
CANADA / JUDGMENT

O'Connor v. James

2009 BCSC 1119

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 1119 O'Connor v. James

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

O'Connor v. James,

2009 BCSC 1119

Date: 20090817

Docket: M022070

Registry: Vancouver

Between:

Graham O'Connor

Plaintiff

And

Adam Jeremy James and Jean James

Defendants

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment

(from Trial)

Counsel for the Plaintiff:

D.O. Shane

Counsel for Defendants

Adam Jeremy James and Jean James:

L.G. Harris

Place and Date of Trial:

Vancouver, B.C.

July 6-9 and 13-16, 2009

Place and Date of Judgment:

Vancouver, B.C.

August 17, 2009

- [1] On December 20, 2001, near No. 6 Road and Triangle Road in Richmond, a car owned by Jean James and driven by Adam Jeremy James struck Mr. O'Connor, who was a pedestrian. Originally, the City of Richmond and British Columbia Hydro & Power Authority were Defendants in this Action. The Action was discontinued against those Defendants. Accordingly, the issues are whether Mr. James was negligent in the operation of the vehicle on that day and, if so, whether Mr. O'Connor contributed to causing the accident.

BACKGROUND

- [2] Mr. O'Connor was born in 1964, is a Canadian citizen, but resided in the United States since age 3. In 2001, he moved to Canada in order to be closer to his family. While a resident in the United States, Mr. O'Connor worked mainly for cash in the construction industry and, during the 1990s, in the fishing industry in the Bering Sea. Mr. O'Connor admitted that he had not filed income tax returns in the 1990s. He described his recreational life as extensive, including water skiing, snow skiing, camping, biking five times a week for 10 to 20 miles a day, hunting once or twice a year for a week each time, dirt biking two times a month, if not more, and camping about six times a year for a few days or on weekends.
- [3] On the day of the accident, Mr. O'Connor was returning from the State of Washington. Mr. O'Connor was picked up at the border by his brother, Ken O'Connor. Mr. O'Connor had purchased a bottle of vodka from a duty-free shop, and suggested that some of it be consumed in his brother's car. His brother did not allow this. His brother drove Mr. O'Connor from the border to a house that Mr. O'Connor was renting on No. 6 Road in Richmond. While his brother was in that home for about ten minutes, he observed that Mr. O'Connor had one glass of vodka and had another one poured as he left for his own home. Ken O'Connor stated that his home was about 18 to 20 minutes away from the rented home of Mr. O'Connor. When he got home, his wife advised him that his brother had called and said that he had been in an accident. His brother then went to the scene of the accident.

- [4] Mr. O'Connor states that he left his rented home about 11:00 p.m., that he was walking southbound on No. 6 Road on the grassy shoulder beside the east side of the road so that he could go to a local movie theatre to make a telephone call. Mr. O'Connor states that he changed over to the west side of No. 6 Road when he saw vehicles coming towards him. He stated that he was concerned because there were more vehicles coming northbound than going southbound. He was also under the impression that the amount of room on the grassy shoulder was decreasing on the west side of No. 6 Road. He states that he walked for a few minutes, heard a "squeal" of tires, and then was hit from behind by the vehicle being driven by Mr. James.
- [5] When Ken O'Connor arrived at the scene of the accident, he saw the vehicle driven by Mr. James angled to the right, with part of it on the grassy portion beside No. 6 Road. Ken O'Connor told police that Mr. O'Connor had drank two glasses of vodka in his presence before he left his brother's rented home.

INJURIES SUFFERED BY MR. O'CONNOR

- [6] Mr. O'Connor suffered fractured ribs on the left side and a compound fracture of the left tibia and fibula such that, at the accident scene, the leg bone had punctured the skin. He required immediate surgery, including insertion of a plate and a rod in his leg. A skin graft was also required. As a result of the surgery, Mr. O'Connor has extensive scarring on his leg.
- [7] Mr. O'Connor was in the hospital for about 10 days and, when he was discharged, he was confined to a wheelchair and the care of others, including his girlfriend who came up from Washington, and various friends who he allowed to stay with him rent-free while he was recuperating. Eventually, he was able to move up to walking with the assistance of crutches. Mr. O'Connor remained in British Columbia until sometime in the middle of 2002, and then he returned to Washington State.
- [8] In April 2002, Mr. O'Connor required readmission to the hospital in order to treat an infection in the leg. A second surgery was required in order to remove the plates that had been inserted.
- [9] Dr. William Yu is an orthopaedic surgeon. He was admitted as an expert to provide an opinion regarding the leg injury suffered by Mr. O'Connor. He saw Mr. O'Connor on April 26, 2005 and January 30, 2008 for the purpose of assessing the injuries sustained. The May 2, 2005, opinion of Dr. Yu sets out the following:

