring Island, and while she knew her boys used it, she did not want them to do so on their premises. She understood that they would go down to the beach and do so.

- [30] Dylan McLeod, a close friend and classmate of the plaintiff, stated that the plaintiff consumed marijuana and alcohol prior to the accident and was no different than himself or their peers. He stated that the plaintiff and his friends were opposed to drinking and driving prior to the accident.
- [31] The plaintiff and his friends also drank at their friends' houses, sometimes with parents present, and sometimes without the presence of the parents.
- [32] The plaintiff gave evidence that he had attended high school parties prior to the date of the accident, including parties at Madison Greggain's and Kyle Matheson's homes. His evidence, as well as that of his brother, one of his sisters, and his parents was that he knew the dangers of drinking and driving prior to the accident, and that he would never get in a car with someone who had been drinking. This was a firm rule, and expectation, with no exceptions.
- [33] Mr. McCormick stated that he and Ms. Jones had talked often to the plaintiff about drinking and driving and the consequences of both driving and being a passenger under such circumstances. Drinking and driving was absolutely not allowed. He never observed any resistance to this idea from the plaintiff, and, indeed his experience of teaching the plaintiff to drive was that he was very cautious.
- [34] The plaintiff stated that prior to the accident he was opposed to drinking and driving, and held the opinion that, if you could tell a driver was intoxicated, you should not get in their car. He stated that he would not get in a vehicle with someone who was intoxicated.
- [35] The plaintiff said that his parents had made clear to him that if he became too intoxicated or sick he could call home and they would pick him up. They had reiterated this on a number of occasions. His parents had also indicated that he was not to drink too much inside the house and, when he was outside the home, if he was drinking, he was to have a plan for where to sleep.
- [36] William "Chip" Chipman was the plaintiff's wood shop teacher. He gave evidence about a teenage party that his daughter hosted approximately 20 years ago. It was his evidence that if he thought attendees were becoming drunk, he told them to slow down. As the night ended, he made sure that all the attendees had safe rides home or he drove them home.
- [37] I find that the plaintiff began experimenting with alcohol between his grade 8 and grade 11 years, and that by the summer of 2012 had begun the somewhat regular use of marijuana. I accept that by the summer of 2012, he consumed alcohol a number of times per month and smoked marijuana three to four days per week.
- [38] The plaintiff was presented with photographs from his Instagram account. He admitted that some of the photographs depicted events where he drank beer, hard liquor, and smoked marijuana, at home or elsewhere.

- [39] With respect to the Instagram photos, Mr. McCormick gave evidence that he was disappointed by what he saw, as he and Ms. Jones were trying to teach their son to limit his exposure to alcohol and drugs. He said that he later realized that the photos spanned a long period of time and said that they did not show or suggest consumption aside from a few instances. He had never seen what was depicted in the photographs in live or photographic form. Had he seen the photos prior to the accident, he said that the plaintiff would have lost all his privileges and Mr. McCormick and Ms. Jones would have done whatever they could to ensure their son was safe.
- [40] Ms. Jones stated that she saw no sign of alcohol or marijuana addiction in the plaintiff or his brother. They performed well in both school and their employment. Ms. Jones disputed that her son was a heavy marijuana user prior to the accident. She gave evidence that she understood that in the summer of 2012 the plaintiff quit smoking marijuana and drinking.
- [41] Each of the plaintiff's parents dismissed the photographs depicting the plaintiff's use of both in his Instagram account, as unrepresentative of his use, or posed for effect, and not a true representation of his use. In all, there were 164 photographs placed into evidence from that account. I appreciate that the photographs were not the complete account, but of the 164 in evidence, 50 were from the time period of February 16 to September 2, 2012. Of the 164, 19 depicted alcohol or alcohol use, 13 depicted marijuana or marijuana use, three depicted the use of both marijuana and alcohol, and 11 depicted marijuana paraphernalia.
- [42] The plaintiff said that the Instagram entries did not show actual use of marijuana or alcohol, but the captions suggest otherwise. I find that the entries do represent a regular use of both alcohol and marijuana by the plaintiff during 2012.
- [43] I find that the plaintiff's parents either chose to be deliberately blind to the extent of his use of marijuana and alcohol, or have recast their recollections out of guilt for the fact that their son was injured in the accident. In any event, I do not believe their evidence about their perceptions of the plaintiff's use of marijuana or alcohol.

The Relationship between the Plaintiff's Family and the Pearson Family

- [44] The defendant Stephen Pearson has worked as a carpenter for the past 40 years. He is 57 years old. He and his wife reside at 313 Epron Road, the same home they occupied at the time of the party. They have three children. Their eldest, Mackenzie, a son, is 26 years-old. Their twin daughters, Hannah and Elise, are 24 years-old. At the time of the accident, Stephen Pearson, his wife and their daughters resided together, their son having moved to Montreal.
- [45] The Pearsons and their daughters gave evidence at trial. I will refer to the parents as Mr. Pearson and Ms. Pearson in these reasons. In order to avoid confusion, and again meaning no disrespect, I will refer to the Pearson daughters as Hannah and Elise.

[46] The plaintiff's mother was a good friend of Lidia Pearson's sister, Lilian "Lil" Rumi. Prior to the accident, the three families had some family get-togethers. The plaintiff knew the defendants as Steve and Lidia, and was aware that they had a son and two twin daughters.

Pre-Party Planning

[47] I will refer to the gathering at the Pearsons' home on September 15-16, 2012 as "the party".

[48] The plaintiff and the Pearsons and their daughters testified about the party.

[49] At the outset, I pause to say that I have serious reservations about the reliability of the plaintiff's evidence. These reservations are not because I consider that the plaintiff was dishonest or deliberately untruthful, but rather because, due to his brain injury, he is incapable of giving reliable evidence.

[50] I accept the evidence of the Pearsons as credible and reliable.

[51] In addition to the plaintiff, the Pearsons, and their daughters, the following witnesses were called to give evidence about the party:

- a) Tom McCormick;
- b) Samantha Clemente;
- c) Michael Elsser;
- d) Ethan Frigon;
- e) Luke Hylands;
- f) Kyle Matheson;
- g) Dylan McLeod; and
- h) Paige Rumi

[52] I will review the evidence of the party given by these witnesses, including the events immediately before and after the party. I will then make findings in respect of the credibility and reliability of this evidence.

[53] Elise testified that the party was for her friend Olivia's birthday. She and her sister asked their parents if they could host a party for her.

[54] Ms. Pearson gave evidence that she had just come back from visiting her son in Montreal when her daughter Hannah asked to host the party. She agreed but was adamant that there was to be no drinking and driving. Ms. Pearson agreed that she knew that some of the attendees would bring alcohol. Her expectation was that parents would come and pick up attendees.

- [55] Elise gave evidence that her parents agreed to the party and stipulated that car keys would be taken from the people who drove, and that she, her sister, and their parents would circulate throughout the party, which would end at 1:00 a.m.
- [56] Mr. Pearson testified about parties he and his wife had allowed their son to host prior to the party. He recalled two such parties and testified to the basic guidelines established at those parties: he and his wife would be present in the home inside their room, giving the partygoers the home, but would walk around on occasion; there was to be no drinking and driving; if attendees drove, their keys would be collected; alcohol could be consumed but would not be provided; and, there would be a time limit of 1:00 a.m. for the party to end.
- [57] Mr. Pearson gave evidence that at 1:00 a.m., it was expected that people would begin calling for rides home, except for those attendees who lived close enough to walk home, would do so, and the closest friends "and maybe a stray kid or two" would spend the night. If there were attendees who needed a ride, he and his wife would facilitate that.
- [58] The plaintiff stated that he both received an invitation to the Pearson party over Facebook and had heard rumors about it at school. The description of the Facebook event page requested those invited to "just please don't drive under the influence". The invitation included a posting by Hannah that linked to a video produced by an anti-drinking and driving campaign. This was the first posting on the Facebook event page, and it was posted prior to the party.
- [59] Mr. McCormick thought he heard about his sons going to the Pearsons' home for a party prior to the event, but understood that it was for a birthday party to which 30-40 people were invited, half of whom were unlikely to attend. He denied hearing about alcohol consumption, but expected that alcohol would be consumed at the party and that the plaintiff would bring and consume alcohol.
- [60] Given what he had heard about where his sons were going, Mr. McCormick did not see any "red flags" and had no concerns. He stated that he had known the Pearsons for 20 years, knew they would look after his children and thought they would be safe in their home.
- [61] Dylan McLeod gave evidence that he was invited to the party over Facebook and face to face by one of the Pearson daughters. He said that he understood it was to be a typical party with what he described as "a decent number of people". He thought it was for someone's birthday and understood drinking would be allowed and that he could bring his own alcohol.
- [62] The plaintiff stated that initially he was not interested in attending the party, but on the day of, his friends Evan Pearson and Dylan McLeod showed up at his home and pressured him to go. He said they indicated they had alcohol, some of which he could have. His recollection was they had six Heineken beers and a bottle of Olde English, a beer with an approximate 7% alcohol content. He said he told them that he had chores to complete and that they offered to help him.

- [63] Ms. Jones testified that a plan for the plaintiff staying at Kris Plambeck's place was discussed, however her understanding was that her boys would only stay at the party until 10:00 p.m. or 11:00 p.m. and then come home.
- [64] The plaintiff thought the plan was that he would either leave his road bike at Kris Plambeck's house or would sleep there. He did not recall planning to sleep at the Pearsons' home.
- [65] The plaintiff recalled that he and his friends left his parents' home at around 7:00 p.m. or 8:00 p.m. and drove to Kris Plambeck's residence. He said he believed that the party was to commence at approximately 8:00 p.m. or 9:00 p.m. and did not recall consuming alcohol before going to the party.
- [66] The plaintiff and his friends waited at Kris Plambeck's home for the party to start. It was twilight when they arrived at the party.
- [67] Dylan McLeod stated that he and a few friends, including Ryan, walked over to the party from Kris Plambeck's house, leaving at approximately 10:00 p.m., drinking and smoking as they walked. He said that the walk lasted approximately 15 or 20 minutes. It was dark out and the area was forested. He recalled people walking on the road.

The Party

- [68] The party occurred during the evening of September 15 - 16, 2012.
- [69] Mr. Pearson recalled that his daughters had a few friends over before 8:00 p.m. By 9:00 p.m. things were getting busier and he and his wife retired to their bedroom, giving the attendees the use of the main floor and basement. Mr. Pearson stated that he and his wife would circulate once an hour, "give or take". He remained in his bedroom for a good part of the evening. When asked who was supervising the party while he and his wife were in their room, Mr. Pearson stated that he thought his daughters and their friends were very responsible and that they would come and find him if something required his attention.
- [70] Mr. Pearson and his wife provided their daughters with two liters of alcoholic cider. He understood that his daughters would be socializing and drinking and would not be standing by the door for the entire party. He also understood that attendees would be arriving throughout the party.
- [71] Ms. Pearson stated that, at the beginning of the night, they had set out a bowl in which to place car keys that were collected. She explained that her daughters knew which of their friends may have had an "N" licence and were driving. She did not think any of the attendees had difficulty giving up their car keys. She did not collect any keys herself, but some were brought to her and her husband. She stated that perhaps five sets of car keys were brought to them.
- [72] With respect to the collection of car keys, Mr. Pearson testified that this relied on people being seen driving up to the house and the fact that he believed his daughters knew who would drive. He recalled taking a single set of car keys, and his daughters bringing car keys

to his wife who put them in a ceramic bowl on the nightstand. Collection of the car keys was delegated to his daughters, as he understood that keys would be taken if cars were driven up their driveway and parked. He acknowledged that it was possible that drivers could be missed and car keys would not be requested from them.

- [73] Tom created an incomplete list of the attendees at the party. He was able to recall 67 attendees, including his brother and himself. He gave evidence that he briefly saw each of the Pearsons on one occasion, in the kitchen on the main floor. He believed they were in their room during the party.
- [74] Ethan Frigon described the party as quiet. He stated that the attendees were trying to be respectful of the fact that the Pearson parents were at home. Other than being respectful, the only rule was that drinking and driving was not permitted.
- [75] Mr. Frigon gave evidence that he believed that his friend Jackson, who parked at Mr. Frigon's home, had his car keys taken. He thought he saw one or both of the Pearsons' daughters with a bowl of keys.
- [76] Hannah Pearson had little reliable memory of what occurred at the party. She stated that her general memory of the events was "foggy" and she was unsure what were real memories and what she had pieced together. She said she recalled that her friends came to the party and people had a good time. She was at the door at the beginning of the party, taking car keys and putting them into a bowl. She did not have much memory of what else she did at the party. She consumed alcohol, but did not remember how much. She recalled that she was mingling.
- [77] In total, there are four doors into the home including two from the patio, as well as the front door and a door in the basement. Mr. Pearson acknowledged that the party was going on outside the home and that someone who did not enter the home via the front door could be missed and their keys not taken. He said that he also understood that teenagers could lie about driving. He did not know if attendees were parking near other homes and did not consider that they might park up the street from his home.
- [78] Mr. Pearson observed cider, coolers, and beer being consumed by the guests. He did not tell any attendees to slow down their consumption of alcohol nor restrict the kinds of alcohol that could be consumed that night. He did not have a recollection of seeing hard liquor, nor did he recall seeing any drinking games. He saw kids dancing and having fun. The music was quite loud. He smelled marijuana outside.
- [79] Mr. Pearson said that no one was turned away from the party, and neither he nor his wife took alcohol from any of the attendees. He agreed that had he seen anyone extremely intoxicated, he would have taken some steps as a matter of safety. Not surprisingly, he agreed that bad things such as falling, passing out or being struck by a car could occur to an intoxicated minor walking down the street. None of these things occurred.

- [80] Mr. Pearson recalled seeing the plaintiff at the party twice and saying hello. He said that he did not see the plaintiff in a state of intoxication.
- [81] Ms. Pearson went to her bedroom when more guests began arriving at the party. She gave evidence that she came out occasionally to check on the attendees, and that her husband did the same. She agreed that she came out of her room at least two or three times but did not remember the exact number of times.
- [82] Ms. Pearson felt that the attendees were responsible, independent kids. She said that she had a "good vibe" when she walked around. She did not feel that any bad behavior came to her attention nor did she see anything out of the ordinary. She did not see anything that alarmed her. She further clarified that she felt that the teenagers were not consuming more alcohol than the limit, although she then acknowledged that the legal limit for both alcohol and marijuana for minors was zero.
- [83] Ms. Pearson testified that she felt the party seemed well controlled. She agreed that she saw minors with beer and bottle-type drinks during the party. She agreed that nothing was done to control the kinds of alcohol coming into the home and there was no rule against hard liquor being consumed. She did not take any alcohol from the attendees as she saw no signs that doing so was necessary.
- [84] Ms. Pearson said that she was unaware of the use of marijuana in the house but did not go outside.
- [85] In her evidence Elise described a well organized, well monitored and controlled party. She testified that while the majority of their guests arrived, she and her sister stood by the door and took car keys away from anyone who had driven. The keys were put in a bowl which was handed to her father. She stated that she would have known who had cars, and only a handful of her friends would have driven. She said that she had a recollection of those guests parking on her parents' property.
- [86] Elise gave evidence that her mother bought her and her sister a two-litre bottle of alcoholic cider for the party. She could not remember if it was shared, but thought she had two alcoholic drinks. She could not remember what they were.
- [87] Elise stated that she was drinking, socializing and circulating throughout the party. She did not remember if she spent time upstairs with Olivia but stated that she may have been upstairs circulating. She agreed that she did not stand by the front door all night. She said that she saw the plaintiff in passing at the party, and that he seemed fine to her. Her contact with the plaintiff that night lasted a few seconds. She could not say whether she saw Ryan.
- [88] Elise recalled that beer pong, a drinking game, was played at some point, but said that she asked for the ping-pong table being used for that game to be put away to make space for dancing.

- [89] Kyle Matheson testified that he arrived at the party at about 10:00 p.m. when it was dark out. He did not recall seeing any adults at the party. He stated that the party was starting to get bigger when he arrived. He remembered socializing with both the plaintiff and Ryan. He said that they drank a few beers and had two or three shots of rum from the bottle. He said that was the "total" number of shots consumed by the three of them. He stated that he did not recall the fine details of the plaintiff's demeanour, but the plaintiff did not seem to stand out.
- [90] Dylan McLeod gave evidence that he thought he saw the Pearsons during the party, but he did not remember where they were or what they were doing.
- [91] Luke Hylands gave evidence that he socialized with both the plaintiff and Ryan at the party. He said they all were drinking. He said that he consumed a couple of beers at the party, though he could not remember exactly how many. He also remembered people consuming both beer and hard liquor. He recalled people "shot gunning" beers, an activity he described as creating a hole at the base of a beer can and then pulling up the tab and opening the can. The effect of this exercise is that one drinks the beer faster.
- [92] Paige Rumi is Lil Rumi's daughter. Paige Rumi was 31-years old at the date of the trial. At the time of the accident, Ms. Rumi resided on Salt Spring Island, working at Moby's Pub. She attended the Fall Fair the day of the party, and stated that she had a couple of pints there, which had a greater effect on her than she expected. After attending at the fair, she went to work, broke a glass and was asked by her manager to leave. Her friend Dara picked her up and the two went to a Chinese food restaurant for the birthday of a friend.
- [93] On their way home, Ms. Rumi and Dara stopped by the Pearson home to say hello. Ms. Rumi said that she went into the Pearson home, but Dara did not. Ms. Rumi testified that her memory was patchy, but her evidence was that she recalled seeing the plaintiff downstairs at the Pearsons' home. Ms. Rumi stated that the plaintiff was swaying and his speech was slurred. She said that she asked him what he was drinking and he took her to the oven, opened it and showed her an empty bottle of whiskey.
- [94] Tom said he thought he consumed at most four beers over the three to four hours he was at the party. He observed his brother briefly at the party and saw him consuming beer. He left around midnight. He had arranged for Evan Henshall to drive him home. He asked his brother if he needed a ride before he left, but the plaintiff declined. Tom thought his brother's level of intoxication was in line with other party guests.
- [95] The plaintiff gave evidence that he did not recall drinking any hard liquor and thought that he consumed less than six beers throughout the night. He admitted that it was hard to fully remember the party, though he also stated that his memory of the night is "pretty strong", as he did not consume too much alcohol. He recalled his friends trying to outdrink people and people sharing alcohol.

