CITATION: Pelletier v. Her Majesty the Queen, 2013 ONSC 6898
COURT FILE NO.: CV-10-098341-00
DATE: 20131107

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Jerry Pelletier	)	
Plaintiff	)	Timothy P. Boland and Darcy W. Romaine, for the Plaintiff
– and –	)	
Her Majesty the Queen in Right of the Province of Ontario and Robin Moore	)	
Defendants	)	Donald H. Rogers, Q.C. and Thomas MacMillan, for the Defendants
	)	**HEARD:** May 13, 2013 to June 7, 2013 and June 27, 2013 with additional written submissions September 5, 12 and 16, 2013

REASONS FOR JUDGMENT

BOSWELL J.

I. INTRODUCTION

[1] The fortunes of the world are in no way distributed equally. Neither are the misfortunes. Jerry Pelletier has been subjected to a prodigious siege of the latter. The particular misfortune that brings the parties before the Court was an incident that occurred on the streets of Orillia, Ontario on the night of June 13, 2008. Jerry, celebrating his 28th birthday, was riding his bicycle across an intersection downtown when he was struck by a police cruiser operated by Sergeant Robin Moore. He suffered significant physical injuries, including a facial smash and he continues to suffer through the ongoing psychological sequelae of the collision.

[2] This is an action for damages. It's complicated. Jerry's background is a troubled one. His life, at least by conventional standards, wasn't great before the accident. It was worse after. Unpacking the physical, emotional and psychological sequelae of the accident from Jerry's pre-existing issues is not an easy task. But it is one faced by the Court in this instance. That said, it

is not the Court's only task. The question of liability, of fault for the collision, remains a live issue. It is where the analysis begins.

II. LIABILITY

[3] The collision occurred just before 11:30 p.m. on June 13, 2008 where Gill Street and Front Street intersect in downtown Orillia. Front Street is the main east-west thoroughfare across the downtown. It lies just north of the shoreline of Lake Couchiching and runs more or less parallel to it. Front Street intersects with Gill Street, which runs north-south. Curiously, as Front Street passes Gill Street, it becomes known as Atherley Road, but the name change is of no moment. Gill Street ultimately terminates at Front. The intersection might be described as a "T" but for the fact that Gill Street is not at right angles to Front/Atherley. It is an oddly shaped intersection, perhaps better described as a "Y" than a "T". It is easier viewed than described. For that reason, attached at Appendix "A" is a sketch of the intersection prepared by an OPP accident reconstructionist who attended the scene and which was marked Exhibit 13 at trial.

[4] It was dark out, of course, when the collision occurred. It was an overcast night and it may have started to rain a little. There is divergent evidence about the level of lighting in the intersection where Jerry was struck. I will explore the lighting issue in detail momentarily. There is no serious dispute that Jerry was on a bike with minimal reflection. He had no helmet, no bike lights, and was wearing dark clothing. He rode from a dark parking lot out onto the intersection. He rode his bike through a pedestrian crosswalk. Jerry alleges, nevertheless, that Officer Moore was negligent and at fault for the collision. He asserts that Officer Moore owed him a duty to take care in traversing the intersection and that Officer Moore breached that duty by failing to operate his vehicle in the manner that a reasonably prudent and careful driver would in the circumstances.

Onus

[5] I must be clear about something before the liability analysis continues. It is not Jerry's onus to prove that Officer Moore was negligent. Indeed, the reverse is true. Section 193(1) of the *Highway Traffic Act*, R.S.O. 1990 c. H.8 (the "*HTA*"), creates a reverse onus when loss or damage is sustained by a person as a result of a collision with a motor vehicle. The reverse onus does not apply in collisions between motor vehicles, but there is no dispute that it applies here, where the collision was between a motor vehicle and a bicycle. In the result, the onus is on the defendants to prove, on a balance of probabilities, that the collision did *not* arise from the negligence or improper conduct of Officer Moore. In light of that onus, my examination of the evidence on liability will begin with a review of the testimony of Officer Moore.

Evidence on Liability

Robin Moore's Testimony

[6] Robin Moore was on duty patrolling in the downtown core of Orillia on the night of June 13, 2008. At 11:22 p.m. he was parked near the lake when he heard a call on the radio about a noise complaint. He recognized the area of the complaint as one that is frequented by police and decided that he would attend the call as back up. He proceeded in an easterly direction across

Front Street. It was a non-emergency call and he was operating his car without emergency lights.