Lower Extremities: Straight leg raising test is 90 degrees bilaterally. Bowstring and Laseque's signs are negative. Left Leg: there are multiple scars: anterior on his left knee for insertion of the IM rod, medial scar for plate insertion, posteromedial for fasciotomy defect covered by skin graft (16 x 7 cm.), anterolateral scar on the left leg with muscle herniation through the fascia defect. He is tender in the anterior scar. He has a partial left foot drop; extensor hallucis longus 1/5 muscle power, tibialis anterior extensor dysfunction 3/5 muscle power. He has a 10-15 degree loss for dorsiflexion of his left ankle compared with his right ankle.

X-ray of the left tibia and fibula was done at Greig Associates on April 26, 2005. The fracture of the left tibia and fibula has healed in good position. There is slight radiolucency and sclerosis around the IM rod.

...

When the fracture healing is incomplete the treatment should be to control the infection and keep the hardware in place until the fracture heals. The hardware could then be removed and then treat the infection if it is still active. This probably the route that should be followed for Mr. O'Connor when medical resources are available to him.

He has also some neck and back pain, probably soft tissue in nature and possibly some disc involvement. This actually contributed, to some extent, his being unable to do any heavy physical work as a plumber/carpenter apprentice.

He has a left foot drop probably because of the severe trauma to his left tibia and fibula with compression in the compartments of his left leg resulting in muscle loss in the compartments. With the foot drop there is a loss of 10-15 degrees of dorsiflexion of his left ankle resulting in a fixed contracture. This makes it difficult for him to work in a squatting position. He has bulging of the muscles in the anterior compartment of his left leg where the fascia was divided during fasciotomy; the muscle bulges through this defect in the fascia. This also constitutes another source of pain.

I believe he has a significant disability. The foot drop and loss of movement of his left ankle will be permanent. There is a probability of some low grade infection of the fracture of the left tibia and fibular [sic] and he might require further surgical treatment in the future.

[10] In his February 4, 2008 opinion, Dr. Yu stated:

Lower Extremities: Straight leg raising test is 90 degrees bilaterally. Bowstring and Laseque's signs are negative. Left Leg: there are multiple scars: anterior on his left knee for insertion of the IM rod, medial for plate insertion, posteromedial for fasciotomy defect covered by skin graft (16 x 7 cm), anterolateral scar on the left leg with muscle herniation through the fascia defect. He is tender in the anterior scar. He has a partial foot drop - extensor hallucis longus 115 muscle power, tibialis anterior extensor dysfunction 315 muscle power. There is a 10-15 degree loss of dorsiflexion of his left ankle when compared with the right. There is reddish discoloration along the skin graft area and slight tenderness on the anterior aspect of the left leg.

X-ray of the left tibia and fibular [sic] was done at Associated Diagnostic Radiologists on January 30, 2008. The fracture has healed; the IM rod is in situ. There is a small area of radiolucency and sclerosis in the anterior aspect of the left tibia, around the mid portion, suspicious of chronic infection. I have order an ESR and C-reactive protein. The results are pending.

He still has discomfort and persistent swelling around the operative site. Radiologically there is a small area of radiolucency with some sclerosis in the anterior aspect of the left tibia, around the mid portion, suspicious of some infection. I have sent him for ESR and C-reactive protein. These tests are useful in determining whether there is an infective process in the left tibia.

As a result of the injury he has ongoing difficulties and has been unable to secure long term employment. I believe the accident has had a significant negative long term impact on his employment and future employability.

WHERE DID THE COLLISION OCCUR?