- [96] The plaintiff said that he recalled his brother offering him a ride, but telling his brother that he did not need one as he intended to stay at Kris Plambeck's residence. While I accept that Tom offered the plaintiff a ride from the party, I reject, as confabulation on his part, the plaintiff's evidence that he recalled that offer.
- [97] Michael Elsser was one of the young people who attended the party. His evidence was that his friend Carrysa got physically ill at the party as they walked down the driveway. Despite her throwing up, it was Mr. Elsser's view that Carrysa seemed completely coherent and functional and did not seem impaired.
- [98] Mr. Elsser provided a statement to the police on March 1, 2013, some six months after the accident.
- [99] He testified at trial that he could not remember the questions he was asked or the answers that he gave, but conceded the obvious; that his memory was fresher when he made the statement to police than at trial, and that listening to the recording of his interview could help refresh his memory. The recording was played in its entirety.
- [100] After hearing the recording, Mr. Elsser stated that it did not in fact refresh his memory. He did, however, accept that the recording would have accurately captured what he believed when he spoke with the police. He identified himself as being the one recorded and confirmed that the recording is of the statement that he provided to the police.
- [101] Counsel for the Pearsons took no issue with the accuracy or validity of the recording, so it was unnecessary to call the interviewing officer to testify with respect to the taking of the statement.
- [102] In the statement, Mr. Elsser stated that:
- a) He was invited to the party over Facebook. The party was for drinking, but he was not supplied alcohol. Everyone brought their own alcohol. He said that this was stated on the invitation one of the defendants' daughters sent him;
 - b) He consumed alcohol at a friend's home prior to attending the party;
 - c) Prior to attending the party, he was at his friend Carson's house, where he consumed alcohol. Carson's mother dropped them off at the party. When he arrived at the party it was fairly early and there were about 20 people in the house. People were arriving already intoxicated;
 - d) He did not see any parents at the party. He was not aware that adults were in the house or on the premises and he thought they were upstairs or at someone else's house for the night;
 - e) 50-60 people attended the party ranging from 15 to 18 or 19 years old. Approximately 70% of the attendees were drinking;

- f) He was inside the defendants' residence from approximately 9:30 p.m. to 11:30 p.m., then outside for the rest of the party aside from 15 minutes when he stepped inside again;
- g) The party occurred "upstairs", in the "kitchen and living room sort of area", "downstairs", where beer pong was played and the driveway;
- h) Prior to leaving the party, Mr. Elsser was "hanging out with Ryan for most of the night [] outside on the driveway", though they did go into the house at some point and played beer pong;
- i) He and Ryan consumed alcohol together. They "drank a couple of beers and [took] shots of Jack Daniels";
- j) Later in the night, a friend of his "started puking" at about 12:00 a.m. or 12:30 a.m., and as a result, he left the party;
- k) He and his friend who was "very drunk" walked away from the party; his friend vomiting for a bit before they left. He then returned to the party at approximately 1:00 a.m.;
- l) When he returned to the party, he socialized with some friends and stepped inside the house for awhile. The party was winding down, so he phoned his father and walked down the road "a little ways" and was picked up;
- m) He was not with the plaintiff or Ryan when they went to the Stibbard residence;

[103] The plaintiff submits that the recording fulfills the requirements of admission of the evidence as past recollection recorded: *R. v. Sipes*, 2012 BCSC 834. In *Sipes* at paras. 9-12, Mr. Justice Smart wrote:

9 The Supreme Court of Canada identified the criteria for the admission of evidence as past recollection recorded in *R. v. Fliss*, 2002 SCC 16, [2002] 1 S.C.R. 535, at para. 63:

... [T]he officer's testimony does not qualify for admission as "past recollection recorded". This doctrine would apply only if the prosecutor could satisfy the four Wigmore criteria, usefully summarized by the Alberta Court of Appeal in *R. v. Meddoui* (1990), 61 C.C.C. (3d) 345, per Kerans J.A., at p. 352:

The basic rule in *Wigmore on Evidence* (Chadbourn rev. 1970), vol. 3, c. 28, s.744 et seq. provided:

1. The past recollection must have been recorded in some reliable way.
2. At the time, it must have been sufficiently fresh and vivid to be probably accurate.
3. The witness must be able now to assert that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he "knew it to be true at the time".
4. The original record itself must be used, if it is procurable.

10 Paciocco and Stuesser discuss past recollection recorded and present recollection revived, and the tendency for the two rules to be misunderstood or blended into one: David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 6th ed. (Toronto: Irwin Law, 2011), at pp. 422-430.

11 The authors summarize past recollection recorded at pp. 422-423:

A witness may, with leave of the court, refresh her memory in court from a document or an electronic record that was recorded reliably. The witness must use the original, if it is available, but where it is not, an authenticated copy can be relied on. If the record is a document created by the witness, it must have been created at a time when the memory of the witness was sufficiently fresh to be vivid and probably accurate. The witness can rely on the document or electronic record to assist in presenting his testimony only if the witness is able to assert that the document...accurately represents his recollection at the time it was made.

12 Paciocco and Stuesser explain that it is the document that is the evidence and why, therefore, it is important to ensure strict compliance with the Wigmore criteria. They state at p. 426:

Since "past recollection recorded" permits witnesses who have no personal memory of an event to rely on the contents of the record and to incorporate the contents of the record into their testimony, it is artificial to suggest that the witness is the immediate source of the evidence. The witness, who has no personal memory of the details and facts recorded, is vouching for the record, but it is the record that is supplying those details and facts. For this reason, many believe that "past recollection recorded" is actually a hearsay exception, with those portions of the record incorporated into the testimony serving as the evidence. This is more realistic than pretending that the testimony of a witness who is simply parroting the document is original testimony. Recognizing this also reaffirms the importance of ensuring strict compliance with the requisites of the rule - effectively, they furnish the kind of necessity and reliability requirements that operate for other forms of hearsay evidence.

[104] Given Mr. Elsser's evidence before me, this is clearly not a case of present recollection revived. For me to be able to rely upon the statement, it must strictly comply with the criteria for past recollection recorded.

[105] I am satisfied that the first, third, and fourth Wigmore criteria for past recollection recorded are met in this case. The issue is whether the statement taken on March 1, 2013, some six months after the accident, meets the second criterion and was sufficiently fresh when made to be vivid and probably accurate.

[106] The parts of the statement that I have referred to as a) through e) and g) add nothing new to the evidence that I have heard from other witnesses, and f), h), and i), while personal to Mr. Elsser, do not assist me in determining the sobriety or otherwise of the plaintiff, and I have independent evidence of Ryan's level of intoxication from Mr. Image, a forensic alcohol consultant and registered toxicologist whose evidence I review later in these reasons.

- [107] The balance of the information in the statement supports the argument that there were some intoxicated young people at the party, but again, I have that evidence from other sources.
- [108] Given the minimal use that could be served by the admission of the statement as past recollection recorded and the inability to establish strict compliance with the second Wigmore criterion, I place no reliance on the statement.
- [109] I am not satisfied that the party differed from other similar parties involving similarly aged minors, and find that their conduct and sobriety was consistent with the conduct and sobriety of the same young people, or others like them on Salt Spring Island before and during 2012.
- [110] I accept the evidence of Elise, supported by that of Ethan Frigon that the party was reasonably well organized, well monitored and controlled, but find that it was attended by minors who exhibited varying states of sobriety from the use of alcohol or marijuana, or both.
- [111] I reject the plaintiff's evidence about his alcohol consumption as confabulation on his part.
- [112] I accept that the Pearsons had a plan in place to take keys from drivers on their arrival at the party, and presented a minimal presence by circulating during the party.
- [113] The plaintiff contends that the evidence of his alcohol use included:
- a) His brother's evidence that alcohol was taken by them to the party;
 - b) Kyle's evidence of taking shots of rum with the plaintiff and Ryan;
 - c) Paige Rumi's observations; and
 - d) Out of character behaviour indicative of intoxication.
- [114] I find the plaintiff did not drink alcohol nor smoke marijuana before the party and that his alcohol consumption at the party was limited to beer alone, and that he did not smoke marijuana that evening.
- [115] I accept that the plaintiff likely had some alcohol to drink at the party, but I reject the evidence of Kyle Matheson, who I find to be a young man who, at the time of the party, was engaged in the regular use of both alcohol and marijuana, and incapable of distinguishing one of the parties he attended from another. Due to his own intoxication I find that Kyle Matheson simply recalled what the plaintiff had done at other parties and believed that he must have done the same at this party.
- [116] I also reject Ms. Rumi's evidence about the plaintiff's state of sobriety, and his showing her a bottle of whiskey in the oven. She was herself intoxicated, and conceded that she was thus in no position to judge the sobriety of another person.

- [117] The plaintiff points to the theft of the Subaru and his getting into that car with an intoxicated driver as indicative of "out of character" behaviour, and thus his level of intoxication.
- [118] There is no reliable evidence as to how and why the Subaru was taken and what the plaintiff believed about the circumstances. With respect to the argument that the plaintiff got into a car with a drunk driver, as I will explain below, I find that Ryan was not intoxicated. Therefore, it would not have been out of character for the plaintiff to get into a car with Ryan.

After the Party

- [119] At around 1:00 a.m., Elise said that her father started organizing a clean up of the residence and people began being picked up. After most of the attendees had been picked up, her mother drove some home.
- [120] Mr. Pearson said that around 1:00 a.m., the music was turned off, the lights were turned up, and the partygoers were told to call for rides. He said that there was a general migration of partygoers out of the home. Some were picked up, and some simply walked away. He acknowledged that there was no plan for the attendees who showed up at the party on foot. Mr. Pearson did not see Tom or the plaintiff leave.
- [121] Mr. Pearson said that it took some time for him to ascertain the attendees who did not have a ride. Once they were identified, his wife coordinated driving them home. She made one such trip. He thought she left the residence at 1:30 a.m. to do so.
- [122] Ms. Pearson gave evidence that at around 1:00 a.m., she went into the kitchen area and turned the music off. She saw cars driving up to her home. She and her husband cleaned up while rides were organized. When it became known that five attendees required a ride, she drove them home. One was Dylan McLeod.
- [123] The Pearson daughters' closer friends stayed and helped clean up. They then went to bed as did Mr. Pearson. He believed his wife returned home at approximately 2:00 a.m. to 2:15 a.m.
- [124] Elise stated that she was standing on the porch by the front door keeping tabs on people as they were leaving. She stated that she saw the plaintiff and Ryan with a group of people who were heading to Ethan Frigon's home. She stated that they were standing outside the front door and heard someone suggest they were headed to Ethan's home. The plaintiff and Ryan seemed fine to her. She did not see "Jade" leave or her condition, as described by Samantha Clemente, whose evidence I review later in these reasons.
- [125] Ms. Pearson stated that, while she was driving five of the partygoers she got to the point where Byron Road meets Epron Road. Dylan McLeod asked to be let out of her car there as he said he wanted to walk to the Stibbard household. She stated that he seemed fine to her and she let him out of her car. She then dropped two boys off, one of whom was Liam

Murray, and then two girls. She returned home at around 2:15 a.m. She denied dropping Liam off at the wrong location. When she returned home, her husband was tidying up and the guests who were sleeping over were getting into bed.

- [126] The plaintiff's evidence was that he left the party at around midnight to walk to Ryan's house. He gave evidence that Ryan drove a car up the Pearsons' driveway and everyone ran up to the car to see who was driving. The plaintiff said that Ryan was offering rides to people, and he was concerned that Ryan was intoxicated.
- [127] The plaintiff gave evidence that Nicole Love indicated that she would only accept a ride if there was a sober passenger. The plaintiff was then asked to get in the backseat of the car and refused to do so. He gave evidence that he was then pushed into the car by a bunch of older "more sporty" people including Kyle Matheson and Byron Muscle who locked the door, rendering him unable to get out. Ryan then drove Ms. Love to the Stibbard home. There the plaintiff said he got out of the car. He then recalled being back in the car, though he could not remember how this happened.
- [128] In cross-examination the plaintiff suggested that he may have walked to the Stibbard residence.
- [129] Mr. Frigon gave evidence that when he and his companions left the party, they returned to his home. He testified that the plaintiff, Ryan, and Ms. Love then arrived at his home. He thought that they arrived on foot as he saw them walking up his driveway. Mr. Frigon said that he believed that the plaintiff and Ryan did not enter the home and left shortly after.
- [130] Luke Hylands could not recall when he left the party. He stated that he and a group of people, the number of which he could not recall, walked to Ethan Frigon's home to spend the night. He believed this was an approximately 10-minute walk from the Pearson home.
- [131] Dylan McLeod stayed at the party until approximately 1:00 a.m. He stated that people had begun to leave and he could not find his friends. He recalled that the plan was to return to the Plambeck household after the party and he set off to the home. He had no recollection of being given a ride by the defendants.
- [132] When he arrived at the Plambeck residence he found that the sliding door was locked. All his things were downstairs and he did not want to cause a commotion. He thought about calling his father, but then decided to return to the defendants' home as Ruby, a young woman in whom he was interested, was there.
- [133] When he arrived at the defendants' home he entered through the wrong door and walked into the defendants' bedroom. He stated that he was "pretty intoxicated" and did not know what he was walking into. He gave evidence that the defendants then took him outside and put him on the porch sofa with a sleeping bag.

- [134] Samantha Clemente testified that she did not attend the party as a guest. She was, however, a designated driver for her friend, Mr. Levi Mundy, and an exchange student, as previously arranged between herself and Mr. Mundy.
- [135] Ms. Clemente testified that she arrived at the defendants' residence to pick up Mr. Mundy at sometime between 1:30 a.m. and 2:00 a.m. She said that she did not enter the home, but did walk up to the door where she was greeted exuberantly by a friend she had not seen in some time. She testified that this display of friendliness was strange and indicative of her friend's level of intoxication.
- [136] Ms. Clemente said that when Mr. Mundy appeared, either he or someone else asked if Ms. Clemente would also drive two other individuals. One of the other two was a female by the name of Jade, who Ms. Clemente observed to be extremely intoxicated, as she was slouching over in the backseat of her vehicle, unresponsive and needed to be helped to the car and from the car to her front door.
- [137] Ms. Clemente did not see the plaintiff; however, she did see Ryan standing on the shoulder of the road. Ms. Clemente testified that she exchanged text messages with him. Ms. Clemente kept the messages, and they were identified and marked as an exhibit at trial. The first message is time stamped 2:00 a.m. and was received by her approximately 10 minutes after she saw Ryan, and her friend responded to it, because she was driving.
- [138] Ms. Clemente lives close to the accident scene. She testified that, later that night, she heard a car she believed to be travelling quickly outside her home. The sound of the car seemed to abruptly disappear and she thought that she heard some rustling. She did not hear a crash, nor could she identify what a car without a muffler sounded like. She did, however, testify that she heard nothing unusual about the car other than the speed.
- [139] Kyle Matheson gave evidence that at approximately 2:00 a.m., he and some other party attendees left the Pearsons' home and walked to Ethan Frigon's home. Mr. Matheson stated that the basis for this decision was the desire to keep socializing. The plaintiff, Ryan, and Nicole Love were among the group, which splintered into two separate subgroups. Kyle Matheson stated that, once his group arrived at Mr. Frigon's residence, Nissa Marie asked Ryan and the plaintiff to leave.
- [140] Notwithstanding my reservations about the evidence of the plaintiff and Mr. Matheson, the evidence of Mr. Frigon and Ms. Clemente satisfy me that the plaintiff and Ryan left the party on foot.
- [141] I reject the submission of the plaintiff's counsel that the plaintiff was so impaired that he was incapable of a reasonable thought process when he left the party. I find that the plaintiff was no more, and likely a lot less intoxicated at the party than he had been on many prior occasions when attending similar parties.

The Acquisition of the Subaru Motor Vehicle

- [142] At the time of the accident, the Couplands were in the process of trying to sell the Subaru. They had been trying to do so for some time, and, to that end, had advertised the vehicle on a local online bulletin board and mentioned its status to friends and family.
- [143] Andrew Coupland testified that at some point in the weeks leading up to the accident, he was contacted by a potential buyer via telephone. He testified that the caller sounded to him to be a young male. He arranged to leave the keys to the vehicle under the hand brake so that the interested young man could test drive the vehicle. His expectation was that the individual would come by to test drive the vehicle that night.
- [144] Mr. Coupland stated that no one ever came to the house, that he was aware of, to inquire about the car before or after the accident.
- [145] The plaintiff testified that he knew that prior to the accident, Ryan was looking for a car. He knew this because, on the way to the party, Ryan told people they were walking with that there was a car just up the road, that he had contacted the owner, and that the keys to the vehicle would be left with him for a test drive.
- [146] I reject this evidence as confabulation on the part of the plaintiff.
- [147] Mr. Coupland testified that he was at home on the evening of September 15, 2012. He was sleeping in his bedroom at the front of the home with the window open when he was awoken by the sound of at least one male and one female voice. The voices stopped, some time passed, during which he remained awake, and then the car started up. When he looked outside, the vehicle was gone. He did not see the individuals who took the vehicle.
- [148] He called the police and reported that his car had been stolen and was traveling north on North End Road.
- [149] The plaintiff contends that the theft of the Couplands' vehicle was foreseeable because of the practice of leaving unlocked cars with keys in them on Salt Spring Island. I reject this contention. A number of witnesses testified about a "culture" on Salt Spring Island of leaving cars unlocked with keys in them. There is enough consistency among these witnesses on this point that I accept it was common for many residents to leave their cars unlocked, sometimes with keys in those cars. However, I find this was a common practice precisely because these residents did not foresee theft of their cars. In particular, there is no evidence of a concern that cars would be stolen in the more remote area of Salt Spring Island where the Couplands had left the Subaru.
- [150] The accident occurred on North End Road at a point that would have required the Subaru to travel away from rather than towards Kris Plambeck's residence. I find that Ryan and the plaintiff stole the Subaru and rather than using it to return to Kris Plambeck's residence, they used it to joy ride.