[7] At the intersection of Front and King Streets, some 300 metres west of the scene of the accident, he encountered another officer, Fred Lebarr. Officer Lebarr pulled up beside him. Officer Lebarr was in the centre lane and Officer Moore was in the curb lane. They rolled down their windows and one commented to the other that they were lucky it was just starting to rain. It had been a busy Friday night, according to Officer Lebarr. The rain would keep revellers indoors. It was not a night that stood out in Officer Moore's recollection as especially busy, but then, as he allowed, every night was busy for the Orillia detachment.

[8] Officer Moore proceeded eastbound in the curb lane of Front Street. Office Lebarr pulled in behind him, falling roughly eight car lengths behind. They headed towards Gill Street, where they would both turn right. The light was green.

[9] Officer Moore said he slowed as he approached the intersection. Officer Lebarr agreed, saying that as Moore slowed, he closed to within three car lengths. He saw Moore's brake lights "flicker" or "flash". He started to focus on his own turn. Just as he was coming into the intersection he saw Moore's car stop suddenly and come into contact with an object that flew over his hood and landed on the pavement in front of his car. The object was later identified as a shoe.

[10] Officer Moore testified that there was a crosswalk across Gill Street at the intersection with Front Street. He said there was enough light that he could have seen pedestrians, but he did not see any pedestrian traffic or any other impediments in front of him. He did note a vehicle stopped at the red light on Gill Street waiting to turn. He said that the vehicle he saw was in the left turn lane. He conceded that he had previously said, at his examination for discovery, that he could not remember what lane the car waiting to turn was in.

[11] Officer Moore went on to say that as he approached the intersection he signalled his intention to turn right. Officer Lebarr did not see the turn signal come on, nor did he make a note of it in his notebook, though he agreed it would be important information to note, had he seen it. To be clear, the absence of a recorded recollection is not the equivalent to Officer Lebarr testifying that the signal light *did not* come on. It is only to say that he did not notice it one way or the other.

[12] Officer Moore proceeded to testify that, once on Gill Street, he saw a second vehicle coming north on Gill pulling in behind the other vehicle stopped at the light waiting to turn. He said his foot was on the brakes throughout the turn. Once he completed the major part of the turn and was beginning to straighten out, a cyclist suddenly appeared in front of him. He had not seen the cyclist prior to that moment. He said he was well south of the crosswalk when he first saw the cyclist. He had no time to do anything. The cyclist struck the car, came up over the hood, struck the windshield and tumbled down off the front of the car and onto the roadway.

Jerry Pelletier's Testimony

[13] Moments before Officer Moore heard the noise complaint come across the radio, Jerry Pelletier was leaving his sister's home at the corner of Gill and James Streets. He had been there for his birthday dinner. Had he lingered at his sister's house only a few seconds longer, or left a few seconds earlier, this incident never would have occurred. But such are the vagaries of life.

[14] Jerry rode his bike north on Gill Street towards Front Street. He was dressed in a light grey t-shirt, blue khaki shorts and black running shoes. He was carrying a knapsack. He was an experienced rider, but was not wearing a helmet and had no light or reflectors on his bike, save for small reflective strips on one side of each pedal. He said it was a clear night.

[15] At the south-east corner of the intersection of Gill and Front is a small plaza. Jerry knew it to have a convenience store. He rode into the plaza intent on buying a juice at the store. But it was closed. He turned around in the parking lot and headed back towards the intersection. The parking lot was dark. He reached the intersection at the south-east corner. He intended to cross Gill Street heading west. He entered the intersection somewhere around the crosswalk and pedalled across. He saw a car approaching in an easterly direction on Front. He recognized it as an OPP cruiser. It was travelling quickly and had no signal on. Jerry said he did not expect it to turn, but it did, and struck him on the right side as he crossed Gill Street. He said the impact occurred just before the end of the thick white line (i.e. the stop line).