- [11] No. 6 Road consists of two lanes of traffic, with a fairly narrow grassy median on either side of the road, and with deep ditches beyond the two grassy medians.
- [12] Mr. O'Connor stated that at all times he was walking in the grassy median and that the reason he switched from the east side of the road to the west side of the road was because the median was larger. By switching to the west side of the road, Mr. O'Connor was facing away from oncoming traffic.
- [13] Ms. Journeau and Mr. Hockley were in a vehicle traveling northbound on No. 6 Road. It was their testimony that they detected the presence of Mr. O'Connor only by the "flicker" against the headlight on the driver's side of the vehicle being driven by Mr. James. They both testified that the body of Mr. O'Connor went flying by them and that the vehicle driven by Mr. James was in the middle of his lane. Ms. Journeau recalls that the James vehicle was on the road after the collision, and not angled to the right off the road. Mr. Hockley also described the car as being directly in the centre of the lane when it came to a stop.
- [14] Ms. Kamayah and Mr. Smolka, who were passengers in the James vehicle, testified that Mr. O'Connor was in the middle travelled portion of the southbound lane when he was struck by the vehicle driven by Mr. James. Ms. Kamayah testified that she was seated in the front passenger seat of the vehicle being driven by Mr. James and that she saw Mr. O'Connor "staggering in the middle of the road" "staggering back and forth" in the southbound lane moving in a southerly direction with his back to the James vehicle. Mr. Smolka testified that he first saw Mr. O'Connor "as he came into the headlights" "at the extreme end of the headlights". Mr. Smolka testified that, when Mr. James applied the brake, he saw Mr. O'Connor come up onto the hood of the vehicle hitting the windshield. Both Ms. Kamayah and Mr. Smolka could not recall whether the James vehicle was angled off the road when it came to rest.
- [15] Mr. James testified that he "suddenly saw a man standing in front of my car". Mr. James testified that he slammed on the brakes, his car hit the individual, the individual slid off his car, hitting the windshield, and that the car skidded to a stop. He described Mr. O'Connor as being "in the centre of my lane" "right in front of the car - maybe closer to the driver's side". He did not believe that his car drifted, but may have gone a "tiny bit to the right but still on the road". However, he did confirm that the photographs taken by Ken O'Connor accurately

represent where his vehicle "came to rest".

- [16] The day after the accident, Ken O'Connor took photographs of the accident scene. He noticed a tire skid mark on the grassy portion on the west side of No. 3 Road. Included within his photographs is one showing what appears to be a tire track from the passenger side of the vehicle coming off the paved portion of No. 6 Road onto the grass median beside the southbound lane and heading directly towards a fire hydrant which is approximately 4-5 feet off the paved surface of No. 6 Road. From the photographs, I estimate that the tire track in the grass median is no longer than two vehicle lengths. I also find that the tire track ends approximately 4-5 feet away from the fire hydrant. Unfortunately, there are no measurements in evidence in these regards. However, it is consensus of all of those who gave evidence that Mr. O'Connor lay close to the fire hydrant after the collision.
- [17] A number of photographs were taken on the night of the accident by Constable Kronlund, who was the attending R.C.M.P. officer. Several of those photographs show the vehicle driven by Mr. James in a position angled off No. 6 Road towards a signpost which is beyond the fire hydrant where the vehicle driven by Mr. James came to rest, and where Mr. O'Connor was found after the collision. Surprisingly, the cruiser driven by Constable Kronlund was not equipped with a tape measure. Accordingly, it was necessary for Constable Kronlund to measure the length of the skid marks that he observed by pacing them off.
- [18] Constable Kronlund described the skid marks as being "sponge/skid marks". He stated he was of the opinion that similar skid marks resulted from diminished traction resulting from dew at near-freezing atmospheric conditions. The diagram prepared by Constable Kronlund shows the skid marks starting in the middle of the southbound lane and gradually moving east so that the right part of the vehicle was off onto the grassy median with the car pointing towards the fire hydrant which was beyond where Mr. O'Connor came to rest.
- [19] A "Collision Reconstruction Report" was prepared by Kurt W. Ising, P.Eng. Mr. Ising was admitted as an expert to provide an opinion relating to accident reconstruction. Mr. Ising confirmed that No. 6 Road runs nominally north-south in the area, that it has one lane in either direction, that the two lanes are 3.3 metres wide, that there are narrow unpaved shoulders on each side of the road, and that the posted speed limit on No. 6 Road is 50 km/h. Mr. Ising relied on the "measurement" taken by Constable Kronlund who measured the tire mark on the road as being "27 paces" leading to the left rear wheel of the car driven by Mr. James. Mr. Ising assumed that 27 paces equated to approximately 19.7 metres. Mr. Ising made the following assumptions which I find as a fact: that the road was either more slippery than wet or wet at the time; that the total stopping distance would be a function of the braking and the perception/response time of Mr. James.
- [20] Mr. Ising came to the following conclusions:
- (a) Mr. O'Connor was struck by the front center of the James vehicle.