The Accident

- [151] The plaintiff said that once he was back in the car, Ryan then began driving. The plaintiff said that he recalled laying in the back seat with multiple seatbelts on. He recalled Ryan driving erratically and leaving the road. His next memory was waking up in the backseat with Ryan's elbow poking him. He believed Ryan was decapitated, but also suggested that Ryan may have spoken to him.
- [152] The Coroner's Report on Ryan was included in a binder entitled "Clinical Records Pursuant to s. 42 of the Evidence Act", and marked as an exhibit before me. It indicates that the passenger of the vehicle driven by Ryan, namely, the plaintiff, was "ejected during the incident and found nearby with serious injuries". The Coroner's Report indicates that neither Ryan nor the plaintiff were wearing seatbelts.
- [153] I accept that the Subaru left the paved roadway, failing to negotiate a curve in the road because it was travelling too fast to safely make the curve.
- [154] I accept that the plaintiff was rendered unconscious in the accident, but I reject his version of his ride in the Subaru, and his evidence of his recollection of coming to after the accident, as that evidence is inconsistent with the findings of the Coroner.

Ryan's Condition at the Time of the Accident

- [155] The Coroner's Report cited "alcohol and cannabis impairment" as a significant condition contributing to death. It described Ryan as an unrestrained driver, and the road he was travelling on as a "paved country road". It stated that Ryan previously had a learner's licence that had expired and the vehicle he was driving as unlicensed and uninsured.
- [156] It was agreed by the parties that Ryan was born on October 4, 1993, and had previously had a learner's licence that had expired before the accident. It was agreed that at the time of the accident, he was driving a vehicle that was both unlicensed and uninsured. It was also agreed that at the time of the accident he was driving at a speed in excess of 70 kilometres per hour, and that the critical curve speed at the curve where his vehicle left the road was 70 kilometres per hour.
- [157] Mr. Brian Image is a forensic alcohol consultant and registered toxicologist. He provided an opinion on Ryan's blood alcohol concentration and his state of impairment at the time of the accident and estimated the amount of alcohol Ryan might have consumed that night. He estimated that Ryan's blood alcohol concentration was likely 69 mg%, being less than the legal limit of 80 mg%.
- [158] Mr. Image opined that a youth of Ryan's weight would have consumed conservatively a minimum of 3.75 ounces of alcohol or approximately 0.8 ounces per hour from the time his drinking commenced, to allow for alcohol elimination. It was his opinion that this was a sufficient level to afford visible signs of impairment, like bloodshot eyes, but his report also states that the "average social drinker" with a 69 mg% blood alcohol level would exhibit few,

if any symptoms. I find that Ryan was more than an "average social drinker" by September 2012. In any case, Mr. Image stated that he "would not expect to see slurred speech, poor balance, or motor in-coordination at a BAC of 69 mg%."

[159] I conclude that Ryan was not intoxicated when he left the Pearsons residence in the early morning hours of September 16, 2012.

The Events during the day on September 16, 2012

[160] The plaintiff had committed to move a wood stove the morning following the party. He was also scheduled to work at the Fall Fair as part of a school fundraiser for the dry grad.

[161] Mr. McCormick realized that the plaintiff was not home at about 7:30 a.m. Some efforts were made to ascertain his whereabouts by members of his family, but none seemed particularly concerned nor alarmed by the fact that the plaintiff was not home that morning. The plaintiff's father went to the Fall Fair that afternoon to complete his duties there and see if the plaintiff arrived for his shift.

[162] Ms. Pearson recalled meeting Lil Rumi and Ms. Jones at the Fall Fair the next day. She denied stating that she was driving guests home from 2:00 a.m. to 4:00 a.m. or that the party was out of control. She accepted that she likely complained about being tired. Lil Rumi was not called as a witness.

[163] When Mr. McCormick returned home from the Fall Fair, there was still no news of the plaintiff. Sometime later, police arrived at their home, told them two boys had been in an accident and that one was dead with the other being rushed to hospital. The police told them that they needed to head to Victoria as soon as possible to determine whether the boy who had been taken to hospital was their son.

Positions of the Parties

[164] At the time of the accident, Ryan was a minor, who had no driver's licence nor a vehicle to drive. It is alleged that he drove the Couplands' motor vehicle in an unsafe manner at an illegal speed, thus causing the accident.

[165] The plaintiff asserts that liability for the accident rests with both the Pearsons and the defendant Ryan.

[166] The plaintiff contends that the Pearsons owed him a duty of care, and that they breached that duty of care by allowing him to become intoxicated on their property, and failing to stop him from leaving their property in that state.

- [167] For their part, the Pearsons contend that there is no evidence that the plaintiff got into a car with an impaired driver, that his judgment was seriously affected by the alcohol he consumed, or that alcohol impairment was a contributing cause of the accident. They say that there is no evidence that the plaintiff or Ryan left the party in an obvious state of intoxication or that the partygoers were uncontrolled.
- [168] The Pearsons deny any liability for the accident. They contend that the accident was caused by Ryan's negligent operation of the Couplands' vehicle and that the plaintiff is contributorily negligent.
- [169] In the alternative, and in the event that they are found partially liable for the plaintiff's injuries, the defendants submit that liability should be apportioned to the plaintiff's parents and the Couplands.
- [170] Neither the plaintiff's parents nor the Couplands remain parties to this action. The defendants rely on *MacDonald v. Cunniff*, 2016 BCSC 559, in which the Court considered the Negligence Act, R.S.B.C. 1996, c. 333 and *Wells v. McBrine* (1988), 33 B.C.L.R. (2d) 86 at 94 (C.A.) [Wells], to conclude that a defendant in a claim of negligence can plead apportionment of a non-party. In *Wells*, our Court of Appeal held that the essential aspect of a claim against a non-party is that "fault was properly raised in the course of the action so that it could be dealt with by evidence and argument."
- [171] In their response to civil claim, the defendants pleaded apportionment under the Negligence Act against the Couplands, but did not plead apportionment against the plaintiff's parents.
- [172] The defendants contend that liability, if any, would arise from having quasi-parental responsibility over the plaintiff due to his status as a minor; and implicitly permitting him to consume alcohol at their home. Those same factors were, or should have been equally apparent to the plaintiff's parents who had even greater parental responsibility over him than did the Pearsons.
- [173] For reasons that will become apparent, I do not need to resolve whether and to what extent I can consider apportionment against the plaintiff's parents.

Discussion

- [174] As Chief Justice McLachlin explained in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 [Mustapha], at para. 3:

A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach.

(a) Duty of Care

- [175] In advancing his claim, the plaintiff is asking this Court to extend the ambit of a duty of care previously recognized in the jurisprudence.
- [176] The plaintiff submits that the Pearsons' duty of care is that duty of care that exists between adults and minors who such adults invite or knowingly allow to be invited to their homes, when it is or becomes known that the minors' attendance is for the purpose of consuming alcohol or drugs or participating in activities in the course of which alcohol or drugs will be, or are consumed, to take reasonable steps so that the minors do not injure themselves and are not injured by other partygoers.
- [177] The existence of a novel duty of care is resolved by a two-part inquiry commonly referred to as the "Anns/Cooper" test.

Test for Duty of Care

- [178] In *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), Lord Wilberforce, speaking in the House of Lords, articulated a two-part test for determining whether a duty of care in negligence arises. The first stage focuses on the relationship between the plaintiff and the defendant, and asks whether it is close or "proximate" enough to give rise to a duty of care. The second stage asks whether there are countervailing policy considerations that negate the duty of care.
- [179] The two-stage approach discussed in *Anns* was adopted by the Supreme Court of Canada in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2 and further refined in *Cooper v. Hobart*, 2001 SCC 79.
- [180] In *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at para. 49, the Court explained that the proximity analysis concerns whether the relationship between the plaintiff and defendant is the type of relationship in which a duty of care to guard against foreseeable harm may rightly be imposed. At para. 50, the Court determined:

50 the essential purpose of the inquiry is to evaluate the nature of that relationship in order to determine whether it is just and fair to impose a duty of care on the defendant. The factors that are relevant to this inquiry depend on the circumstances of the case. As stated by McLachlin J. (as she then was) in *Norsk*, supra, at p. 1151, "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (cited with approval in *Hercules Managements*, supra, at para. 23, and *Cooper*, supra, at para. 35). Examples of factors that might be relevant to the inquiry include the expectations of the parties, representations, reliance and the nature of the property or interest involved.

- [181] Once the plaintiff establishes a prima facie duty of care, the evidentiary burden then shifts to the defendant to establish that there are residual policy reasons to negate this duty of care: *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at para. 20 [Rankin].

Social Host Liability Cases

[182] The existence of a general duty of care between a social host and users of public highways injured by an adult party guest was rejected by the Supreme Court of Canada in *Childs v. Desormeaux*, 2006 SCC 18 [Childs].

[183] In *Childs*, the defendant driver was known to his hosts to be a heavy drinker. As he was leaving, he was walked to his car by one of the hosts who asked him if he was alright to drive, to which he replied that he was. The plaintiff was the occupant of a vehicle that the defendant driver struck as he was driving away from the party.

[184] The trial judge found that the defendant driver, "had probably consumed 12 beers at the party over two and a half hours, producing a blood-alcohol concentration of approximately 235 mg per 100 ml when he left the party and 225 mg per 100 ml at the time of the accident - concentrations well over the legal limit for driving of 80 mg per 100 ml."

[185] The difference between proximity and foreseeability was explained by the Supreme Court of Canada in *Childs*, in the following terms:

12 Some cases speak of foreseeability being an element of proximity where "proximity" is used in the sense of establishing a relationship sufficient to give rise to a duty of care: see, e.g., *Kamloops. Odhavji*, by contrast, sees foreseeability and proximity as separate elements at the first stage; "proximity" is here used in the narrower sense of features of the relationship other than foreseeability. There is no suggestion that *Odhavji* was intended to change the *Anns* test; rather, it merely clarified that proximity will not always be satisfied by reasonable foreseeability. What is clear is that at stage one, foreseeability and factors going to the relationship between the parties must be considered with a view to determining whether a *prima facie* duty of care arises. At stage two, the issue is whether this duty is negated by other, broader policy considerations.

[186] At para. 26 in *Childs*, Chief Justice McLachlin concluded that the injury to the plaintiff was not reasonably foreseeable on the facts found by the trial judge, and that even if it were, no duty would arise because the wrong alleged was a failure to act or nonfeasance in circumstances where there was no positive duty to act.

[187] In describing the difference between nonfeasance and misfeasance, the Chief Justice noted at paras. 31-33 that:

31 Foreseeability without more may establish a duty of care. This is usually the case, for example, where an overt act of the defendant has directly caused foreseeable physical harm to the plaintiff: see *Cooper*. However, where the conduct alleged against the defendant is a failure to act, foreseeability alone may not establish a duty of care. In the absence of an overt act on the part of the defendant, the nature of the relationship must be examined to determine whether there is a nexus between the parties. Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on

those in a position to become involved.

32 In this case, we are concerned not with an overt act of the social hosts, but with their alleged failure to act. The case put against them is that they should have interfered with the autonomy of Mr. Desormeaux by preventing him from drinking and driving. It follows that foreseeability alone would not establish a duty of care in this case.

33 The appellants' argument that Mr. Courrier and Ms. Zimmerman committed positive acts that created, or contributed to, the risk cannot be sustained. It is argued that they facilitated the consumption of alcohol by organizing a social event where alcohol was consumed on their premises. But this is not an act that creates risk to users of public roads. The real complaint is that having organized the party, the hosts permitted their guest to drink and then take the wheel of an automobile.

[188] In Childs, at paras. 35-37, the Court enumerated three different categories of relationships that have given rise to a positive duty to act:

- (a) Where the defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls;
- (b) Paternalistic relationships of supervision and control, such as those of parent-child or teacher-student; and
- (c) Where the defendant exercises a public function or engages in a commercial enterprise that includes implied responsibilities to the public at large.

[189] At paras. 38 - 39 the Court discussed themes common to the three categories:

38 Running through all of these situations is the defendant's material implication in the creation of risk or his or her control of a risk to which others have been invited. The operator of a dangerous sporting competition creates or enhances the risk by inviting and enabling people to participate in an inherently risky activity. It follows that the operator must take special steps to protect against the risk materializing. In the example of the parent or teacher who has assumed control of a vulnerable person, the vulnerability of the person and its subjection to the control of the defendant creates a situation where the latter has an enhanced responsibility to safeguard against risk. The public provider of services undertakes a public service, and must do so in a way that appropriately minimizes associated risks to the public.

39 Also running through the examples is a concern for the autonomy of the persons affected by the positive action proposed. The law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene. It is only when these third parties have a special relationship to the person in danger or a material role in the creation or management of the risk that the law may impinge on autonomy. Thus, the operator of a risky sporting activity may be required to prevent a person who is unfit to perform a sport safely from participating or, when a risk materializes, to attempt a rescue. Similarly, the publican may be

required to refuse to serve an inebriated patron who may drive, or a teacher be required to take positive action to protect a child who lacks the right or power to make decisions for itself. The autonomy of risk takers or putative rescuers is not absolutely protected, but, at common law, it is always respected.

[Emphasis added].

[190] In applying the law to the facts in *Childs* and deciding that no duty of care was owed, the Chief Justice wrote at paras. 44-47:

44 Holding a private party at which alcohol is served -- the bare facts of this case -- is insufficient to implicate the host in the creation of a risk sufficient to give rise to a duty of care to third parties who may be subsequently injured by the conduct of a guest. The host creates a place where people can meet, visit and imbibe alcohol, whether served on the premises or supplied by the guest. All this falls within accepted parameters of non-dangerous conduct. More is required to establish a danger or risk that requires positive action.

45 Nor does the autonomy of the individual support the case for a duty to take action to protect highway users in the case at bar. As discussed, the implication of a duty of care depends on the relationships involved. The relationship between social host and guest at a house party is part of this equation. A person who accepts an invitation to attend a private party does not park his autonomy at the door. The guest remains responsible for his or her conduct. Short of active implication in the creation or enhancement of the risk, a host is entitled to respect the autonomy of a guest. The consumption of alcohol, and the assumption of the risks of impaired judgment, is in almost all cases a personal choice and an inherently personal activity. Absent the special considerations that may apply in the commercial context, when such a choice is made by an adult, there is no reason why others should be made to bear its costs.

46 This brings us to the factor of reasonable reliance. There is no evidence that anyone relied on the hosts in this case to monitor guests' intake of alcohol or prevent intoxicated guests from driving. This represents an important distinction between the situation of a private host, as here, and a public host. The public host provides alcohol to members of the public, under a strict regulatory regime. It is reasonable to expect that the public provider will act to protect the public interest. There is public reliance that he will comply with the rules that prohibit serving too much alcohol to a patron and that if this should occur and the patron seeks to drive, that the public host will take reasonable steps to prevent the person from driving. The same cannot be said of the private social host, who neither undertakes nor is expected to monitor the conduct of guests on behalf of the public.

47 I conclude that hosting a party at which alcohol is served does not, without more, establish the degree of proximity required to give rise to a duty of care on the hosts to third-party highway users who may be injured by an intoxicated guest. The injury here was not shown to be foreseeable on the facts as found by the trial judge. Even if it had been, this is at best a case of nonfeasance. No duty to monitor guests' drinking or to prevent them from driving can be imposed having regard to the relevant cases and legal principles. A social host at a party where

alcohol is served is not under a duty of care to members of the public who may be injured by a guest's actions, unless the host's conduct implicates him or her in the creation or exacerbation of the risk. On the facts of this case, I agree with the Court of Appeal, at para. 75, per Weiler J.A.:

The person sought to be held liable must be implicated in the creation of the risk. . . . The social hosts had no statutory duty to monitor the consumption of alcohol or to control the structure of the atmosphere in which alcohol was served. There is no evidence that anyone relied on them to do so. . . . I cannot accept the proposition that by merely supplying the venue of a BYOB party, a host assumes legal responsibility to third party users of the road for monitoring the alcohol consumed by guests, . . . It would not be just and fair in the circumstances to impose a duty of care.

[Emphasis added]

[191] The plaintiff placed considerable reliance on the trial decision in *Prevost v. Vetter*, 2001 BCSC 297, supplemental reasons at 2001 BCSC 312; a case that predates *Childs*. There, Mr. Justice Coultas found two homeowners liable for serious injuries sustained by the plaintiff, a minor, when he was thrown from an automobile being driven by the homeowners' niece, when the automobile left the highway and overturned. The niece and the plaintiff began the short trip that culminated in the accident from her uncle and aunt's home. She had consumed alcoholic beverages on their property and was intoxicated when she and the plaintiff entered her automobile.

[192] In reasons for judgment indexed at 2002 BCCA 202, the Court of Appeal held that the determinations and conclusion reached by the summary trial judge could not have been arrived at using a summary judgment procedure, and his decision was set aside, as explained at para. 18:

In order to find that the appellants owed a duty of care to Adam Prevost, it was necessary for the summary trial judge to find not only that Desiree Vetter's ability to drive was impaired by alcohol but also that the appellants ought reasonably to have foreseen that she intended to drive and that her driving while in that condition posed a risk of harm to passengers in her automobile...

[Emphasis added]

[193] The plaintiff submits that the following decisions on unsuccessful summary judgment applications that post-date the decision in *Childs*, support a duty of care in the present case: *Oyagi v. Grossman*, [2007] O.J. No. 1087; *Hamilton v. Kember*, [2008] O.J. No. 734; *Sidhu v. Hiebert*, 2011 BCSC 1364; *Lutter v. Smithson*, 2013 BCSC 119; *Wardak v. Froom*, 2017 ONSC 1166; and *Williams v. Richard*, 2018 ONCA 889 [Williams].