Jo-Ann Speiran's Testimony

[16] It seems Orillia is still a small town. Jo-Ann Speiran was stopped at the intersection of Gill and Front, waiting to turn right and go eastbound on Atherley Road, when Jerry was struck by the police cruiser. She knew Officer Moore. They had met at a pub downtown where she worked. They'd gone for coffee once. Later he arrested her son, which she described as being to her son's benefit.

[17] Ms. Speiran testified that she had proceeded northbound on Gill Street and stopped at the intersection at Front Street. She was on her way to Fern Resort, which would require that she turn right onto Atherley Rd. Indeed, she said she was in the right turn lane on Gill Street. The light was red. Of particular significance is that she said she stopped at the corner, then rolled up a little so she could view traffic both ways. She was about to execute her turn when a man on a bicycle rode directly in front of her. She had to slam on her brakes to avoid hitting him. She did not see him before he was immediately in front of her. She believes he came from the parking lot to her right.

[18] She said the cyclist rode past the front of her car, then down the left side of it. He turned to look at her through the driver's side window. She looked back at him. He then veered off to head south on Gill Street. He crossed the centre yellow line and just then was struck by the first of two police cars turning right onto Gill Street from Front Street. She said that the impact occurred to the side of her car. She acknowledged that in a statement given to the police on the night of the incident, she had said the impact was towards the rear of her car, but she no longer thought that was the case.

[19] Ms. Speiran testified that she thinks the cyclist was on his cell phone as he passed by her. She said his hand was up to the side of his face and he was talking. She could see the light from his phone reflecting off the side of his face. In the statement she made to the police on the night of the accident, she did not mention that the cyclist was on a cell phone.

[20] Ms. Speiran said it was not raining out at the time of the collision and the roads were dry. She said the intersection was well lit, though she qualified that later to say that the west half was well lit but the east half was not as well lit.

[21] On the south-west corner of the intersection is a car dealership, Thor Motors, that had a very well illuminated parking lot. There is a consensus among all witnesses that the lights of Thor Motors were on at the time of the collision. Ms. Speiran said that the lights from the dealership reached the driver's side of her car and they illuminated the cyclist as he rode down the side of her car.

The Accident Reconstructionists

[22] Five experts provided the Court with evidence of their attempts to reconstruct the collision. Two members of the OPP's Technical Traffic Collision Investigation ("TTCI") team - Sgt. John Martin and PC Brad Pearsall - were the first experts on the scene. They were followed a short time later by members of the SIU, including Leslie Noble, a forensic identification investigator. Subsequently, each party retained an engineer specializing in accident reconstruction: Craig Wilkinson for the plaintiff and James Hrycay for the defendants.

[23] Officers Martin and Pearsall arrived at the collision scene at about 12:30 a.m. on June 14, 2008. They had been advised that the SIU would be investigating and, in the result, their own investigation was circumscribed. They could not touch any of the evidence at the scene, so they were, by and large, limited to taking measurements and making a photographic record.

[24] PC Pearsall used a total station device to take measurements of the intersection and all relevant aspects of it. A total station is an electronic surveying device. It allowed PC Pearsall to plot out a survey of the intersection with its important features. His survey resulted in the sketch marked Exhibit 13 at trial and a copy of that sketch is attached as Appendix "A".

[25] PC Pearsall's sketch shows the relative resting positions of the vehicles of Officers Moore and Lebarr, as well as the final resting position of Jerry Pelletier and his bicycle. Officer Lebarr's vehicle stopped in the curb lane, just as it was entering the intersection – its nose just into the crosswalk. Officer Moore's vehicle was several car lengths into the intersection, but it came to rest in the northbound lanes of Gill Street, having crossed the centre line. Jerry was thrown forward from the resting point of Officer Moore's cruiser. No one took a measurement from the front of the cruiser to Jerry's resting position, but there is a pool of blood marked on PC Pearsall's sketch that appears to be about five metres off the front bumper of the cruiser.

[26] PC Pearsall's measurements were taken at night. The next day Sgt. Martin returned to the scene and he identified what appeared to be a bike tire mark just east of the stop bar on Gill Street and running for a distance of 2.7 metres in a southwest direction. Jerry's right shoe was

found a short distance from the tire mark and is noted on the sketch. Officer Moore's vehicle was measured to have come to rest 14.93 metres from the bike tire mark.