- (b) Mr. O'Connor was positioned within the southbound lane at impact.
 - (c) Assuming a wet-road skid distance of 19.7 meters (based on Cst. Kronlund's 27 paces), the initial speed of the James vehicle was 59.5 ± 2.7 km/h (or 55 to 65 km/h with 95% confidence). If the road was more slippery than wet, then the calculated speed range would be reduced.
 - (d) A distance of 39.8 ± 4.4 meters (or 33 to 50 meters with 95% confidence) is required to stop from 59.5 ± 2.7 km/h. This includes both maximum braking and perception/response time. Experiments on the detection of darkly-clad pedestrians suggest an average detection distance of 22.8 meters is typical on an unfit road in the presence of oncoming headlights.
 - (e) Assuming the road may be treated as dark (based on the unlit streetlight behind Mr. O'Connor), then a driver travelling 59.5 ± 2.7 km/h has only a 9% probability of stopping before impact. The probability is increased to 21% if travelling 50 km/h.
- [21] Mr. Ising also is of the opinion that detection of an individual would be diminished if the individual was wearing no reflective clothing, that there would be some reduction of visibility if there was glare from an oncoming vehicle, that the absence of a streetlight would make the visibility more difficult, that it would be necessary for the James vehicle to have been going at least 40 kph in order that there would be windshield damage, that it would have been necessary for the James vehicle to be travelling between 60 kph and 80 kph for the upper part of the windshield to be damaged, that lights on low beam would illuminate about 25 metres ahead, that lights on high beams would illuminate about 100 metres ahead, and that the street light, if it had been on, would make a pedestrian easier to see only if the person was wearing some reflective clothing, and was not dressed all in black.
- [22] It was the consensus of all witnesses that Mr. O'Connor was dressed entirely in black that night and was wearing no reflective clothing. I also find that the approaching vehicle driven by Mr. Hockley had the low beams activated. I also find that the street light at the corner of No. 6 Road and Triangle Road was not operating. Taking into account all of the evidence, I find that Mr. O'Connor was on the road surface, and not on the grass median beside the southbound lane of No. 6 Road when he was hit. For Mr. O'Connor to have been hit on the grassy median, it would have been necessary for one of two virtually impossible scenarios to have taken place. The vehicle driven by Mr. James would have gone off the road to hit Mr. O'Connor, gone back onto the road before the brakes were applied, and then moved gradually to the right off the road until it came to rest on the grassy median. Alternatively, it would have been necessary for Mr. James to apply the brakes on the vehicle, for the vehicle to move gradually off the road onto the median, for the vehicle to strike Mr. O'Connor, and for the vehicle to have come to a stop on the median after travelling only about two car lengths. I find that neither scenario would have been possible.
- [23] I accept the evidence of Ms. Journeau, Mr. Hockley, Ms. Kamayah, and Mr. James that Mr. O'Connor was in the southbound lane of No. 6 Road when he was hit by the vehicle driven by Mr. James. I find that it would have been impossible for the collision to have occurred on the

grassy median and for the vehicle driven by Mr. James to have come to rest where it did if the contact with Mr. O'Connor had been on the grassy median. Walking where he was walking, Mr. O'Connor violated a number of provisions of the Motor (Vehicle) Act, R.S.B.C. 1996, c. 319:

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

182 (1) If there is a sidewalk that is reasonable passable on either or both sides of a highway, a pedestrian must not walk on a roadway.

(2) If there is no sidewalk, a pedestrian walking along or on a highway must walk only on the extreme left side of the roadway or the shoulder of the highway, facing traffic approaching from the opposite direction.

LEVEL OF INTOXICATION OF MR. O'CONNOR

[24] While Mr. James testified at Trial that he smelled alcohol on the breath of Mr. O'Connor, I prefer the evidence that he gave at his September 2, 2004 Examination for Discovery, and the statement that he provided to the Insurance Corporation of British Columbia within about a week of the accident. I conclude that Mr. James was incorrect when he stated at Trial that he smelled alcohol on Mr. O'Connor's breath. Mr. Smolka was a passenger in the James vehicle and, although he believed Mr. O'Connor was intoxicated, he did not smell alcohol. Mr. Hockley felt that the speech of Mr. O'Connor was quite slurred, but he was not able to testify that he smelled alcohol on the breath of Mr. O'Connor.

[25] The more persuasive evidence about how much alcohol Mr. O'Connor had consumed that night consists of a blood alcohol reading that was taken at Vancouver General Hospital at 2:00 a.m. on the morning following the accident. While considerable efforts were made to cast doubt on the accuracy of the blood alcohol reading taken, I am satisfied that it was accurate.