[194] In *Williams*, the Court commented that:

[27] Much of the post-*Childs* jurisprudence regarding proximity has engaged in a factually specific evaluation of whether "something more" is present to suggest that a positive duty to act may exist. While there is no definitive list, the case law has looked at a variety of factors

to determine what could qualify as "something more" that would make a social gathering an inherent and obvious risk, including: whether alcohol was served at the party or whether guests were invited to bring their own alcohol, the size and type of the party, and whether other risky behaviour was occurring at the party, such as underage drinking or drug use: see generally Childs, Sidhu, Wardak, Lutter, Sabourin, Kim, Allen v. Radej, 2014 ABQB 171, Oyagi v. Grossman, 2007 CanLII 9234 (Ont. Sup. Ct); Wenzel v. Desanti, 2011 ABCA 226, 510 A.R. 327, leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 437.

- [28] There are many different factual permutations of what could transform a social gathering into an invitation to an inherent and obvious risk. It is helpful to think of these situations as being situated along a spectrum. At one end of the spectrum is Childs, which was a "bring your own alcohol" party where the hosts provided minimal alcohol. Similarly, private parties of a reasonable size are usually viewed by the courts as not inherently risky: see Robinson v. Lewis, 2015 ABQB 385, at paras. 72-77. Likewise, an invitation to a co-worker's home to have dinner and after-work drinks outside is not inherently dangerous or risky: see Allen, at para. 78. Moving further down the spectrum, a young adult throwing a "wild" Halloween party and providing alcohol for around 40 people, some of whom are using illegal drugs, may implicate a host in the creation of an inherent risk: see Kim, at paras. 9-10, 25. On the far end of the spectrum, a teenager throwing a house party at which over 100 people attend, most of whom are underage drinkers, while their parents are out of town, likely implicates the host in the creation of an inherent risk: Oyagi, at paras. 6-7, and 12.
- [195] I do not find these cases to be of assistance. In none of them was liability established. While each discusses the potential for such a finding, the absence of such a finding limits their application to this case.
- [196] The Pearsons submit the following cases as examples where the court refused to conclude social hosts owed a duty of care in similar circumstances.
- [197] In Desanti v. Gray, 2011 ABCA 226, leave to appeal ref'd [2011] S.C.C.A. No. 437, the Alberta Court of Appeal dismissed an appeal against parents whose 17-year-old son held a party where the plaintiff became intoxicated. A young man left the party and waited for the plaintiff to leave. He and the plaintiff engaged in a fight, following which the young man returned to his vehicle and then accidentally or intentionally twice hit the plaintiff with the vehicle. The plaintiff sued the young man for his injuries suffered. The young man alleged the respondent parents were liable to the plaintiff for failing to ensure that the plaintiff did not consume alcohol and not preventing the plaintiff from confronting the appellant.
- [198] The Court of Appeal held that the young man's claim could not satisfy either branch of the Anns test for determining the existence of a duty of care:
23. In these circumstances, the appellants cannot satisfy the first prong of the Anns proximity test (Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.)) for determining the existence of a duty of care, namely the foreseeability of the physical harm suffered by the plaintiff at the hands of a third party due to his consuming alcohol at the party. It is Simply

not reasonably foreseeable to a householder that a guest who has left a party at that house would be the victim of an assault at some place outside of the control of the householder simply because the guest was consuming alcohol at the party: see by comparison *Kauk v. Dickson*, 2008 ONCA 97, 53 C.C.L.T. (3d) 223 (a commercial host case); *Dickerson v. 1610396 Ontario Inc.*, 2010 ONCA 894, 329 D.L.R. (4th) 542 (a commercial host case). To conclude otherwise would unreasonably extend social host liability beyond that presently envisioned by the law. This is so even if the social host hears something that suggests that the plaintiff guest might act in an unwise manner after he has left.

24. As pointed out to counsel during argument, the extension of social host liability thus proposed by the appellants would not be limited to situations where the guest is intoxicated. The potential plaintiff guest might be sober but angry or sad or insouciant to a degree that makes it foreseeable that the guest might fall into some harm at some stage in the future. The factor of intoxication here is not a moral hook on which to hang liability. The only relevance of Wenzel's level of insobriety, if anything, is said to be in influencing his decision to confront Desanti. Wenzel's insobriety did not cause his injury. He was injured in a dispute with Desanti. On the other hand, the introduction of insobriety as a factor demonstrates the indeterminate nature of the liability thus proposed, since presumably the level of insobriety, or how long it might last, or its effect on the mental state of the guest, would all be factors to consider in assessing any such foreseeability. And all of this ignores the lack of any "control" by the social host from which a duty to take protective measures (for whatever time and space is said to be predictably involved) would spring.
25. Thus, even if proximity at the first phase of *Childs* were to be assumed, the indeterminate liability concern would certainly rise to the occasion at the second level of the *Anns* analysis. Implicit in an extension of social host liability for voluntary guests becoming crime victims after they have left any area in which the hosts have any control of the situation would be an undefined form of extended guardianship. This form of liability cannot be reconciled in a legally manageable way with the proper limits of personal liability in negligence as discussed in *Childs*. Indeed, it is even conceptually in tension with the restrictions on vicarious liability: see e.g. *E. (B.) v. Oblates*. In practical terms, it is not easy to define such an extension of social host liability.

[199] In *Jampolsky v. Shattler*, 2011 BCSC 494, the defendant hosted a party. One of the guests stole the host's car and caused an accident, injuring the 18-year-old plaintiff. The Court held that the risk of the guest stealing the host's car and engaging in unsafe driving was not reasonably foreseeable.

[200] In *Baumeister (guardian ad litem of) v. Drake* (1986), 5 B.C.L.R. (2d) 382 (S.C.), [Baumeister] Mr. Justice Gould dismissed a claim against the party hosts who gave a party for their grade 12 son and his friends who were graduating from high school. Although the guests were underage and the hosts had provided alcohol, Mr. Justice Gould refused to hold the hosts liable, stating at page 389:

Neither Shane Baumeister [the plaintiff] nor Gary Drake [the driver] were permitted, induced, encouraged or enabled by the Carefoots [the hosts], or either of them, to get themselves into their dangerous state of impairment. They did that themselves before they ever arrived at the Carefoots' party, and aggravated their disability themselves after they arrived at the party with alcohol supplied by themselves or other guests, but not by the Carefoots.

[201] Gould J. found that there was no way for the hosts to prevent guests from drinking their own alcohol, and found the driver and the plaintiff equally at fault for the accident.

[202] Lastly, I have considered *Ferrier v. Hubbert*, 2015 ONSC 5286, in which Mr. Justice Belch granted summary judgment dismissing a claim against parents whose adult son and girlfriend hosted a party at his parents' cottage while the parents were there. Belch J. found the following:

[57] While [the defendants] Mr. and Mrs. Sangster were present at their property that day, they were not invited to the birthday celebrations. From their testimony during discovery, [the injured plaintiff] Daniel Ferrier and [the defendant/driver] Justin Hubbert were not acquainted with Mr. and Mrs. Sangster. Mr. and Mrs. Sangster, in addition to not serving alcohol, provided no food to the guests either. The only contribution made by Mr. Sangster to the event is he operated the boat and motor used in the water skiing and tubing when it was [the defendants' son] Joey Sangster's turn, otherwise, Joey Sangster operated the boat and motor when the guests were towed behind it. The operation of the boat and motor did not lead to any accident or injuries.

[58] Mrs. Sangster's involvement occurred around midnight or shortly after midnight when she appeared at the cabin to inquire whether the boys, Joey, Daniel, and or Justin had left from the cabin in a motor vehicle. Evidently, she then discovered Joey's car was missing and phoned him demanding he return with the car and not to remove it from the property. About 20 minutes later, he and the car returned. I am satisfied these actions do not make her a social host.

[59] Her additional involvement took place when she returned to the cabin on a second occasion after the boys had again left the property, this time with Justin Hubbert operating his motor vehicle. This does not make her a social host. When the boys returned after the accident, she helped clean up the blood on Justin Hubbert's face which was a result of injuries he received in the accident. She later drove him to the hospital. Cleaning the blood from his facial injuries and driving him to the hospital for treatment do not make her a social host, but are consistent with the actions of a caring person.

[203] While I have reviewed and considered these cases, my task remains to determine reasonable foreseeability, proximity, and ultimately whether a duty of care was owed on the facts as I have found them.

Application of the Test for Duty of Care

- [204] The first stage of the Anns/Cooper analysis asks whether the relationship between the plaintiff and the defendants discloses reasonable foreseeability and sufficient proximity to establish a prima facie duty of care.
- [205] The duty of care asserted by the plaintiff here is confined to minor attendees of a party hosted by adult social hosts. He says that his status as a minor adds the additional element contemplated by the Court in Childs at para. 47 as the harm in such a case is far more foreseeable and the relationship between him and the Pearsons far more proximate than in Childs.
- [206] Reasonable foreseeability of harm and proximity operate as crucial limiting principles in the law of negligence. They ensure that liability will only be found when the defendants ought reasonably to have contemplated the type of harm the plaintiff suffered.
- [207] As the Court stated in Rankin at paras. 21-22, it would be unjust to impose liability in cases where there was no reason for the defendant to have contemplated that their conduct could result in the harm complained of.
- [208] In Rankin, the Court clarified how the inquiry into foreseeability is to be undertaken:
- [24] the proper question to ask is whether the plaintiff has "offer[ed] facts to persuade the court that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged": A. M. Linden and B. Feldthusen, *Canadian Tort Law* (10th ed. 2015), at p. 322 (emphasis added). This approach ensures that the inquiry considers both the defendant who committed the act as well as the plaintiff, whose harm allegedly makes the act wrongful. As Professor Weinrib notes, the duty of care analysis is a search for the connection between the wrong and the injury suffered by the plaintiff: p. 150; see also Anns, at pp. 751-52; Childs, at para. 25.
- [25] The facts of this case highlight the importance of framing the question of whether harm is foreseeable with sufficient analytical rigour to connect the failure to take care to the type of harm caused to persons in the plaintiff's situation. Here, the claim is brought by an individual who was physically injured following the theft of the car from Rankin's Garage. The foreseeability question must therefore be framed in a way that links the impugned act (leaving the vehicle unsecured) to the harm suffered by the plaintiff (physical injury).
- [26] Thus, in this context, it is not enough to determine simply whether the theft of the vehicle was reasonably foreseeable. The claim is not brought by the owner of the car for the loss of the property interest in the car; if that were the case, a risk of theft in general would suffice. Characterizing the nature of the risk-taking as the risk of theft does not illuminate why the impugned act is wrongful in this case since creating a risk of theft would not necessarily expose the plaintiff to a risk of physical injury. Instead, further evidence is needed to create a connection between the theft and the unsafe operation of the stolen vehicle. The proper question to be asked in this context is whether the type of harm suffered -- personal injury --

was reasonably foreseeable to someone in the position of the defendant when considering the security of the vehicles stored at the garage.

[Emphasis added]

[209] First, I consider reasonable foreseeability.

[210] The fact that something is possible does not mean it is reasonably foreseeable. Obviously, any harm that has occurred is by definition possible. Thus, as discussed in Rankin at para. 46, for harm to be reasonably foreseeable, a higher threshold than mere possibility must be met.

[211] The plaintiff contends that the proper question to be asked here is whether the type of harm suffered; personal injury, was reasonably foreseeable to someone in the position of the Pearsons when considering the safety of minors who have consumed alcohol and/or smoked marijuana, leaving their home at approximately 1:00 a.m. into the unlit, rural roads of Salt Spring Island.

[212] The plaintiff submits that as such, unlike Childs and Rankin, foreseeability in this case is clear cut and easily made out on the facts. He says that the evidentiary gaps in Rankin are filled here. When the defendants failed to properly control and supervise the party and the intoxication of the minor attendees, and then allowed those attendees to venture out, it was reasonably foreseeable that personal injury could occur in any number of ways.

[213] The plaintiff argues that given the rural, forested setting, lack of light and intoxication of the minors being released into this environment, foreseeable causes of personal injury were abundant. Trips and falls on the roads, being hit by a car, the hazards that accompany wandering on foot intoxicated, fights and scuffles, just to name a few, were all said by the plaintiff to have been foreseeable.

[214] The plaintiff further contends that the foreseeability of harm when minors are consuming alcohol is informed by the fact the Legislature through the Liquor Control and Licensing Act, S.B.C. 2015, c. 19 has prohibited minors from possessing, purchasing, and consuming alcohol as well as the sale of alcohol to minors, employment of minors in business where alcohol is being consumed and, most importantly allowing minors to consume alcohol. Section 77 states that:

Supplying liquor to minors

77(1) Subject to the regulations, a person must not

- (a) sell, give or otherwise supply liquor to a minor,
- (b) possess liquor for the purposes of selling, giving or otherwise supplying the liquor to a minor, or
- (c) allow a minor to consume or possess liquor in or at a place under the person's control.

- [215] The provision replicates the language of s. 33(1) of the former Liquor Control and Licensing Act, in force at the time of the party. For the purpose of my analysis, it does not matter which statute is relied upon by the plaintiff.
- [216] The Pearsons contend that the Court in Childs concluded social hosts did not owe a duty of care to a plaintiff injured in a car accident caused by an intoxicated adult guest, and that if the accident occurred in Alberta (or any of the other provinces where the drinking age is 18), the application of Childs would preclude liability.
- [217] The Pearsons argue that the mere fact that the accident occurred in British Columbia instead of Alberta does not create liability on their part. I disagree, and I am not prepared to ignore the legislation in this province.
- [218] In *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670, a majority of the Court, made the following comments concerning the requirement in the BC Motor Vehicle Act that passengers under the age of 16 were to wear seatbelts, which are directly applicable to the present case:

It is clear that the breach of a statutory provision is not conclusive of liability. Yet the existence of the section does provide further support for finding that a duty of care rests on the driver to take all reasonable steps to see that seat belts are worn by children. The statute reflects the public importance placed on safety measures and a societal concern for promoting the safety of children. It is, as well, a public recognition that children often require the help and supervision of adults, particularly in ensuring that when they are passengers in a vehicle, they are made reasonably safe.

- [219] Similarly, in *S.C. (Next friend of) v. Boy Scouts of Canada*, 2002 ABQB 152 [S.C.], a case involving the molestation of a 5 year old boy at a Boy Scout camp that a family friend brought him to, Madam Justice Acton found that:
- [20] Thus, the Child Welfare Act, like the B.C. Motor Vehicle Act, identifies general societal values and interests that can be taken into account when ascertaining underlying duties and policy goals in negligence law. The Act is relevant, in my view, to both parts of the Anns test.
- [220] The societal values and interests represented by the provisions of the Liquor Control and Licensing Act mentioned above can inform the first part of the Anns test, but it is well-established that a breach of statute does not create liability in negligence: *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 225.
- [221] While I accept that the societal values and interests represented by the provisions of the Liquor Control and Licensing Act should be considered in applying the first part of the Anns test, I find that they are overwhelmed by the community standards on Salt Spring Island at the time of the accident.

- [222] The plaintiff submits that theft of the Subaru need not have been foreseeable. For the purposes of foreseeability in the duty of care analysis, he submits that Rankin makes clear that all that is required in this case is that personal injury to the plaintiff, an intoxicated minor, was reasonably foreseeable, including injury arising from ending up in a car with an intoxicated driver.
- [223] The plaintiff contrasts his situation to that in Rankin where the foreseeability inquiry failed because all of the evidence was directed at the issue of theft. The evidence did not, however, suggest that if a vehicle was stolen from Rankin's Garage, that vehicle would be operated in an unsafe manner. Further, the evidence did not address the risk of theft by minors or the risk of theft leading to an accident causing personal injury. As such, the Court found that, while theft was foreseeable, further evidence establishing that it was reasonably foreseeable that the vehicle would be operated in an unsafe manner was required in order for the plaintiff to make personal injury reasonably foreseeable from the act of theft.
- [224] In the recent decision of the Court of Appeal in Provost v. Dueck Downtown Chevrolet Buick GMC Limited, 2020 BCCA 86 [Provost], Mr. Justice Butler wrote at para. 5:

This appeal raises difficult questions about the duty of care owed by a car dealership whose negligent actions result in the theft of a vehicle and the thief's negligent driving results in injury to persons and damage to property. The issues raised are particularly contentious because the judge relied on the decision of the Ontario Court of Appeal in J.J. v. C.C., 2016 ONCA 718 in concluding that the Dueck Appellants owed a duty of care. That decision was subsequently overturned after the trial decision in this case: Rankin (Rankin's Garage & Sales) v. J.J., 2018 SCC 19. Justice Karakatsanis, writing for the majority in Rankin, concluded that a garage business that negligently stored vehicles by leaving them unlocked with the keys in the ashtray did not owe a duty of care to the plaintiff who was seriously injured by the negligent driving of a minor who stole the vehicle. In arriving at that conclusion, Justice Karakatsanis determined that while the risk of theft was reasonably foreseeable, the plaintiff presented insufficient evidence to establish that it was foreseeable that someone could be injured by negligent operation of the stolen vehicle subsequent to the theft. She summarized her conclusion:

- [2] A business will only owe a duty of care to someone who is injured following the theft of the vehicle when, in addition to theft, the unsafe operation of the stolen vehicle was reasonably foreseeable.
- [225] The plaintiff alleges that his case is different in that the acts in Rankin and Provost were relatively innocuous; leaving a vehicle where it could be stolen but not create a danger of injury, whereas here, the plaintiff contends that multiple failures of the Pearsons releasing minors, whose judgment and capacities were impaired by the consumption of alcohol and/or the use of marijuana, into the dark did create such a risk.