The Point of Impact

[27] The TTCI officers and Mr. Hrycay agree that what appeared to Sgt. Martin to be a tire mark is in fact a tire mark, made by one or both of Jerry's bike tires just before impact. Mr. Wilkinson did not believe it was a tire mark, but rather thought it was a scrape mark on the road that is not possible to tie to the bike. Mr. Noble was of the view that the "tire mark" was in fact a skid mark from a shoe. He noted that Jerry's shoes came off as a result of the collision and he thought the skid mark on the road was made by Jerry's shoe sliding across the paved surface.

[28] The conclusion of three of the five experts who testified about the collision was that the point of impact was at the location of the tire mark. Mr. Noble's evidence about the point of collision is not a whole lot different. He testified that the best he could say was that the contact between the bike and the cruiser occurred shortly after the car made the turn. Mr. Wilkinson said that it was very difficult to place the exact point of impact. It had to be assumed. He assumed it was in the same general area of what the TTCI officers noted as the "tire mark".

[29] I am satisfied that the skid mark was a tire mark and that it represents the point of impact between the cruiser and the bicycle. It fits with the overall scene in the following ways:

(a) Jerry's evidence is that the collision was just before the end of the thick white line on Gill Street (i.e. the stop bar). The tire mark begins just beyond the stop bar;

(b) Jo-Ann Speiran's evidence was that Jerry pedalled past the front of her car, down the side of it, then veered across Gill Street. He was struck, she said, to the side and near the back of her car. That location fits generally with the location of the tire mark;

(c) Jerry's right shoe was found a short distance from the skid mark. Officer Lebarr said that he saw a shoe come up over the car and land on the road at the time of impact, which places the shoe near the point of impact;

(d) Officer Moore testified that the moment he saw the cyclist he stomped on his brakes. He did not describe taking any evasive manoeuvres. He simply hit the brakes and came to a stop, at which point the cyclist was thrown from the front of his car. The final resting position of his car generally fits with an arc that passes through the tire mark and ends where his car ultimately stopped, with only very minor steering adjustments.

[30] Ultimately, even if the skid mark is not a mark left by Jerry's tire(s), its location accords with the findings of all five experts in terms of the general location in which the impact occurred. In the absence of any evidence that the impact occurred at some other point, the only reasonable finding I can make is that the "bike tire mark" indicated on Exhibit 13 (Appendix "A") represents the point of impact.

Speed

[31] Determining the speeds of the cruiser and the bicycle immediately before the collision is a difficult task. It requires a combination of math, research literature and common sense.

[32] Jerry estimated that his speed was between 10 and 15 kilometres per hour ("kph") before the impact. Mr. Wilkinson testified that research studies involving cyclists of average ability demonstrate that their mean cruising speed is just over 20 kph, with most people falling in the 12 to 20 kph range. Mr. Hrycay agreed that it made sense to look at statistical studies of bike speeds in order to assess what speed Jerry was likely travelling at. He said research studies show that the cruising speed for most cyclists is between 11 and 22 kph. Only fifteen percent of riders have a cruising speed higher than 22 kph and only fifteen percent cruise at slower than 11 kph.

[33] It is impossible to know exactly what Jerry's speed was just prior to the impact. I find that it was likely in the range of 10 to 15 kph, as Jerry said it was. Jerry was a better than average cyclist. He was young and fit and an experienced rider. His cruising speed would not likely have been at the lower end of the statistical range. That said, he had just entered the intersection from a parking lot and would likely not have been in full flight, particularly when he had to navigate around the front of Ms. Speiran's car. I also find that he began to brake just before the impact.

[34] The distance from the sidewalk where Jerry entered the intersection and the centre line of the road is about eleven metres. At 15 kph, it would have taken Jerry about 2.6 seconds to cover that distance, according to Mr. Hrycay's calculations. At 10 kph it would have taken 3.9 seconds. Mr. Wilkinson calculated a range of speeds for Jerry and found he was likely in the intersection between 2.1 and 5 seconds before impact. I have found that Jerry's speed was likely between 10 and 15 kph. On that basis, it appears to me that he was likely in the intersection for a little more than three seconds prior to impact. There is no way to know exactly how long he took to cross the intersection because his exact speed is not known, the exact point of impact is not known and the exact pathway he rode from the moment he entered the intersection to the point of impact is not known. For instance, it is unclear how much of a detour he had to make around the front of Ms. Speiran's car because it is unknown how far into the crosswalk the nose of her vehicle was, if at all.