[26] Dr. William Schreiber testified regarding the validity and reliability of the blood alcohol reading procedures at the hospital. Dr. Schreiber testified that the chance of confusing the sample taken from Mr. O'Connor with another person's blood sample was infinitesimal. I accept that evidence. Dr. Schreiber also dealt with the conversion from millilitres per litre to milligrams of alcohol in 100 millilitres of blood. I accept the evidence that no error was made in the conversion that was undertaken. Dr. Schreiber also testified regarding the differences between measuring alcohol content when blood serum is used, as opposed to when whole blood is used. I am satisfied that nothing turns on the use of one versus the use of the other. I also am satisfied that the testing has been in any way compromised by the fact that the tests were done on blood serum.

[27] W.K. Jeffery is a Forensic Alcohol Toxicology Consultant. Mr. Jeffery was admitted as an expert to provide an opinion regarding blood alcohol readings and the effect of alcohol on the ability of a person to make correct decisions and exercise good judgment. In his February 6, 2009 opinion provided to counsel for the Defendant, Mr. Jeffery stated in part:

The blood alcohol concentration (BAC) at the time of the accident (TOA, 2321 hrs) would be in the range of 180-199 milligrams of alcohol in 100 millilitres of blood (mg%). This is based on an elimination rate of between 10 and 20 mg% per hour of alcohol from the body and is valid only if all the alcohol consumed were absorbed into the blood. This would be the case if there were no consumption of alcohol in the thirty minutes prior to the TOA and until after the breath tests.

In order to have a BAC of 180-199 mg%, Mr. O'Connor weighing 180 lbs (assumed), would have the equivalent of approximately 11.3-12.5 ounces of 40% alcohol, or 7.6-8.3 bottles of beer (5%v/v). If Mr. O'Connor weighed 160 lbs, he would have the equivalent of approximately 10.0-11.1 ounces of 40% alcohol, or 6.7-7.5 bottles of beer (5%v/v). This is a minimum quantity and in practise the actual quantity required can be 50% more than this.

[28] Mr. O'Connor testified that he weighed 180 pounds at the time of the accident. During cross-examination, Mr. Jeffery confirmed that he did not know whether Mr. O'Connor had a full stomach or not and did not know the type of alcohol that he had consumed. Mr. Jeffery testified that the type of the alcohol would affect the rate of absorption, with single malt scotch taking about one hour to reach maximum absorption and beer taking about 30 minutes to reach maximum absorption. I accept the evidence of Mr. Jeffery regarding the rate that alcohol consumed is absorbed into the blood, but I also take into account that Mr. O'Connor had consumed some alcohol 30 minutes prior to the accident. I find that no alcohol was consumed after the accident.

[29] I am satisfied that the blood alcohol concentration at the time of the accident would have been lower than what was estimated by Mr. Jeffery by virtue of the fact that not all of the alcohol consumed by Mr. O'Connor had been absorbed by the time of the accident. Having concluded that, I still find that the blood alcohol concentration of Mr. O'Connor was in excess of the legal limit of 80 milligrams of alcohol in 100 millilitres of blood. The question which arises is the extent to which the judgment of Mr. O'Connor was affected by his consumption of vodka that night.

[30] By way of general evidence regarding the signs and symptoms of intoxication and levels of impairment, Mr. Jeffery set out the following in his opinion:

The physical signs and symptoms of impairment/intoxication that would be noticed by others (if not under the influence), is dependent on whether that individual is a "novice drinker", a "social drinker" or an "experienced drinker". A novice drinker would show outward signs of intoxication at much lower blood alcohol concentrations than a social drinker. The experienced drinker may not show any visible signs of intoxication until very high blood alcohol concentrations are obtained. Regardless of how Mr. O'Connor is classified as a drinker, he would still show obvious signs of impairment in memory and comprehension, and inability to choose correctly between

alternatives, such as red and green lights, a loss of judgement (is it safe to cross the street), slowed reaction times, loss of fine motor control (there may be a loss of gross motor control), a loss of depth perception and peripheral vision, resulting in tunnelled vision. There is also a loss of sense of taste, smell and hearing.

[31] Mr. Jeffery provided the following opinion:

It is my opinion that Mr. O'Connor at a Blood Alcohol Concentration of between 180-199 mg%, is impaired in his ability to make correct decisions and judgement with respect to crossing or walking on a road. His reaction time will be impaired so he could not properly react to an oncoming vehicle, and his vision would be impaired so he may not be able to correctly judge the speed or distance of the oncoming vehicle.

[32] Although I cannot conclude that the blood alcohol concentration at the time of the accident was as high as 180 - 199 milligrams of alcohol in one hundred millilitres of blood, I can conclude that there was some impairment of the ability of Mr. O'Connor to make correct decisions. However, whether or not his ability to make correct decisions was impaired by alcohol or not, the fact that I have found that Mr. O'Connor was on the road allows me to conclude that he did not display good judgment in deciding to walk on the road rather than on the median and to walk on the side of No. 3 Road where vehicles were approaching him from behind rather than coming towards him.