- [226] The plaintiff contends that Rankin and Provost required two intervening steps; theft of the vehicle and then dangerous operation of the vehicle, whereas here, the only step was the release of the impaired plaintiff into the dark.
- [227] In Rankin, the Court addressed the duty of care analysis on the basis that the foreseeability question must be framed in a way that links the impugned act (in Rankin, leaving the vehicle unsecured) to the harm suffered by the plaintiff (physical injury).
- [228] Here, the impugned act was described as allowing intoxicated minors to venture off on foot from the party in the middle of the night. Applying Rankin, the question of foreseeability in this case must be framed in a way that links that act to the harm suffered by the plaintiff; in other words: was physical injury reasonably foreseeable as a result of letting minors who have consumed alcohol and/or marijuana leave the Pearsons' premises on foot at night?
- [229] As I have discussed above the Court in Rankin at para. 46 held that simply because something is possible does not mean it is foreseeable. The plaintiff submits that trips and falls, being hit by a car, fights and scuffles, and the hazards that accompany wandering on foot intoxicated were all foreseeable. I am unable to accept that contention. These harms may have all been possible, but my inquiry must focus on whether personal injury was foreseeable. I find that these harms were not foreseeable.
- [230] The post-Childs jurisprudence has focused heavily on a social host's knowledge as to the relevant guest's level of intoxication, and I have rejected the submission that the plaintiff was intoxicated when he left the party. In the result, I find that there were no obvious signs that the plaintiff would suffer injury by walking home from the party.
- [231] Despite his argument that the foreseeability inquiry should focus on the foreseeability of his injury, rather than the theft of a car, he submits that the theft of a car was nevertheless foreseeable in the circumstances.
- [232] The plaintiff contends that several witnesses, including Paige Rumi and Mr. Pearson, testified as to the local custom of storing vehicles, particularly that they are commonly left unlocked with the keys inside them. As such, the plaintiff contends that theft of a vehicle was the very type of thing that was reasonably foreseeable in the circumstances; the very kind of evidence that was missing in Rankin.
- [233] I am unable to accept this contention. I find that the culture of leaving vehicles unlocked, even with keys somewhere in or near them existed because the risk of vehicle theft was too remote to create a duty on the Pearsons to anticipate that guests from their party would steal a vehicle to drive after drinking alcohol.
- [234] I have already indicated above that I am not persuaded that the plaintiff was an intoxicated minor at the time he left the party.

- [235] The evidence does not support the assumption inherent in the contention that the plaintiff was so intoxicated that he was incapable of responsible conduct. The plaintiff was, by all accounts, a responsible young man whose own father could not conceive of his riding with a drunk driver, let alone participating in the theft of a car.
- [236] He had walked to and from this and other parties where he and his contemporaries had consumed alcohol and/or smoked marijuana, and was trusted by his parents to find a safe means of getting home from such parties, or finding a place to spend the night.
- [237] By all accounts, the plaintiff was not a bad or unreliable young man. In these circumstances, should the defendants have foreseen that someone from the party would leave on foot, and then steal a car?
- [238] I find that duty did not extend to foreseeing that one or more of the party guests would steal a car and drive it unsafely.
- [239] I nevertheless turn to proximity.
- [240] The plaintiff submits that the duty of care for which he contends is fully in keeping with the already established duties of care in cases, "where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls" and "paternalistic relationships of supervision and control, such as those of parent-child or teacher-student": Childs at paras. 35 and 36.
- [241] The plaintiff agreed that, while illegal, not all parties involving alcohol and minors are necessarily risky, but he emphasized the comments of Mr. Justice Hourigan for the Ontario Court of Appeal in Williams at para. 28 regarding the spectrum of risk:
- [28] There are many different factual permutations of what could transform a social gathering into an invitation to an inherent and obvious risk. It is helpful to think of these situations as being situated along a spectrum. At one end of the spectrum is Childs, which was a "bring your own alcohol" party where the hosts provided minimal alcohol. Similarly, private parties of a reasonable size are usually viewed by the courts as not inherently risky: see Robinson v. Lewis, 2015 ABQB 385, at paras. 72-77. Likewise, an invitation to a co-worker's home to have dinner and after-work drinks outside is not inherently dangerous or risky: see Allen, at para. 78. Moving further down the spectrum, a young adult throwing a "wild" Halloween party and providing alcohol for around 40 people, some of whom are using illegal drugs, may implicate a host in the creation of an inherent risk: see Kim, at paras. 9-10, 25. On the far end of the spectrum, a teenager throwing a house party at which over 100 people attend, most of whom are underage drinkers, while their parents are out of town, likely implicates the host in the creation of an inherent risk: Oyagi, at paras. 6-7, and 12.
- [242] At a minimum, the Pearsons acquiesced in the plaintiff's presence in their home at the party.

- [243] The plaintiff submits that a large party where alcohol is being consumed by dozens of minors with little to no supervision is an obvious risk, and to the extent that parents of the hosts knowingly allowed this to happen, it implicates them in the creation of the risk. The plaintiff says that those adults also put themselves in a position of supervision and control over the intoxicated minors. In this way, the specific iteration of a social host duty of care being advanced by the plaintiff is manifestly different than the one discussed in *Childs*, and is best seen as an extension of two already existing positive duties of care, in a very specific, social host, context.
- [244] The plaintiff contends that the Pearsons accepted control over him and the other minor party attendees when they invited them into their home and allowed them to stay and become intoxicated. In doing so, he contends that as in *C.S.*, they "willingly and knowingly undertook to care for children in a situation where the children's parents would not be present".
- [245] I find that the reasoning in this case is of limited application. *C.S.* was sexually molested by the defendant Miller while the two of them were visiting a Boy Scout camp, Camp Bones, at Skeleton Lake, Alberta. He was 5 years of age at the time, a factor that significantly distinguishes his vulnerability and need for supervision from the plaintiff's circumstances.
- [246] The plaintiff contends that the argument that house parties for minors who can be expected to drink alcohol or smoke marijuana are safer than parties at the beach or in the bush, assumes that a home environment is in fact safer than those alternatives. This, of course depends the kind and level of supervision provided.
- [247] The plaintiff also disagrees with the argument that minors of a certain age are going to drink regardless, and doing so in a safe environment is preferable to on their own or in small groups. He contends that this argument overlooks the fact that the minors may be more likely to drink or more likely to drink excessively at a large gathering, especially when such a gathering is an event which excessive alcohol consumption is associated with, such as a house party. No evidence was presented to support this contention, and given the widespread history and practice of such parties on Salt Spring Island prior to the party at the Pearsons, I do not accept that his contention is accurate.
- [248] The Pearsons permitted minors to come to their home, and acquiesced in the use of marijuana and the consumption of alcohol at their home. They accept that they could have refused entry to their home of anyone they did not wish to attend the party and that they had the ability to prohibit excessive drinking. The Pearsons did assert some supervisory role and made some attempt to control the activities of the attendees at the party. Thus, they asserted some paternalistic relationship with the guests of the party.
- [249] I find as well that the Pearsons assumed some element of control over the minors who attended the party, but I am not prepared to find that they created an inherent and obvious risk that the minor guests would or could be injured.

[250] Although I have found that the defendants were in a paternalistic relationship with the guests of the party, I find that no duty of care has been established in this case because the injury complained of was not reasonably foreseeable as a result of the defendants' conduct. The plaintiff's case thus fails on the duty of care analysis.

[251] Having concluded that a prima facie duty of care has not been established, I find it unnecessary to consider whether any duty would be negated by policy considerations at the second stage of the Anns test.

(b) Breach of the Standard of Care

[252] In case my conclusion about the duty of care is incorrect, I will consider whether the defendants nevertheless met the standard of care in the circumstances.

[253] Mr. Justice Major, writing for the Court, in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 [Ryan] explained at para. 28:

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

[Emphasis added]

[254] The plaintiff submits that *Bingley v. Morrison Fuels*, 2009 ONCA 319 makes it clear that, "[i]t is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable". As such, the plaintiff submits that the relevant question is whether the guests having access to cars and driving was reasonably foreseeable and this must be answered in the affirmative.

[255] The plaintiff submits that the defendants were in a "paternalistic relationship" of supervision and control over him, a category of relationship contemplated in *Childs* at para. 36. The standard of a "careful and prudent parent", typically applied to such cases, may therefore be relevant to this analysis.

[256] The Supreme Court of Canada discussed that standard of care of a careful and prudent parent in *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21 and in *K.L.B. v. British Columbia*, 2003 SCC 51 at para. 14, among others. The Court of Appeal also referred to the standard of a careful and prudent parent most recently in *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at para. 364.

[257] In *Laplane (Guardian ad litem of) v. Laplane* (1995) 8 B.C.L.R. (3d) 119 (C.A.) [*Laplane*] at para. 14, the Court of Appeal explained the standard of care as follows:

A parent, or other person responsible for small children, has, of course, a duty to take reasonable care not to expose them to unreasonable risk of foreseeable harm. The test to be applied in determining whether that duty has been discharged is an "objective" one in the sense that the parent is expected to do, or not to do, that which, according to community standards of the time, the ordinary reasonably careful parent would do, or not do, in the same circumstances. But the test is "subjective" to the extent that the reasonable parent must be put in the position in which the defendant found himself or herself, and given only that knowledge which the defendant parent had, when deciding what the reasonable parent in Mr. LaPlante's position would have understood or believed, and as a consequence have done or not have done. Ms. McGee says that "error of judgment" alone will not amount to negligence. That must, of course, be right, in the sense that there may be several courses of conduct any of which a reasonably careful parent might follow in a given situation, and it will be enough to answer a claim in negligence that the course adopted by the defendant parent was one of those which the reasonable careful parent might have taken, even though events may, of course, have shown the choice to have been unfortunate.

[Emphasis added]

[258] As the Court in *Laplane* explains, the conduct of the defendant will be measured against what the careful and prudent parent would do according to the "community standards of the time". Insofar as community standards are concerned, it is the immediate community that is of concern: *Arnold v. Teno*, [1978] 2 S.C.R. 287 at 313.

[259] The careful and prudent parent standard is also informed by the age of the child. In *Newton v. Newton*, 2002 BCSC 789, rev'd on other grounds 2003 BCCA 389, Mr. Justice Burnyeat cited *Lelarge v. Blakney* (1978), 92 D.L.R. (3d) 440 (N.B.C.A.) to describe the parental duty of care at para. 21:

The parental duty of care is a duty personally imposed upon the parent irrespective of the wrongdoing or the liability of a child. The duty is to supervise and control the activities of the child and, in doing so, to use reasonable care to prevent foreseeable damage to others. The extent of the duty varies with the age of the child. The degree of supervision and control required of a young child may be very different from that required of a child approaching the age of majority. As the age of the child increases and the expectation that he will conform to adult standards of behaviour also increases, the parental duty to supervise and control his activities tends to diminish.

[Emphasis added]

[260] Whether the standard of care is that of a "ordinary, reasonable and prudent person", as articulated in *Ryan*, or "careful and prudent parent", as articulated in *Laplane*, does not alter my analysis. I find that the factors and circumstances to consider are substantively the

same for both. For instance, the Court in Laplante speaks of "community standards", and the Court in Ryan speaks of "custom" as an "external indicator of reasonable conduct". In addition, the careful and prudent parent standard is informed by the age of the child. Where the child is 17 years old, as in this case, I accept that the degree of supervision and control required is on the lower end.

- [261] As hosts, the Pearsons had to take all reasonable steps to minimize the risks of harm to their guests, including the plaintiff. The standard is one of reasonableness, not perfection.
- [262] I find that parents on Salt Spring Island took different approaches to managing teenage alcohol and marijuana consumption. Some chose to host house parties. The rationale for this approach is that it is safer for teenagers to experiment with alcohol and marijuana in a reasonably controlled and supervised environment, as opposed to going to bush parties or beach parties where participants are driving to and from the parties with no adults present. This was the Pearsons' view. Mr. McCormick acknowledged that others on Salt Spring Island shared this view.
- [263] The plaintiff argues that the factors in Ryan support the finding that the defendants' conduct fell well below the standard of care to be expected in the circumstances.
- [264] The plaintiff contends that there were many things the Pearsons could have done differently, such as: limiting the number of guests; monitoring the party more fully, both by taking a more active role and asking friends or family to help them; or, prohibiting alcohol consumption in accordance with the statutory regime or past an excessive point.
- [265] Failing that, the plaintiff contends that the Pearsons could have instituted rules about the kind of alcohol that could be consumed; for instance, no hard alcohol; and the way alcohol was consumed; for instance, no drinking games or activities such as shots or shot gunning alcohol; identified overconsumption and taken steps; or, stopped the party.
- [266] The plaintiff submits that these actions, which would have been reasonable in the circumstances, would have required little or no cost to the defendants.
- [267] I find it unhelpful to list all of the things that the Pearsons might have done in an effort to avoid liability. Their duty of care cannot extend beyond the foreseeable. The question is whether the risk that arose here was foreseeable.
- [268] The plaintiff submits that it was foreseeable that party guests would have access to cars and drive them. While this submission might apply with respect of those guests who arrived at the party by car, the evidence establishes that many guests, including the plaintiff and Ryan, arrived at the party on foot. I find that it was not reasonably foreseeable that guests who arrived at the party on foot would subsequently have access to cars and would drive them.

- [269] In my view, the standard proposed by the plaintiff is essentially one of perfection; anticipating all possibilities and avoiding any risks. That is simply not the way the world works. The duty is to act reasonably, not to act perfectly. It is never possible to eliminate all risks and the Pearsons were not required to do so.
- [270] The plaintiff argues that the Pearsons were unable to track the intoxication of their guests or the happenings at the party and cannot use the circumstances that they permitted as a defence. They cannot, for instance, create a situation they could not monitor and then allege that they were unable to foresee what could happen because they were unaware of the situation.
- [271] I do not accept that the Pearsons were unaware of the general nature of the party. While they were not hovering over the attendees, they did circulate through the party at various times and had a general sense of the atmosphere.
- [272] As Mr. Frigon observed, the attendees were trying to be respectful of the fact that the Pearson parents were at home.
- [273] The plaintiff contends that it is clear that both he and Ryan were intoxicated and became so on the Pearsons' premises. As I have stated above, the plaintiff was no more, and likely a lot less intoxicated at the party than he had been on many prior occasions when attending similar parties.
- [274] The defendants had collected or had their daughters collect car keys from those who were thought to have driven to the party. There is no evidence that any of the partygoers who had consumed alcohol drove from the party.
- [275] The plaintiff contends that the Pearsons should have ensured that the minors leaving their home had a safe means of getting home. I find that the Pearsons not only foresaw this issue, they addressed it.
- [276] While Mr. Pearson conceded that there was no plan for minors who attended the party on foot and then decided to walk away, as he did not feel that there needed to be any such plan, I find that this mischaracterizes the circumstances. The plan was to let those who walked to the party walk home from the party.
- [277] The Pearsons did not encounter minors who were intoxicated and had no safe way of getting home. They asked the partygoers who needed a ride to call their parents. For those without rides who needed them, Ms. Pearson offered to drive them. She eventually drove home five guests of the party. The Pearsons also allowed Dylan McLeod to stay over and sleep on their porch when he returned later in the early morning hours.

- [278] There is no evidence that any of the guests at the party, other than Ryan or the plaintiff, drove whilst impaired or rode with a driver who had been drinking. I find that the Pearsons' plan of taking keys from anyone who might have intended to drive after consuming alcohol at their home and offering rides to those who had no safe way of leaving the party was successful in avoiding reasonably foreseeable harm to their guests.
- [279] Finally, I address an additional aspect of the plaintiff's argument. The plaintiff submits that the defendants are subject to a higher standard of care because they chose to host a party in violation of the statutory regime which prohibits the consumption of alcohol by minors. This, the plaintiff says, makes the Pearsons akin to commercial hosts.
- [280] While I acknowledge that the party constituted a breach of the statutory regime governing alcohol consumption by minors, I cannot accept that this fact alone demands a higher standard of care. It did not make the Pearsons akin to commercial hosts. As Gould J. found in *Baumeister*, the court takes judicial notice of the fact that graduation parties are an established custom in British Columbia, notwithstanding that they constitute, when minors are involved, a breach of the law.
- [281] In the result, I find that if they owed a duty of care to the plaintiff, the Pearsons met the required standard of care.

(c) Damages

- [282] Clearly the plaintiff sustained serious injuries as a result of the accident. His injuries included:
1. Right scalp hematoma.
 2. Left mandibular fracture.
 3. Right posterior maxillary sinus wall fracture.
 4. Right upper lid contusion.
 5. Right lower eyelid contusion.
 6. Left subdermal hematoma.
 7. Multiple areas of intracerebral contusion and hemorrhage.
 8. Transverse process fractures of C7, T1, T2, undisplaced.
 9. Scapular tip fracture.
 10. Right distal radius and ulnar styloid fractures with associated rhabdomyolysis/compartament syndrome.
 11. Left anterior axillary abrasion/ligature.
 12. Right anterior biceps abrasion/contusion.

13. Laceration right third PIP dorsally.
14. Blisters, erythema suggesting burn or prolonged downtime bilateral forearms.
15. Partial thickness laceration left anterior medial lower thigh.
16. Acute renal injury.
17. Probable aspiration pneumonitis.

(d) Causation

- [283] The Pearsons can only be liable if permitting minors to consume alcohol on their property and subsequently letting those minors leave on foot caused the plaintiff's injuries in fact and in law.
- [284] The test for factual causation is the "but for" test. To satisfy the "but for" test, the plaintiff must demonstrate a substantial connection between the injury and the defendant's conduct: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-22.
- [285] The test for proof of causation was reiterated as the "but for" test by Chief Justice McLachlin in *Clements v. Clements*, 2012 SCC 32 at paras. 8 - 12.
- [286] The issue of causation in law is often referred to as "remoteness". The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable": *Mustapha* at para. 12.
- [287] Having found that the Pearsons owed no duty of care to the plaintiff and, if they did, met their required standard of care, it follows that the plaintiff's damage was not caused by any breach of a duty of care by the Pearsons.
- [288] Despite that finding, I will, however, deal with the parties' submissions on damages, and assess the plaintiff's entitlement to damages, had he in fact succeeded on the liability aspects of his case.