[35] The calculation of the speed of the car is almost as tricky. The best that can be accomplished is a range of speeds. The professional engineers who testified used similar methods. They did three different types of calculations. First, they looked at the distance between the tire mark (the assumed point of impact) and the final resting point of the cruiser. They assumed a deceleration rate, based on full braking and a range of friction values to arrive at estimates of the speed at the point of impact. Mr. Wilkinson opined that using this method, Officer Moore's speed was likely in the range of 51 to 58 kph. Mr. Hrycay's opinion was that this method yielded a speed in the range of 47 to 57 kph. Officer Pearsall, using the same method, calculated a maximum speed at the point of impact of 51.4 kph.

[36] Second, they performed a calculation of the cruiser's speed based on the throw distance of Jerry. He was thrown almost 19 metres from the point of impact. Mr. Wilkinson opined that

this method suggested the cruiser's speed was 46 to 56 kph, while Mr. Hrycay said this same method suggested a speed in a range between 48 and 58 kph.

[37] Finally, each checked their calculations against the radius of the curve. The radius would permit a maximum speed before the cruiser started to slide out of the turn. There was no evidence of a side slide, so it was assumed that Officer Moore proceeded through the curve within its tolerable limits. Mr. Wilkinson testified that those limits were 39 to 44 kph provided Officer Moore stayed within the right turn bay. Mr. Hrycay's conclusion was that the maximum speed to make the turn without side slipping was about 40 kph.

[38] Both engineers agreed that the wider the turn made by Officer Moore, the higher the speed he could have maintained through the corner without sliding out. In June 2008, the curb lane on Front Street at the intersection with Gill Street was quite wide, allowing for a wide variation of possible speeds through the corner. The intersection was subsequently redesigned and that turn lane was narrowed. I am not satisfied that the engineers appreciated the width of the right turn bay in June 2008. In the result, I find their estimates of the tolerable speed limits of the turn to be conservative. More reliable are the calculations based on the rate of deceleration and throw distance.

[39] Officer Lebarr testified that he was travelling between 50 and 60 kph along Front Street and was maintaining a consistent distance behind Officer Moore, which led him to conclude that Officer Moore was travelling at about the same speed. Officer Moore took off from the intersection of Front and King faster than he did and got about eight car lengths ahead of him. That distance reduced to about three car lengths as they approached the turn onto Gill Street, which led Officer Lebarr to conclude that Officer Moore had slowed as he entered the corner. He also said he saw Officer Moore's brake lights flicker.

[40] Officer Moore said he was travelling at a speed of about 45 to 50 kph as he approached the turn. He slowed as he entered it.

[41] It is impossible to say what Officer Moore's exact speed was at the point of impact. The best that can be done is to estimate it based on the evidence of Officers Lebarr and Moore, considered in conjunction with the calculations performed by the experts. In doing so, and in placing more weight on the deceleration rate and throw distance calculations, for the reasons I set out above, I conclude that Officer Moore's speed was likely just above 50 kph at the time of impact. On the basis of Officer Lebarr's evidence, I find that Officer Moore braked only minimally as he approached and entered the turn – merely touching his brakes, resulting in the "flickering" of his brake lights.

Lighting

[42] The intersection where the collision took place was illuminated by three principal sources of light. First, there were street lamps along Front Street to the immediate north and south of the intersection, and another about seventeen metres south of the crosswalk on Gill Street. Second, at the southwest corner of the intersection there was, and remains, the Thor Motors car dealership. The parking lot for the dealership was very well lit and its light improved visibility at

the intersection, though the witnesses were not in agreement about the extent of that improvement. Finally, because of the layout of the intersection, it was illuminated by the headlamps of vehicles approaching it from Front Street to the west.

[43] The general conditions on the night of the collision are not altogether agreed on by the witnesses.

[44] Officer Moore testified that it had just begun to drizzle before the impact with Jerry. He recalled commenting on the rain to Office Lebarr when they spoke briefly at the intersection of Front and King Streets. Officer Lebarr similarly said that it had just begun to rain and he too recalled the brief conversation with Officer Moore to the effect that it would make their jobs a little easier by keeping intoxicated bar patrons indoors.