WAS MR. JAMES NEGLIGENT THAT NIGHT?

[33] Section 181 of the Motor (Vehicle) Act states:

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

(a) exercise due care to avoid colliding with a pedestrian who is on the highway.

[34] At Trial, Mr. James estimated that his speed was between 50 and 55 kph. I find that this is other than in accordance with the testimony of Mr. Ising who was retained by Mr. James to provide an opinion regarding the speed of the James vehicle. I accept the evidence of Mr. Ising. At Trial, Mr. James testified that it was "very dark", that the impact occurred just before Triangle Road, that his car had not "come to the turn", that he was going "regular speed" but "could have slowed down", that his turn signal was not yet on, that the street light at the corner of Triangle Road and No. 6 Road was out, that he knew that there were no sidewalks in the area, that he knew there were only lights on the left side of the road, that he agreed that he saw a "glint" on the road, that he agreed that there may have been ice on the road, that he did not think it necessary to slow down, and that his car "skidded" after Mr. O'Connor was struck.

[35] From the evidence, I make the following findings: (a) the temperature that night in the area approached the freezing point; (b) the road surface was either icy or covered with dew as a result of the new-freezing atmospheric conditions; (c) the posted speed limit on No. 6 Road is 50 km/h; (d) the vehicle being driving by Mr. James was travelling at somewhere between

55 km/h and 65 km/h that night; (e) it was the intention of Mr. James to make a left turn at the intersection of No. 6 Road and Triangle Road and this intersection which would be to the left of Mr. James was being approached by Mr. James; (f) the vehicle driven by Mr. Hockley was being driven towards Mr. James and the low-beam lights of the Hockley vehicle were activated; and (g) the street light at the intersection of No. 6 Road and Triangle Road was not operative so that illumination of No. 6 Road at that point was diminished.

- [36] On the basis of that evidence, I am satisfied that Mr. James was negligent in the operation of the vehicle which struck Mr. O'Connor. Mr. James ignored the road conditions, visibility on No. 6 Road, the speed limits, his knowledge that there were no sidewalks, and his knowledge that there might be pedestrians. All of these factors contributed to a need for Mr. James to drive more slowly than even the speed limit which was in effect. Mr. James owed a duty of care to Mr. O'Connor and did not meet that duty by driving his car at the speed he was going when it hit Mr. O'Connor.
- [37] Having reached that conclusion, I also find that the probability of Mr. James being able to stop his vehicle prior to hitting Mr. O'Connor was only marginally better if Mr. James had been driving his vehicle within the speed limit or slightly less than the speed limit in view of the road conditions and the visibility that evening. In this regard, I accept the evidence of Mr. Ising that the probability of Mr. James being able to stop his vehicle would have been increased from about 9% to about 21%.

CONTRIBUTORY NEGLIGENCE OF MR. O'CONNOR

- [38] In *Iannone v. Hoogenraad* (1990), 50 B.C.L.R. (2d) 390 (S.C.), Maczko J. stated:

In order to establish contributory negligence the defendant must prove two elements: first, that the plaintiff's conduct showed a want of reasonable care for his own safety which caused or rendered the injuries more serious and, secondly, that had he conducted himself in a reasonable manner his injuries would have been avoided or lessened ... (at pp. 392-4)

- [39] It is clear that the judgment of Mr. O'Connor was somewhat impaired by alcohol. As well, he was dressed entirely in black without reflective clothing. His clothing made it difficult if not impossible for drivers to see him. Contrary to s. 182(2) of the Motor (Vehicle) Act, Mr. O'Connor was not walking facing traffic, and was not walking on the shoulder of No. 6 Road. Mr. James has shown that the conduct of Mr. O'Connor that evening showed a want of reasonable care for his own safety and that this contributed to causing his injuries. Mr. James has proven that Mr. O'Connor did not conduct himself in a reasonable manner so that his injuries could have been avoided or, at least, diminished. In the circumstances, I assess liability at 90% against Mr. O'Connor and 10% against Mr. James.

WHAT ARE THE DAMAGES OF MR. O'CONNOR?