The Plaintiff's Present Circumstances

- [289] Following the accident, the plaintiff was taken to Victoria General Hospital. He was in a coma in the Intensive Care Unit for 12 days before being transferred to the neurology wing. He remained in the neurology wing until December 2012, when he was transferred to Sunny Hill Health Centre for Children.
- [290] The plaintiff's condition improved at Sunny Hill. He regained the ability to speak and eat, and his mobility improved. The plaintiff was discharged from Sunny Hill and returned to Salt Spring Island in June 2013. He remained on Salt Spring Island living with his parents until January 2018, when he moved to Mary Cridge Manor in Victoria ("MCM"). MCM is an assisted living facility.

[291] After the plaintiff returned from the hospital in 2013, the family moved to a new home on Mountain View Road where the plaintiff resided with them. Mr. McCormick still resides on Salt Spring Island, but he now lives in a house on Creekside Drive.

(a) Lay Witnesses

[292] Tom, the plaintiff's twin brother, visits the plaintiff monthly in Victoria. The two are not as close as they were prior to the accident. Communicating with the plaintiff is difficult and his memory poses problems. His personality has changed drastically and he lacks motivation. He stated that his brother's ability to walk is severely affected. His speaking is also impaired.

[293] He has noticed that his brother is unable to make financial decisions or decisions regarding his home and daily decisions such as with respect to cooking.

[294] When he enters his brother's residence, he sees that very little has changed from the last time he was there. The state of the apartment is the same, and he routinely finds items in the fridge that he bought during his last visit. While visiting his brother, Tom will go grocery shopping with him, help with cleaning and meal preparation and may go out for coffee or lunch.

[295] He has noticed that his brother is quick to become angry and frustrated and can be unpredictable. He is unable to be rational in conversations.

[296] Charlotte, the plaintiff's older sister, spent time with the plaintiff on Salt Spring Island following the accident. She stated that he was very happy to be out of the hospital and motivated and positive. He was different though. She stated that he was very immature, like a 12-year-old, and there was a lot he did not know or realize and he experienced memory issues.

[297] Charlotte testified that she feels that the plaintiff has gotten worse since moving to MCM. He seems angrier and more upset. She felt he was clearer and had more of a grasp on reality when he first returned home. She stated that she feels that he has "gone down a dark hole" and he is "worse and worse" each time she sees him.

[298] She stated that she feels that he is "not really there anymore". All the plaintiff talks about is the accident. While he does seem to sometimes be motivated, he does not seem to be able to make anything happen or maintain positivity or start something. She stated that he seems to be stuck.

[299] She stated that the plaintiff became depressed over time and this manifested by him becoming very angry and negative and losing his motivated and hopeful nature and that he seemed lonely and isolated. She stated that he seemed to feel stuck and without friends. She saw angry outbursts where he would scream or yell at her or others. She described him becoming trapped in loops which escalated situations.

- [300] Charlotte testified that the plaintiff forgets to eat and seems unable to understand where to begin when making himself something. She said that his cleanliness and hygiene seemed okay, but that there were limitations with respect to his physical injuries, most notably his right arm.
- [301] She stated that the plaintiff's mobility has become worse since he moved to MCM. When he first moved home, he attended physiotherapy and rehabilitation and was motivated to exercise. She stated that he was walking "straighter and stronger" when he first got home compared to now. He is now more "tippy" and she has seen him almost fall over a few times.
- [302] She stated that the plaintiff is also vulnerable. He is lonely and desperate for friends and someone to talk to him like a normal person. He wants to be included.
- [303] Ms. Jones said that the plaintiff has difficulty using his right arm. His grip is poor, and he has difficulty opening things and writing.
- [304] Ms. Jones agreed that the plaintiff walks with a funny gait, dragging his left foot, and said that his balance is "not great" but is better when he is rested. She gave evidence that he becomes fatigued easily, especially if he has a strenuous morning. This results in increased confusion and slurred speech.

(b) Medical Evidence

- [305] Dr. Susan Lazar, a psychiatrist, expressed the opinion that the plaintiff sustained a severe traumatic brain injury in the accident, and as a result, experiences cognitive impairments consistent with the probable diagnosis of major neurocognitive disorder. The plaintiff's cognitive impairments include deficits related to his memory functioning, executive functioning and social cognition, but he does not have a major mood or anxiety disorder.
- [306] Dr. Jacqueline Purtzki is a specialist in adult and paediatric physical medicine and rehabilitation. In her second report, she notes that the plaintiff's mood and anxiety improved after he started taking Effexor.
- [307] Dr. Purtzki opined that the plaintiff's brain injury resulted in physical symptoms. These are truncal weakness, lower limb spasticity and abnormal gait, mild thoracic scoliosis, abnormal shoulder girdle movements, and impaired dynamic balance.
- [308] She described that the plaintiff also had physical injuries arising from the accident, which include right forearm fracture and compartment syndrome. This results in a "phantom pain" and reduced functioning of the right arm and hand. The plaintiff gave evidence that his right arm pain manifests as a tingling or numbness in his wrist and elbow. His right hand will form a fist unintentionally, but he can pick things up and do what he needs to do with his right hand.

- [309] In 2017, the plaintiff fell and badly fractured his left elbow while attending a marijuana consumption establishment. He had consumed Sativa marijuana, and, when he stood up, he was unable to walk.
- [310] The plaintiff's use of his right arm mobility is extremely limited. He was learning to use his left arm more following the accident, but after his fall and the injury to that arm, he is back to using his right arm.
- [311] Dr. Purtzki described the plaintiff's 2017 injury to his left elbow as a complicated left elbow fracture that resulted in a permanent impairment which prevents him from fully extending his left arm. She said that this injury affects the plaintiff's ability to lift heavy objects. She expressed her view that the left elbow injury was the result of excessive marijuana intoxication, not the accident.
- [312] The plaintiff can no longer run. He can walk uphill if he does so slowly. He can use stairs if there is a railing for his use. His knees get sore when walking and he requires special running shoes, which he goes through at a rate of one pair a month, due to his abnormal gait, whilst walking on pavement.
- [313] In the history section of her January 25, 2013 report in the Children's Hospital records, Dr. Andrea Chapman, a psychiatrist, recorded:

According to the father, they said before the accident, [the plaintiff] had at times been somewhat 'moody.' He said that there possibly could have been some depressive symptoms before the accident, however it was not something they formally looked into and in the past he has never seen a psychologist, counselor or psychiatrist in the past. He said in the summer, he had been hanging around with a 'not so good crowd'. He had been drinking and smoking marijuana.

Damages

(a) Non-Pecuniary Damages

- [314] The parties agreed that at the present time, the upper limit for non-pecuniary damages is approximately \$388,177.
- [315] The purpose of non-pecuniary damages was succinctly stated by Madam Justice Ker in *Trites v. Penner*, 2010 BCSC 882:
- [188] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair and reasonable to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 [Andrews]; *Jackson v. Lai*, 2007 BCSC 1023 at para. 134 [Jackson]; *Kuskis v. Hon Tin*, 2008 BCSC 862 at para. 135 [Kuskis].

- [189] For the purposes of assessing non-pecuniary damages, fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Andrews; Jackson; Jenkins v. Bourcier*, 2003 BCSC 388 at para. 87; *Radford v. Drobot et al.*, 2005 BCSC 293 at para. 62; *Kuskis* at para 136.
- [316] In *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley], Madam Justice Kirkpatrick set out the following non-exhaustive list of the factors which influence awards for non-pecuniary damages at para. 46:
- a. the age of the plaintiff;
 - b. the nature of the injury;
 - c. the severity and duration of pain;
 - d. the disability;
 - e. the emotional suffering;
 - f. the loss or impairment of life;
 - g. the impairment of family, marital, and social relationships;
 - h. the impairment of physical and mental abilities; and
 - i. the loss of lifestyle.
- [317] As a result of the accident the plaintiff has a shortened life expectancy, with a predicted age of death at 69.8 years. This is a difference of 11 years from an average BC adult's life expectancy. His shortened life expectancy will affect his claim for non-pecuniary damages, his claim for the cost of future care and, to a lesser extent, his future income claim.
- [318] The plaintiff submits that an award of non-pecuniary damages near or at the upper limit is appropriate in this case. He submits this case is substantially similar to *Spehar v. Beazley*, 2002 BCSC 1104, aff'd 2004 BCCA 290 [Spehar], where the upper limit, then \$280,000, was awarded. He contends that, like the plaintiff in *Spehar*, his brain injury is "devastating". He relies on *Spehar* for the proposition that a devastating brain injury should attract an award of non-pecuniary damages in the upper range without making "fine distinctions" regarding degree of comparable brain injuries.
- [319] The defendants referred me to *Robinson (Litigation guardian of) v. Bud's Bar Inc. (cob Bud's Bar and Lounge)*, 2015 BCSC 1767 [Robinson], and *Mackey (Litigation guardian of) v. British Columbia (Provincial Capital Commission)*, 2016 BCSC 1333 [Mackey].
- [320] In *Robinson*, Mr. Justice Sigurdson dealt with a 19-year old plaintiff who suffered a traumatic brain injury causing cognitive impairment when he was pushed backwards during an altercation and hit his head on the pavement. The plaintiff's brain injury caused permanent cognitive difficulties such as impaired ability to sequence information, poor insight, a lack of focus, impaired memory, and difficulty with sustained concentration and

multi-tasking. He also developed a mental disorder requiring antipsychotic and anti-anxiety medication for the rest of his life. The plaintiff was awarded \$250,000 in non-pecuniary damages.

[321] The plaintiff contends that the brain injury and resulting symptoms in Robinson are similar to his, but that his physical injuries are more significant than those of the plaintiff in Robinson.

[322] In Mackey, the plaintiff, age 17, fell two stories on the concrete walkway when he tried to swing around a lamp post that came loose. The plaintiff suffered a traumatic brain injury with permanent cognitive defects. He also suffered a broken arm, lacerations to his scalp, chin and tongue, and contusions to his chest, arms and legs. He spent five weeks in hospital and another 15 months in an intensive rehabilitation program. Mr. Justice Macintosh found that that plaintiff would have gone to medical school if it were not for his injuries. He was awarded \$250,000.

[323] The defendants contend that the plaintiff in Mackey appears to have regained more physical functioning than the plaintiff has, and that taking into account the Stapley factors in his condition, \$275,000 is a fair award for non-pecuniary damages.

[324] While I accept that the plaintiff has lost a great deal due to the injuries that he sustained in the accident, he has not been left without some ability to enjoy the life he now faces. Bearing in mind the present upper limit for an award for non-pecuniary damages, had I found liability for the plaintiff I would have awarded him \$300,000 under this head of damages.

(b) Loss of Past Earning Capacity

[325] The legal principles which apply to a loss of income earning capacity award, both past (pre-trial) and future (post-trial), were summarized in detail by Mr. Justice Verhoeven in *Firman v. Asadi*, 2019 BCSC 270 at para. 155, where he adopted his previous comments in *Sendher v. Wong*, 2014 BCSC 140. With respect to past loss of income earning capacity, Verhoeven J. summarized the legal principles as follows:

[158] The award for past loss of earning capacity is based on the value of the work that the plaintiff would have performed but for her accident injuries. The award is properly characterized as a loss of earning capacity: *Bradley v. Bath*, 2010 BCCA 10 (CanLII) at paras. 31-32; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 (CanLII), at para. 153; *X. v. Y.*, 2011 BCSC 944 (CanLII), at para. 185.

[159] The plaintiff need not establish the actual loss of earnings on a balance of probabilities. What would have happened prior to the trial but for the accident injuries is hypothetical, just the same as what may happen in the future, after the trial.

[160] In *Smith v. Knudsen*, 2004 BCCA 613 (CanLII), at para. 29, Rowles J.A. stated:

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.

- [161] However the plaintiff must establish on a balance of probabilities that there is a causal connection between the accident injuries and the pecuniary loss claimed; mere speculation is insufficient: *Smith v. Knudsen* para. 36; *Athey*, at para. 27; *Perren v. Lalari*, 2010 BCCA 140 (CanLII), at para. 32; *Falati v. Smith*, 2010 BCSC 465 (CanLII), at para. 41, *aff'd* 2011 BCCA 45 (CanLII).
- [162] Just as in the case of the assessment of future loss of earning capacity, in the case of past loss of earning capacity, if the plaintiff establishes a real and substantial likelihood of the pecuniary loss asserted, the assessment of damages to be awarded as compensation depends upon an assessment of the degree of likelihood of the particular loss, combined with an assessment of the value of the loss.
- [163] In cases where it is appropriate to proceed with an assessment of the value of the loss, s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, stipulates that a person who suffers loss of income is only entitled to recover the net income amount as damages: *X. v. Y.*, at para. 187; *Lines*, at paras. 152-186.
- [326] The plaintiff introduced the report of an economist, Robert Carson of Associated Economic Consultants, in support of his claim for loss of earning capacity. According to Table 1 in Mr. Carson's report of November 4, 2019, which assumes that the plaintiff pursued carpentry after high school, his past income loss net of all labor market contingencies is \$165,433, assuming a four-year path to becoming a carpenter.
- [327] The plaintiff did finish high school equivalency, but it took distance education courses, tutoring and more time for him to do so, and I am not satisfied that he did so on any traditional basis.
- [328] The plaintiff submits that the evidence establishes that, had he not been injured in this accident, he would have easily earned his ticket in carpentry and used it as a stepping stone to other educational, business and vocational accomplishments, including becoming an engineer, architect or starting his own business. He argues that his practical capabilities and the example set by his twin brother make it far more likely the latter or something similar would have been his course.
- [329] He contends that a reasonable assessment of his past loss of income is \$182,000 inclusive of 10% non-wage benefits.

- [330] I am unable to accept that there is any likelihood that, but for the accident, the plaintiff would have achieved an occupation other than that of a carpenter, but I do find that there was a real and substantial possibility that he would have pursued work in the field of carpentry.
- [331] The plaintiff's figures, however, ignore the limited income he has enjoyed since the accident. In 2015, he worked as a landscape laborer working two to three days per week for four to five hours per day during the working season. He earned around \$1,000 per month. The work ended when he fractured his left elbow.
- [332] In 2018, he worked at a marijuana consumption store called Terp City Lounge. He worked six to seven hour shifts and was paid \$13.70 per hour. His duties included collecting cover charges for customers, general clean-up, and selling snacks. More recently, he got a job through an organization called Solid Outreach, where he and a friend are paid \$25 per hour to pick up needles for two hours.
- [333] I find that the income that the plaintiff has managed to earn since the accident is so minimal that it is less than the amount of income that he would have earned, whilst in training to be a carpenter, and need not be taken into account to reduce his claim for lost earning capacity up to the date of trial.
- [334] The question arises as to how long it would have taken the plaintiff to complete his carpentry training, but for the accident.
- [335] Dylan McLeod is 24 years old. He is the son of Dave McLeod. He lives in Vancouver and works as an apprentice carpenter. He has yet to receive his full certification, having completed his first three years of education at Camosun College in Victoria, he plans to complete his fourth in Vancouver. He believes he will be a fully qualified carpenter in September 2020. He stated that he has worked off and on and could have become a carpenter in four years had he worked full time.
- [336] The plaintiff's twin brother, Tom, went to Camosun College to become an electrician. He will become a journeyman electrician once he completes his work hours this summer.
- [337] I was impressed with the industry and accomplishments of the plaintiff's brother Tom. I find that his drive to pursue training and a career was superior to that of the plaintiff. I find that he was considerably more motivated to pursue training than the plaintiff. I conclude that his delay in completing his training as an electrician was due to the other training he interspersed with his training as an electrician.
- [338] I find that, but for the injuries he sustained in the accident, the plaintiff would have taken the same length of time to complete his apprenticeship as did his friend Dylan McLeod, and had he pursued carpentry, I find that the plaintiff would likely have earned his certification in the summer of 2020.

[339] Had the plaintiff pursued his training as a carpenter, his capacity for part-time employment would have been reduced, but not entirely eliminated. Bearing in mind the length of time that I have found that the plaintiff would have taken to complete training as a carpenter I find that the modest income earned by the plaintiff since the accident is less than he would have earned over the period of time since the accident, had he pursued a career as a carpenter.

[340] An award of \$150,000 would reflect the delayed eight-year path I find that the plaintiff would have taken, but for the accident, similar to Dylan McLeod. Had I found liability for the plaintiff I would have awarded him that amount under this head of damages.

(c) Loss of Future Income Earning Capacity

[341] The plaintiff contends that an assessment of \$2,500,000, inclusive of benefits, under this head of damages is reasonable.

[342] In Mr. Carson's income loss report of November 4, 2019, the plaintiff's without-accident future income is said to be \$1,864,545. However, this figure does not take into account the plaintiff's reduced life expectancy. Mr. Carson said the reduced life expectancy would result in a reduction of up to 5%, or roughly \$95,000.

[343] Mr. Carson's calculations assume that the plaintiff would have completed his carpentry certification in four years. He admitted that if it took the plaintiff eight years, as I have found would have been the case, but for the accident, this would reduce his total income loss, but that the reduction would be modest because earnings data already reflect the fact that some people take longer to complete their certifications.

[344] The defendants contend that taking into account the plaintiff's reduced life expectancy and the likelihood that he would have earned his carpentry certification in the summer of 2020, an overall 5% reduction of Mr. Carson's without-incident future income total is justified, bringing the number to \$1,771,317.75.

[345] The defendants say that the plaintiff's figure should be further reduced to take into account the plaintiff's residual earning capacity.

[346] The defendants present the plaintiff's future income loss, net of any residual earning capacity at a final total of \$1,528,728.11.

[347] They emphasize that according to Dr. Lazar, Dr. Purtzki, and the vocational rehabilitation consultant, Mr. Alex Jackson, the plaintiff should have some residual earning capacity. He had just started grade 12 when the accident occurred. His prior work history included working at a golf course, a pub, a restaurant, and various landscaping and construction-related jobs. Although there were some references to architecture, firefighting, and photography, the most likely course is that the plaintiff would have pursued a career in carpentry. He probably would have gone to Camosun College.

[348] Dr. Lazar expressed the view that the plaintiff might be successful in securing employment in the future. She stated in cross-examination that he can work part-time in the right environment.

[349] Mr. Jackson stated that part-time volunteer or paid work would be a good outcome for the plaintiff.

[350] Dr. Purtzki expressed her opinion that although the plaintiff will never be able to support himself financially, he could "take on part-time, low skilled and low paying jobs".

[351] While these experts expressed these views, I find that they did so more in the hope of finding activities that would occupy the plaintiff, as opposed to earning him any real income.

[352] Having observed the plaintiff, and hearing the limitations that he will face in the future from his family members, his friends, and the experts, I find that he has no appreciable residual earning capacity.

[353] Had I found liability for the plaintiff I would have assessed his future loss of income earning capacity at \$1.8 million.

(d) Cost of Care to Date

[354] This aspect of the plaintiff's claim includes a claim for his parents "in-trust" for the considerable support that they have provided to him.

[355] In *Bystedt (Guardian ad litem of) v. Hay*, 2001 BCSC 1735 at para. 180, Madam Justice Smith reviewed the factors to be considered in the making of "in-trust" awards. She then offered the following summary of those factors:

- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
- (c) the maximum value of such services is the cost of obtaining the services outside the family;
- (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
- (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

- [356] The law relating to in-trust awards was more recently summarized by Mr. Justice Davies in *Hans v. Volvo Trucks North America Inc.*, 2016 BCSC 1155:
- [529] Spouses or other family members who provide care or other services to an injured plaintiff are entitled to compensation for those services rendered over and above those what would be expected from the family relationship.
- [530] In *Dykeman v. Porohowski*, 2010 BCCA 36, Newbury J.A. wrote at para. 28:
- [28] Since *Kroeker*, it has been settled law in this province that "housekeeping and other spousal services have economic value for which a claim by an injured party will lie even where those services are replaced gratuitously from within the family." In *Kroeker*, such recovery was allowed under the heading of 'loss of future ability to perform household tasks', but obviously, damages for loss of such ability prior to trial may also be properly claimed and recovered: see, e.g., *McTavish v. MacGillivray*, 2000 BCCA 164 (CanLII) at paras, 43, 51-7, per Huddart J.A.; *West v. Cotton* (1995) 1995 CanLII 1424 (BC CA), 10 B.C.L.R. (3d) 73 (C.A.) at para. 25; and *Campbell v. Banman* 2009 BCCA 484 (CanLII). The reasoning in *Kroeker* has been extended beyond "spousal" services to services rendered by other members of a family: see *Boren v. Vancouver Resource Society*, *Dufault*, *McTavish v. MacGillivray*; *Bystedt v. Hay*, all *supra*. Such awards are colloquially referred to as "in trust" even though it is the plaintiff who recovers them, and British Columbia courts do not generally impose trust terms in their orders, regarding the loss as that of the plaintiff: see *Feng v. Graham* (1988) 1988 CanLII 3044 (BC CA), 25 B.C.L.R. (2d) 116 (C.A.) at 9-10; *McTavish*, *supra*.
- [357] The plaintiff's parents spent all or part of 263 days with the plaintiff at the various hospitals where he received treatment.
- [358] The plaintiff was in a coma in the ICU for 12 days. There was temporary housing at Victoria General Hospital where the family was able to stay.
- [359] In June 2013, the plaintiff returned to Salt Spring Island, where he continued to receive therapy. In January 2018 he moved to MCM in Victoria.
- [360] Mr. McCormick and Ms. Jones have provided care, support, and guidance well above that expected of a parent. They have been involved in every aspect of the plaintiff's rehabilitation, care, and re-introduction to avocational life. The additional work included interacting with caregivers, managing his daily life decisions, and accompanying the plaintiff for treatment. The plaintiff needs constant accompaniment when he travels because if anything went wrong, anything out of the ordinary, he would become confused and is vulnerable to potentially making bad decisions.

- [361] Ms. Jones reduced her work to a four-day week to continue to assist her son, for example with appointments, although she received some income replacement. She felt that the nursing care on the neurological ward was subpar and that she was required to help with care aide tasks due to short staffing. While at Sunny Hill, she essentially spent her days caring for her son and interacting with the various rehabilitation providers.
- [362] As in the case of *Woo v. Crème De La Crumb Bakeshop & Catering Ltd.*, 2019 BCSC 1752, the plaintiff presents an in-trust claim on behalf of his parents in the amount of \$100,000 for his father and \$50,000 for his mother, which includes the assistance they will continue to provide in the future.
- [363] The defendants concede that the plaintiff's parents have been heavily involved in his care since the accident and it is clear that they are entitled to compensation. They were less involved during his stay at the Victoria General Hospital, but were particularly involved in his care while he was at Sunny Hill from November 2012 to June 2013 and when the plaintiff lived on Salt Spring Island from June 2013 to January 2018. The defendants also concede that an in-trust award should be made for care and services provided during the four and a half years that the plaintiff lived on Salt Spring Island. The defendants submit the plaintiff's parents' involvement in his care has reduced significantly since he moved to MCM in January 2018.
- [364] In *Sangra (Guardian ad litem of) v. Lima*, 2015 BCSC 2350, the plaintiff's wife took over six months off of work and spent 12-15 hours per day or more in the hospital with the plaintiff. The care she provided during the plaintiff's initial five and a half weeks in hospital was similar to the care that the plaintiff's family provided at Victoria General Hospital. Mr. Sangra was then transferred to two different facilities. At these facilities, the plaintiff's wife provided a similar or greater level of care to what the plaintiff's parents provided at Sunny Hill. Mr. Justice Walker concluded at para. 243 that:

I find that Ms. Sangra's significant efforts to help her husband with his recovery while he was hospitalized, particularly at Mt. St. Joseph's and Holy Family hospitals, augmented the rehabilitation care provided by the medical staff to Mr. Sangra's recovery. With the encouragement of hospital and rehabilitation staff, and in addition to helping her husband with his communication, Ms. Sangra was continuously at his side assisting him to become flexible and mobile. She also fed and cleaned him, changed his soiled bedding and clothing and helped him with his toileting. The evidence establishes that hospital staff encouraged Ms. Sangra to do as much as she could to assist because of their heavy workloads. Her relentless efforts to promote her husband's recovery have continued since his release from Holy Family Hospital. I am satisfied that her efforts are directly linked to the qualitative nature and speed of Mr. Sangra's recovery.

- [365] Walker J. awarded the plaintiff's wife an in-trust award of \$28,000 for care provided while the plaintiff was in hospital. The defendants concede that the plaintiff was hospitalized for longer than Mr. Sangra, which should be reflected in the in-trust award in this case.

[366] The defendants contend that the in-trust award should also reflect the fact that the plaintiff's care needs declined as his condition improved, and thus, an in-trust award of \$50,000 would be fair compensation for the care provided by his family while at Victoria General Hospital and Sunny Hill.

[367] The defendants raised the decision in *Hermanson v. Durkee*, 2014 BCSC 877, where an 18-year-old plaintiff suffered a severe traumatic brain injury in a motor vehicle accident. Like the plaintiff, Mr. Hermanson did not live independently either before or after the accident due to his young age. At the time of trial, Mr. Hermanson had been living at home for three years. During that time, his mother and girlfriend provided assistance with transportation, meal preparation, and general homemaking and provided reminders for various tasks. His mother also provided some rehabilitation assistance. These are similar to the services that the plaintiff's family provided while he lived on Salt Spring Island from June 2013 until January 2018.

[368] Had I found liability for the plaintiff I would have assessed the in-trust claim for the plaintiff's parents as proposed by the plaintiff at \$100,000 for his father and \$50,000 for his mother.

(e) Future Cost of Care

[369] The legal principles underpinning a cost of future care award were summarized by Mr. Justice Savage in *Gao v. Dietrich*, 2018 BCCA 372:

[68] An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229 at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "restitutio in integrum" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.

[69] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), 49 B.C.L.R. (2d) 33 (S.C.) at 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 (CanLII) at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.

- [70] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, this Court clarified that the medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability, and recommended treatment, and the health care professional's recommended care item (at para. 39).
- [71] In *Ali v. Glover*, 2016 BCCA 446, and *Reimer v. Bischoff*, 2017 BCCA 4, this Court overturned awards for future care because there was no evidence from a health care professional recommending a treatment item.
- [370] The plaintiff claims \$5,810,683 as reasonable and supportable on the evidence for cost of future care. The plaintiff submits his emphasis on full compensation for these future care costs is partially a response to the arbitrary limit on non-pecuniary damages.
- [371] The plaintiff's cost of future care claim is detailed in the report of Sholeh Salehi, an occupational therapist with Optimum Therapy Rehabilitation Services.
- [372] Ms. Salehi made the following recommendation with respect to medications for the plaintiff in the future:

Mr. McCormick is currently taking Venlafaxine XR 75 mg for his depression and other than daily vitamins. Dr. Purtzki recommended amitriptyline 2%, ketamine 1% cream for neuropathic pain management of right forearm; occasional Advil for muscle pain; Effexor or its derivatives, for reducing frustration and improving energy; Modafinil for chronic fatigue of neurological origin.

- [373] She also recommended "future Botox injections for hamstrings and gastrocnemius muscles. Therefore, an allowance of \$1,300 - 1,500 per year is recommended to cover the cost of future medications (Venlafaxine is approximately \$17.95/month and other anti-depressants \$30-\$50/month)."

- [374] For rehabilitation and other therapies, Ms. Salehi proposed:

Mr. McCormick will continue to require the following rehabilitation services for the management of his limitations, as a result of the accident:

- Occupational therapy/case management:

The writer concurs with Dr. Kosaka in that Mr. McCormick is permanently disabled and he would require rehabilitation support to assist in organization, home and money management, decision making, planning, and goal setting, and to be able to live independently.

Mr. McCormick will require support to build functional strength and work towards some type of part-time employment/volunteer work. The occupational therapist can help him with pain management, coping strategies, problem-solving, goal setting, and planning through different stages of life.

To minimize the burden of care on his parents, during the first year, as he transitions to a new home environment, he would benefit from 3 sessions per month, 2 hours per session of occupational therapy/case management. After the first year he would benefit from biweekly intervention, 2 hours per session. This level of support is critical to assist him with weekly goal setting, money management, scheduling/organizing his week as well as to help him to develop healthy habits and routines and also serve as a check-in for safety monitoring and problem solving. Hence until age 50 as he goes through different transitions in life and milestones. He will require this level of support to manage these transitions and try to establish a routine. Hence, for the first year based on 3 sessions per month, 36 sessions/year is recommended for a total of 72 hours of intervention, plus 36 hours of travel time. After the first year, until age 50, based on biweekly sessions, 24 sessions/year is recommended for a total of 48 hours of intervention, plus 24 hours of travel. Thereafter, a lifelong allowance of 12 sessions per year is recommended for occupational therapy/case management services, facilitate any goals, and assist Mr. McCormick with any transitions through adulthood. Session duration is estimated at 2 hours/sessions. Occupational therapy services are billed at an average rate of \$112/hour.

· Rehabilitation Assistant/Kinesiologist:

... He would benefit from a kinesiologist to develop an exercise routine appropriate for his injuries. Mr. McCormick has demonstrated a decrease in his overall functional tolerance, increase in fatigue and pain. He has been going to the gym one-two times per week with a support worker from MCM. He has demonstrated difficulty in initiating and following through with activities.

His current exercise program has been set by the Physiotherapist and Kinesiologist in the Brain Injury Team. It is more likely than not that once he is done with the MCM program, and he does not have the Brain Injury Team and the support workers, he will have difficulty following through with his exercise program, due to his cognitive limitations. There are also safety issues with him attending the gym on his own due to his decreased balance as well as him overdoing it and injuring himself.

Mr. McCormick may benefit more with an RA with a kinesiology background so that they can provide both exercise and life skills support.

In order to assist Mr. McCormick with the follow through of daily living goals and monitor his participation with the tasks, a Rehabilitation Assistant is recommended to follow through on the therapy plan outlined by the occupational therapist, and to complement any goals outlined by the psychologist, speech pathologist and vocational rehabilitation consultant. The writer concurs with Dr. Lazar, Dr. Purtzki and Dr. Kosaka in that Mr. McCormick is unlikely to be capable of independent living. Therefore to maximize independence and minimize burden of care on his family, as well as the fact that family support may not be available at all times, it is anticipated that Mr. McCormick would require a higher level of support throughout his life as he goes through different transitions and working towards different goals. Mr. McCormick has been deemed to be incapable of living independently by his physicians. The Rehabilitation Assistant

could also assist Mr. McCormick with re-establishing leisure activities as a healthy outlet to manage his emotional symptoms and feelings self-confidence in this regard.

In order for Mr. McCormick to be able to live semi-independently without the burden of care on his family, it is anticipated that he will require Rehabilitation Assistant support every day, for 2 hours per day, five days per week, as well as additional 6 weeks per year for activities that may require full or half-day attendance such as job coaching, a total of 290 sessions per year for, 2 hours per session, plus 290 hours/year of travel time until age 65. Thereafter, it is recommended that he receive 3 session per week for 2-hour sessions, for a total of 312 hours per year. While there may be other cheaper alternatives such as a life skills worker, these individuals may not have adequate training or experience to deal with the neurobehavioral sequelae (such as anger management, judgment and decision making, problems solving, compensation strategies, etc.)

Mr. McCormick may use more than this number of sessions in some years and fewer in other years. Kinesiology services are billed at \$50 per hour. Cost of the annual membership fee for Community Fitness Centre in Victoria is \$492.00 for adults and seniors, as per Crystal Pool and Fitness Centre.

· Physiotherapy:

the writer concurs with Dr. Purtzki and Dr. Kosaka in that Mr. McCormick will benefit from an allowance of physiotherapy to help with treatment of aggravations and flare-ups, as well as providing recommendations for the exercise program as fit for him.

the writer recommends an allowance of 8 to 12 physiotherapy sessions per year to address the above issues which would be outside the scope of practice of the Rehabilitation Assistant, Kinesiologist, or occupational therapist. Physiotherapy services are billed at \$95 per 30 minutes visit. (As per Physiotherapy Association of British Columbia).

· Psychology/Counselling support: Dr. Kosaka and Dr. Lazar noted that Ms. McCormick would benefit from psychological counselling, over his lifetime to learn strategies and techniques to cope with anxiety and depression. Dr. Lazar recommended that Mr. McCormick would benefit from one to one PhD-level psychological counselling with experience in brain injury, to target symptoms of anxiety, affective regulation, anger management techniques, and relational concerns. As well as behavioural component and instruction regarding specific relaxation and mood-enhancing techniques. She recommended he receive weekly sessions during the first year, biweekly to monthly sessions during the 2nd year, and ongoing yearly session in groups of 8 to support him in times of transition and crises.

The writer concurs with Dr. Kosaka and Dr. Lazar in that Mr. McCormick would require ongoing counselling throughout his life. Therefore, an allowance of 24 sessions/year is recommended for the first year, 12 to 15 sessions/year is recommended for the 2nd year and 8 sessions/year is recommended over his lifetime. Also 12 sessions/year of family counselling for a period 3 years is recommended to assist in adjustment issues and provide support for the family to learn, manage, and cope with Mr. McCormick's brain injury. He may use more than this number of sessions in

some years and fewer in other years. Psychological services are billed at \$200/hour, as per BC Association of Psychologists.

· Speech and Language Pathologist:

Dr. Lazar recommended ongoing Speech and Language Pathology treatments to support functional communication skills and social cognition. It is recommended that Mr. McCormick be assessed by a Speech and Language Pathologist to determine needs, and treatment sessions required. An allowance of \$800 is recommended for Speech and Language assessment as per West Coast Speech and Language Pathology. Further allowance needs to be considered depending on the result and recommendations of the assessment.

[375] Insofar as the plaintiff's vocational needs were concerned, Ms. Salehi proposed:

Dr. Kosaka, Dr. Purtzki, and Dr. Lazar all opined that Mr. McCormick would require support in gaining and maintaining meaningful employment and recommended that he be provided with vocational counselling. Mr. Jackson opined that Mr. McCormick's injuries will prevent him from being able to obtain and/or maintain employment in the competitive labour market.

Mr. Jackson recommended that given Mr. McCormick age he would benefit from 6-7 rounds of job placement throughout his lifetime. The writer concurs with Mr. Jackson's recommendation of 6-7 rounds of job placements over Mr. McCormick's lifetime. The cost of these services is estimated at \$3,500 to \$4,000 per placement.

[376] For care arrangements, Ms. Salehi proposed:

... Mr. McCormick currently has access to 8 hours a day of support during the day, and 6 hours of week of one to one support worker. Reportedly there has been no change in his behaviour and cognitive skills in the past two years.

...

He has one more year at MCM before he has to move out and has applied for substitute housing in Victoria. Dr. Lazar, Dr. Kosaka and Dr. Purtzki all concur that Mr. McCormick would not be able to live independently. Dr. Purtzki noted that Mr. McCormick will be at increased risk of falls as he ages, especially in his 50s and 60s. He would require safety features in his bathroom such as grab bars, raised toilet seat and a shower chair. Considering his level of cognitive functioning, his progress to date and level of assistance he continues to receive both from the MCM staff and his parents, I concur that Mr. McCormick is not able to live independently and needs access to at least 8 hours of support per day.