- (a) Non-Pecuniary Damages

- [40] In support of the submission that non-pecuniary damages of Mr. O'Connor should be in the range of \$80,000.00 to \$90,000.00, the Defendants submit that the following decisions closely approximate the injuries suffered by him: (a) *Meise v. Whiting*, 187 D.L.R. (4th) 525 (S.C.), where the plaintiff suffered a fractured tibia and fibula with the prospect of ankle fusion (\$70,000.00); (b) *Forbes v. Wilkinson*, [2005] B.C.J. No. 3235 (S.C.), where a plaintiff who suffered from birth with cerebral palsy and spastic quadriplegia sustained extensive injury to her left tibia and fibula (\$90,000.00); and (c) *Nicoll v. Strata Plan 1611*, [2005] B.C.J. No. 1177 (S.C.), where the plaintiff suffered a "high-energy type fracture of his right leg" and was left with permanent ankle deformity and a leg-length discrepancy, chronic ankle pain, and the possibility of the development of arthritis in the future (\$100,000.00).
- [41] In support of the submission that the non-pecuniary damages should be set in the range of between \$100,000.00 and \$125,000.00, Mr. O'Connor submits that the following decisions closely parallel the injuries suffered by him: (a) *Hall v. Cooper Industries, Inc.*, [2004] B.C.J. No. 338 (S.C.), where the plaintiff suffered a "comminuted" fracture of the tibia and fibula of his right leg, which required surgery to insert an intramedullary nail into the tibia, along with two proximal as well as two distal fixation or stabilizing screws, further surgery to correct a tear of the medial meniscus or cartilage, later surgery to remove the distal fixation screws, further surgery after it was determined that there had been a "non-union" of the fracture, and where the plaintiff also experienced soft tissue pain in his right and left knee and Achilles tendon (\$150,000.00); and (b) *Funk v. Carter* (2004), 32 B.C.L.R. (4th) 158 (S.C.), where the plaintiff suffered compound comminuted fractures of the tibia and fibula of both legs, chronic pain, impaired mobility, and an emotional reaction (\$140,000.00). Mr. O'Connor concedes that the decision in *Hall*, supra, involved more severe injuries and complicated by an emotional reaction, and that the decision in *Funk*, supra, involved breaks in both legs with the injuries complicated by an emotional reaction.
- [42] Although Mr. O'Connor enjoyed riding dirt bikes, water skiing, hiking, camping and "quadding" prior to the accident, I find that he has only been able to return to riding a bicycle from time to time, and he has not been able to return to the previous bicycle riding that he enjoyed. I find that Mr. O'Connor has not been in a position to return to his other recreational activities. I also find that, while the problem with his ribs has subsided and Mr. O'Connor is now able to walk without assistance, I find that Mr. O'Connor continues to feel pain in his leg, particularly in cold weather. After considering the decisions submitted on behalf of the parties, and after considering the injuries, the duration of the pain and suffering caused by the injuries, and the likely pain and suffering to be suffered in the future, I set the non-pecuniary damages of Mr. O'Connor at \$90,000.00.
- (b) Past Income Loss
- [43] It is conceded that the evidence makes it very difficult to assess the past wage loss that occurred. Mr. O'Connor was described by his counsel as "a person who appeared to live from paycheque to paycheque". Mr. O'Connor worked when he needed money, did not record what he was earning, and did not file income tax returns on a regular basis or at all. As well,

he was often paid "under the table". There were no records in evidence to show what he was earning or when it was earned, despite the fact that a representative of a former employee testified at Trial.

- [44] In *Iannone v. Hoogenraad, Gibney and Gibney* (1990), 50 B.C.L.R. (2d) 390 (S.C.), Maczko J. summarized the law on unreported income, stating: "... If a plaintiff does not declare income on his tax returns, he will face a strong inference against him." Citing with approval the decision in *Iannone*, supra, MacAulay J. in *Klonarakis v. Gregg*, [1999] B.C.J. No. 1768 (S.C.) stated that a failure to file income tax returns: "... does not bar his claim but raises a strong inference against him ..." (at para. 45).
- [45] Mr. O'Connor stated at Trial that he had earned between \$10,000.00 and \$20,000.00 (U.S.) per year prior to the accident, he did not work during the remainder of 2001 or in 2002, he resumed work in 2003, his earnings remained lower than his pre-accident earnings, and he presently does not work other than for his girlfriend who is financially secure and requires him to work from time to time on properties she owns.
- [46] Based on the evidence of his brother, his sister-in-law, and of Mr. O'Connor, I am satisfied that Mr. O'Connor was working prior to the accident, and that his ability to work after the accident has been diminished. I find that Mr. O'Connor suffered a reduction in the income that was available to him as a result of the accident. In the circumstances, I find that his past wage loss (in U.S. funds) was \$10,000.00 for 2002 and \$5,000.00 for each of 2003 and 2004. In view of the current lack of employment by Mr. O'Connor, I do not find that there was wage loss for 2005 through 2009. In total, I find the past wage loss to be \$25,000.00 (Canadian funds).
- (c) Loss of Income Earning Capacity
- [47] The Defendants submit that any award for future loss of income earning capacity ought to be a "nominal one" by virtue of the fact that, while Mr. O'Connor is unable to fish and to undertake previous other work, it is in "equally clear" there are other activities that could be undertaken, Mr. O'Connor has not tried to do those activities, he has not attempted to retrain himself, he has not taken any steps to enrol in courses available to him that he could access for nominal or no cost, and he has failed in any respect to mitigate his losses.
- [48] Relying on the decisions in *Hall* (\$600,000.00) and *Funk* (\$400,000.00), both supra, Mr. O'Connor submits that an award in the neighbourhood of \$100,000.00 to \$200,000.00 should be made for loss of income earning capacity. It is submitted that he has a permanent injury with permanent impairment so that the type of work he was previously doing is not available to him because of the effect of cold weather and resultant pain in his left leg and that some work is not available because of his weakened leg. Starting from the proposition that Mr. O'Connor was earning between \$10,000.00 and \$20,000.00 (U.S. funds) a year, and based on the fact that he has 21 years of income earning life left, it is submitted on behalf of Mr. O'Connor that an award of between \$100,000.00 and \$200,000.00 is warranted.