If Mr. McCormick is provided with 8 hours of care-aid, they can assist with homemaking, childcare and other chore that he may not have the energy to perform. Hence it is recommended that Mr. McCormick rent a suite and be provided with 8-hours of daily care in order to have a supported living model of care, and without having the burden of care on his extended family, until age 55. The writer concurs with Dr. Purtzki in that it is possible that Mr. McCormick experience further deterioration in his physical, psychological, and cognitive symptoms. He may

encounter mobility difficulties. Therefore it is recommended that he be provided with 12 hour care after age 55 onward. Mr. McCormick would be best served by workers hired through a health care agency, which has nursing services and supervision programs in place for their care aides. The cost of this service is estimated at \$35-\$45/hour as per Keepers Comfort and Bay Shore Home Health. It is also recommended that he be set up with Lifeline Services after age 55, to improve safety during the night-time, and at times that he is by himself. The cost is estimated at \$75/month with one time installation fee of \$90, as per Philips Lifeline.

[377] Ms. Salehi proposed the following equipment needs for the plaintiff:

- It was recommended that Mr. McCormick be provided with a Stove Guard for safety reasons once he has moved out of the group home. This will automatically turn off the stove if the person has not been in front of it for a period of time, the price of a stove guard is \$669.95 plus \$20 shipping, as per Stove Guard International Ltd.

- Mobility Aids:

Mr. McCormick may require mobility aids after age 55, as it is possible that his physical condition may deteriorate. It is recommended that Mr. McCormick he may require a cane or walker initially, and he may eventually require a wheelchair or scooter. Cost of a cane is approximately \$30-\$50 plus tax. Cost of a 4-wheel-walker is estimated at approximately \$569. Cost of basic manual wheelchair is estimated at approximately \$3,000 to \$5,000, as per TIME Mobility and Accessibility, depending on his needs at the time. Cost of a light to medium scooter is approximately \$3,000 to \$6,000 as per McDonald's Home Health Care. Replacement maybe needed every 7-10 years.

- Safety Equipment:

To ensure safety and minimize risk of falls in the bathroom and home, Mr. McCormick may require equipment through-out his life span. At present due to his reduced balance he requires raised toilet seat (\$60-\$85), grab bars in the bathtub (32 inch bar @ \$40 per bar plus \$80 installation fee), and shower chair (\$89.00). Therefore, an allowance of \$500-\$800 is recommended for equipment every 3-5 years.

[378] Ms. Salehi also proposed a functional driving evaluation for the plaintiff:

The cost of Driver Rehab Assessment for the plaintiff at \$1,000-\$1,060, as per Community Therapists and GF Strong, and if the plaintiff were successful in obtaining a license some further training classes to address limitation that may arise as the result of the assessment. An allowance of 10-15 sessions is recommended. Costed at \$175 to \$250 per session as per GF Strong and Community Therapists.

[379] Ms. Salehi's costs are therefore summarized as follows:

Cost

Frequency

1. MEDICATIONS

Allowance for additional pharmacological management

\$1,300 - \$1,500

Yearly

2. REHABILITATION/THERAPIES

Occupational Therapy/Case Management First Year:

36 sessions at 2 hrs/session plus 1 hr/session for travel = 3 hours at \$112/hr

\$12,096

One time cost

Second year to age 50:

24 sessions at 2 hrs/session plus 1 hr/session for travel = 3 hrs at \$112/hr

\$8,064

Second Year until age 50

Thereafter:

12 sessions at 2 hrs/session plus 1 hr/session for travel = 3 hrs x 12 sessions

\$4,032

Yearly

Kinesiology/Rehabilitation Assistant

Up to age 65:

5 sessions per week/2 hours per session for 58 weeks = 290 sessions at \$50/hr plus 290/hr of travel

\$43,500

Yearly up to age 65

Thereafter:

3 sessions/week plus 3 hrs travel/week = 156 sessions at \$50/hr plus 156/hr of travel

\$23,400

Yearly

Gym pass

\$492.00

Yearly

Physiotherapy

8-12 sessions/year \$95/session

\$760 to \$1,140

Yearly

Psychology

First year:

24 sessions/year at \$200/hr

\$4,800

One time Cost

Second year:

12 to 15 sessions/year at \$200/hour

\$2,400 to \$3,000

One time Cost

Thereafter:

8 sessions/year at \$200

\$1,600

Yearly

Family Counselling:

12 sessions/year at \$200

\$2,400

For 3 years

Speech and Language Pathologist Assessment

\$800

One time cost

3. VOCATIONAL NEEDS

6-7 placement cycles at \$3,500 - \$4,000 per placement

\$21,000 - \$28,000

One time cost

4. CARE REQUIREMENTS

Care aids, up to age 55: 8 hours/day 7 days per week at \$35 to \$45/hour

\$101,920 - \$131,040 + GST

Yearly to age 55

Thereafter: 12 hours/day 7 days per week at \$35 to 45/hour

\$152,800 - \$196,560 + GST

Yearly after age 55

Lifeline \$75/month

\$900.00

Yearly after 55

\$90 installation fee

\$90.00

One time cost

5. MEDICAL/REHABILITATION EQUIPMENT NEEDS:

Stove Guard

\$669.95 + taxes

Every 10 years

Mobility aid:

Cane

\$30-\$50 + taxes

Every 3 - 5 years

Walker

\$569

Every 3 - 5 years

Wheelchair or Scooter

\$3,000 - \$6,000

Every 7 - 10 years after age 55

Safety equipment

Allowance of \$500 - \$800

\$500 - \$800

Every 3 - 5 years

6. DRIVING ASSESSMENT/REHABILITATION

Driver Rehabilitation Assessment

\$1,061

One time cost

Driver Rehab classes 10 - 15 classes @ \$175 - \$250

\$1,750 - \$3,750

One time cost

[380] The defendants contend that there is no medical justification for an award of \$1,300 - \$1,500 per year for medication. The plaintiff's only present prescription medication is Venlafaxine (Effexor), which costs \$17.95 per month. There are no plans to change the plaintiff's medication in the future. He may need Advil on occasion for muscle pain. Ms. Salehi cites Dr. Purtzki's "recommendation" for Botox injections. However, Dr. Purtzki does not make this recommendation. Rather, she says that Botox injections are something that "should be considered in the future". This does not establish the required probability of a future need. At the very least, the defendants contend that there should be a strong negative contingency for the possibility that he never needs this treatment.

[381] Given that Venlafaxine, the only of the above medications that the plaintiff uses, costs about \$200 per year, I accept that the claim of \$1,300-\$1,500 is unwarranted. I accept the submission of the defendants that an award of \$300 per year will be sufficient to cover the cost of Venlafaxine and Advil, as well as provide enough of a buffer in the event of a change in the plaintiff's medication.

[382] In terms of the plaintiff's claim for occupational therapy, the defendants argue that none of the medical experts that Ms. Salehi relies on quantify the plaintiff's needs for occupational therapy. Ms. Salehi recommends 36 sessions per year for the first year "as he transitions to a new home environment." She recommends 24 sessions per year until age 50 "as he goes through different transitions in life and milestones." She also recommends 12 sessions per year after age 50 to assist the plaintiff with "any transitions through adulthood." The defendants point out that she offers no explanation as to why the initial transition to a new home requires three times more occupational therapy than transitions after age 50, and that she offers no explanation as to why transitions after the first year until age 50 require double the amount of occupational therapy than transitions after age 50.

- [383] I accept the defendants' contention that 12 sessions of occupational therapy per year would be sufficient, and I assess the annual cost for occupational therapy at \$112 per hour for 12, two-hour sessions at \$2,688.
- [384] Since moving to the MCM, the plaintiff has been provided with a weekly and monthly schedule in his current management program. He stated that he does his own shopping, though his parents sometimes help him.
- [385] Mr. McCormick testified that when he and Ms. Jones visit the plaintiff at MCM they clean his room and remove rotten food from the fridge. Based on what he has witnessed, it does not seem like the plaintiff has ever cleaned his bathroom, fridge or oven. He estimated he and Ms. Jones visit the plaintiff in Victoria six times a month. The plaintiff returns to Salt Spring Island at least once a month to see his doctor. He also returns for holidays, and, on those occasions, will stay for an extended period.
- [386] I find that without schedules prepared by someone else, the plaintiff would quickly flounder in terms of his shopping and meal preparation.
- [387] Mr. McCormick gave evidence that the plaintiff needs to have his energy level constantly monitored as he tires easy, especially in new situations. He said that any unusual addition to his daily routine is trouble.
- [388] Mr. McCormick gave evidence that the plaintiff forgets to eat and is prone to not remembering that he will be hungry. When he becomes hungry, he cannot handle the situation and has, on numerous occasions, phoned home because he is hungry and upset and does not know what to do. On his own, he has very low functioning in his ability to make meals.
- [389] The plaintiff's memory function is impaired. He is sensitive to noise and has difficulty tolerating busy or noisy environments.
- [390] Ms. Jones agreed that busy/noisy environments are difficult for him as he becomes overstimulated and cannot focus.
- [391] She said that the plaintiff is vulnerable and people take advantage of him. She once received a call from her son telling her that a man wanted him to cash a cheque for him in the plaintiff's account and then give him the money. This is not the only time someone has asked him to cash a cheque for them. He is also overcharged for things. She gave evidence that, on one occasion a homeless man, named "Paul", moved into his apartment and stayed for two months.

- [392] Although he stated that he manages his own bank account, his mother does have viewing privileges. He takes money out, and occasionally deposits money. His rent automatically comes out of his account. He also budgets for food and has a few hundred dollars for "presents and stuff". He is supposed to live on a budget and receives about \$1,000 per month from the government, but his parents find that they need to add to his bank account on a regular basis.
- [393] I am not persuaded that the plaintiff can actually manage an account, unless it has only limited funds and is supervised by someone else.
- [394] I find that the plaintiff will require management assistance, but as I am of the view that he will require the assistance of a care attendant, I have concluded that it would be a duplication of his needs to also provide him with an award for a case manager.
- [395] Insofar as the kinesiology/rehabilitation assistant is concerned, the defendants say that the plaintiff's evidence was that he currently goes to the gym with a personal trainer twice per week, and that there is no evidence that more training is required or would be undertaken. I accept the defendants' submission that two sessions per week of kinesiology/rehabilitation assistance would be sufficient to address the plaintiff's claim for such services and assess that at a cost of \$100 for each two hour session (\$50 per hour), plus \$25 per hour for travel, for a total annual cost of \$13,000, but would disallow the claim for a gym pass, as I conclude that such an expense would likely have been incurred by the plaintiff whether he had been in the accident or not.
- [396] I accept that the plaintiff has mobility challenges and lurches forward off kilter when he moves, continually stabbing his foot into the ground, and that because of how he walks, he goes through one good quality pair of shoes per month.
- [397] When he arrived home, the plaintiff's outlook was good for a period but he then began to understand his limitations. On two occasions prior to his move to MCM his parents had to take the plaintiff to the ER because he has threatened to kill himself. It is unclear to me whether these were genuine threats or attention getting gestures, but his parents reacted sensibly by taking him to the hospital.
- [398] I heard evidence from the plaintiff's family members that he has issues with anger management and can lash out when he gets tired and frustrated. He has thrown things at his mother and threatened her.
- [399] However, the evidence is that the plaintiff's mood and mental health have greatly improved since the increase to his dosage of Venlafaxine. Accordingly, the defendants contend, and I agree, that his need for counselling has diminished and propose that a 50% reduction in Ms. Salehi's figure for the plaintiff's psychological counselling is appropriate. In the event that I had found liability in the plaintiff's favor, I would have awarded him the sum of \$2,400 for psychological counselling.

- [400] The defendants contend, and I agree, that Ms. Salehi's recommendation for family counselling to "assist in adjustment issues and provide support for the family to learn, manage, and cope with [the plaintiff's] brain injury" is unrelated to the plaintiff. His family members are not parties to this action, so I decline to make any award for this item as a future care cost.
- [401] As I have found that the plaintiff does not enjoy any residual employability prospects, I am not prepared to make any award for the cost of vocational counselling. I appreciate that a vocational assessment might go beyond paid employment, but as I have accepted that the plaintiff will need occupational therapy, I consider that a vocational assessment is an unwarranted duplication in this case.
- [402] The defendants say that there is no medical justification for the plaintiff to have a care aide for eight hours per day, seven days per week. He currently lives at MCM and while MCM has staff available eight hours per day, the defendants contend that there is no evidence that he actually uses or needs anywhere near this level of support.
- [403] The defendants concede that the presently available staff members assist the plaintiff with meal preparation twice per week for two hours, and that he gets some assistance with shopping, but otherwise he does everything by himself. He sets his own schedule and he spends most of his days outside of his apartment.
- [404] The plaintiff stated in cross-examination that he does not want somebody to be there watching him for eight hours per day. The defendants contend that an allowance for five visits per week for two hours per day is reasonable, as it provides the same amount of in-home care he currently receives plus an additional six hours per week and could be increased to three hours per day after age 55.
- [405] I find that the evidence establishes that the plaintiff's brain injury has caused significant multiple and overlapping cognitive, emotional and behavioral problems for him. These problems are permanent and are not subject to improvement in the future. As a result of his vulnerability, he requires someone to be with him or to check in on him on a regular basis. Without this help, he will be vulnerable to exploitation. His "friend" Paul has made this abundantly clear.
- [406] I find that on average, the plaintiff will need the assistance of a care worker for eight hours per day, five days per week, and for a total of two hours per day on Saturdays and Sundays.
- [407] I do not, however, accept the costs for such a worker presented by Ms. Salehi. She priced care aides at \$35-\$45 per hour. Her draft summary of costs priced them at \$29-\$32 per hour. The defendants say there is no explanation for this discrepancy, and indeed none was offered.

- [408] Ms. Salehi said the range set out in her report is justified because the care aide needs to have a certain skill set to deal with the plaintiff's brain injury and anxiety. I find that there is no indication he is receiving or needs specialized care.
- [409] The defendants submit that a rate of \$25 per hour is sufficient to allow the plaintiff to hire a care aide. This is the inflation-adjusted cost of a care aide assessed by Mr. Justice Kelleher in *Mitchell v. We Care Health Services Inc. et al.*, 2004 BCSC 902. While Kelleher J. assessed the cost of a care aide at \$19 per hour in *Mitchell*, he did so on the evidence before him. The evidence to justify such a rate is not before me, so I find the case to be of no assistance.
- [410] If I had found liability for the plaintiff, I would order that the cost of a care attendant be awarded at \$29 per hour; the lower of Ms. Salehi's initial figure.
- [411] Using Mr. Carson's multiplier, that would result in an award for the cost of a care attendant for 44 hours a week or 2,288 hours per year of \$66,352.
- [412] I am not persuaded that had I found liability in the plaintiff's favor his claims for the Lifeline or its installation fees are appropriate claims.
- [413] The defendants contend that there should be some deduction to the claim for medical/rehabilitation equipment needs to account for the fact that the plaintiff will not simultaneously need a cane, a walker, and a scooter or a wheelchair, because an allowance for all three simultaneously would lead to double or triple recovery. They argue that each of these items should be reduced by one-third. They also argue there should be a 50% reduction to reflect that much of his bathroom safety equipment will be replaced less frequently than the three to five years suggested by Ms. Salehi, if needed at all.
- [414] There is some merit to the defendants' submission with respect to medical/rehabilitation equipment needs, and in an effort to be fair to both sides, and if I had found liability for the plaintiff, I would limit the plaintiff's recovery for these items to \$5,000.
- [415] Ms. Salehi included a driving assessment and rehabilitation efforts to allow the plaintiff to drive. The defendants oppose any amount for a driving assessment and rehabilitation cost. The plaintiff's evidence was that he had no interest in driving. Dr. Purtzki stated that she is "quite doubtful" that the plaintiff will be able to obtain a restricted driver's licence, and Mr. Jackson stated that it is unlikely that he could pass a driving test. Had I found liability for the plaintiff, this care item would not be allowed because it is not likely to be incurred.
- [416] In his report of March 3, 2020, Mr. Carson, with a further update reflecting a reduced life expectancy of 70 years for the plaintiff, revised multipliers for future care cost items.
- [417] I have recalculated the items that I would accept for the plaintiff's future care costs, using the present value multiplier of \$27,841 per \$1,000 for costs of future care items from the date of trial until the plaintiff's presumed death from Mr. Carson's report of March 3, 2020. That would result in the following figures:

- a. Medications: \$8,352.30;
- b. Occupational therapy: \$74,837;
- c. Rehab assistant/kinesiologist: \$361,933;
- d. Psychologist: \$2,400;
- e. Care Requirements: \$1,847,306;
- f. Medical/rehabilitation equipment needs: \$5,000.

Total without taxes: \$2,299,828.30.

Total with taxes at 15%: \$2,644,802.55.

[418] I will not refer to the costs of financial management proposed by Ms. Salehi, and the parties have agreed that submissions with respect to the need for and cost of such management will be deferred for the present.

[419] Ms. Salehi concluded that the follow-up with physiatry, psychiatry, and a family physician, as well as an orthopedic specialist recommended by Dr. Purtzki would be covered by the Provincial Medical Plan, and thus present no cost to the plaintiff himself.

(f) Special Damages

[420] The amount is agreed at \$42,278.31.

(g) The Health Care Costs Recovery Claim

[421] The Minister's Certificate with respect to the Health Care Costs Recovery Act, S.B.C. 2008, c. 27 totals \$771,326.68. In the event that the plaintiff had established liability against the Pearsons, I would have ordered that the Minister was entitled to recover this amount.

(h) Tax Gross-up and Management Fees

[422] The parties have agreed that issues of tax gross-up and management fees will be deferred, so I will not address that head of damages.

Conclusion

[423] The plaintiff's claim is dismissed.

[424] Had I not dismissed the plaintiff's claim I would have awarded him the following damages:

- a) Non-pecuniary damages: \$300,000;
- b) Loss of Past Earning Capacity: \$150,000;
- c) Loss of Future Income Earning Capacity: \$1,800,000;
- d) Cost of Care to Date: \$150,000;

- e) Future Care Costs: \$2,644,802.55;
- f) Special Damages: \$42,278.31;
- g) Claim pursuant to the Health Care Costs Recovery Act: \$771,326.68

Total: \$5,858,407.54.

The Honourable Chief Justice Hinkson

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