[49] An award for loss of capacity is justified where a finding can be made that a plaintiff faces limitations on his or her ability to work competitively in jobs that may have been previously open: *Sinnott v. Boggs* (2007) 69 B.C.L.R. (4th) 276 (C.A.). In assessing loss of capacity, the following factors must be considered: (a) whether a plaintiff has been rendered less capable overall from earning income from all types of employment; (b) whether a plaintiff is less marketable or attractive as an employee to potential employers; (c) whether a plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and (d) whether a plaintiff is less valuable to himself as a person capable of earning income in competitive labour market." : *Brown v. Golayi* (1985), 26 B.C.L.R. (3d) 353 (S.C.).

[50] A plaintiff is entitled to compensation for real and substantial possibilities of loss which are to be quantified by estimating the chance of the loss occurring. In *Reilly v. Lynn* (2003), 10 B.C.L.R. (4th) 16 (C.A.), the majority judgment of Low and Smith JJA set out the following:

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, *supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop* (2001), 84 B.C.L.R. (3d) 158, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79. In adjusting for contingencies, the remarks of Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, at 253, are a useful guide:

[51] I am satisfied that Mr. O'Connor is entitled to more than a "nominal" award for loss of income earning capacity. While much heavy construction work is still available to him, much is not. As well, the lucrative ability to go fishing in the Bering Sea is no longer available. Taking into account the factors set out in *Brown*, *supra*, I am satisfied that Mr. O'Connor has shown that there is a real and substantial possibility of loss. I make an award of \$60,000.00 for the loss of income earning capacity of Mr. O'Connor.

(d) Cost of Future Care

[52] The only evidence at Trial is that of Mr. O'Connor who says that he wants to get the rod in his leg removed. Dr. Yu agreed that this was an option although whether it was done depended upon what Mr. O'Connor desired. It is submitted on behalf of Mr. O'Connor that, because he resides in the United States and the cost of the removal of the rod will depend on whether or not he has medical coverage at the time the procedure is undertaken, an award of \$10,000.00 is an appropriate figure for cost of future care.

[53] I cannot accede to the submission made on behalf of Mr. O'Connor. First, there was no evidence when this procedure will be undertaken. Second, there is nothing in evidence as to what would not be covered by the insurance presently in place for Mr. O'Connor. Third, there was no medical necessity shown for the procedure. Fourth, there is no indication that Mr. O'Connor has approached the insurer of Mr. James to ascertain whether the insurer will pay for such a procedure. In the circumstances, no award is made for the cost of future care.

(e) Special Damages

[54] No special damages were specifically pleaded. No special damages were proven. Accordingly, no award is made for special damages.

SETTLEMENT REACHED WITH THE CITY OF RICHMOND AND BRITISH COLUMBIA HYDRO & POWER AUTHORITY

[55] If settlement funds are to be paid by the City of Richmond and/or by British Columbia Hydro & Power Authority as a result of a settlement reached with those former Defendants, then any funds paid or to be paid are to be applied against the gross amount of my assessment of the damages of Mr. O'Connor.

COSTS

[56] As I am advised by the provisions of Rule 37B of the Rules of Court apply, the parties will be at liberty to speak to the question of costs.

__ "Burnyeat J." __

The Honourable Mr. Justice Burnyeat

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