[45] Office Lebarr testified that the lights were on at Thor Motors at the time of the collision. They were very bright and made that corner (the southwest corner of the intersection) very bright.

[46] Dale Dixon is a detective constable with the Orillia detachment of the OPP. He was the acting officer in charge at the time of the collision. As soon as he heard the call about the incident he rushed to the scene. He was there moments after it occurred. He recalled the night as being dark. He could not recall whether it had rained, or if the streets were wet or dry. He agreed that the lights were on at Thor Motors, but disagreed with Officer Lebarr's evidence that the lighting from the car dealership made the southwest corner of the intersection "very bright". He said that the light from Thor Motors diminished from west to east across Gill Street. He conceded in cross-examination that he made no notation in his notebook about the lighting conditions at the scene of the collision.

[47] Officer Pearsall said the sky was quite overcast and that it had rained at some point during his investigation. He described the three street lamps providing some illumination of the intersection and added that the light from Thor Motors extended into the intersection as well. His recollection was that the Thor Motors light made the stretch of Front Street in front of the dealership very bright, but he did not think that it provided a lot of extra illumination on Gill Street.

[48] Sergeant Walter Bauman was the officer in charge of the Orillia detachment. He was working a paid duty doing security for the band "Blondie" at Casino Rama, but responded to the collision scene when he heard the radio call about the incident. His evidence about lighting echoed that of Officer Pearsall. He said that the parking lot of the plaza on the southeast side of the intersection was very dark. He used to park there and watch the intersection for impaired drivers because his cruiser would be difficult for them to spot. He said the intersection itself was not well lit in June 2008. There was ambient light, he agreed, from Thor Motors, but it mostly illuminated Front Street and only a "little bit" onto Gill Street.

[49] Jo-Ann Speiran said that it was not raining at the time of the collision and that the roads were dry. Her evidence about the lighting of the intersection was somewhat internally inconsistent. In direct examination she said the lighting wasn't very good at the intersection of

Front and Gill Street. In cross-examination she agreed with counsel's suggestion that it was a well-lit intersection. When asked why she said, in chief, that it wasn't well-lit, she replied that half of the intersection was well-lit and half of it wasn't. She said the area where Jerry was coming from was not well lit, but agreed that in the area of the crosswalk it *was* well-lit. She then immediately qualified that statement and said that the crosswalk "can be" well-lit. But on the night of the accident she would have to say that it was not. The lighting was so dim, she said, that she did not see Jerry at first when he rode in front of her. She acknowledged that the lights of Thor Motors were on and that they illuminated the western half of the intersection, but not the eastern half. She further acknowledged that she had told the police in a prior statement that it was a well-lit intersection. She also made a statement to the SIU where she described the intersection as well-lit because of the lighting from Thor Motors.

[50] The Plaintiff's engineer, Mr. Wilkinson, attended the collision scene on June 13, 2011, exactly three years after the date of the incident. Using a light meter, he took a series of luminance values across the intersection. He generally described the intersection as remarkably bright and noted that the lights from the car dealership are incredibly bright.

[51] Mr. Wilkinson took measurements across the crosswalk in the general area in which they assumed Jerry crossed. Their measurements ranged from 17 to 28 lux. To put those numbers in perspective, daylight values are in the hundreds. Twilight is about 3 lux. According to a research study cited by Mr. Wilkinson, at 16 to 20 lux a pedestrian can be seen from more than 230 metres away. There is some criticism of the study cited by Mr. Wilkinson given that the test subjects in the study were alert to the fact that they were looking for pedestrians. That said, according to his calculations, Officer Moore only needed to see Jerry from 22 to 40 metres away in order to be able to stop and/or avoid the collision.

[52] Jerry described June 13, 2008 as a nice night. He said the roads were dry. In cross-examination he said he guessed it would be difficult to see him, in dark clothing, on a dark night, on a bike without lights.

[53] Officer Moore conceded in cross-examination that there was enough light in the intersection for him to have seen someone in the crosswalk as he approached it.

Positions of the Parties on Liability

[54] The plaintiff relies, of course, on the reverse onus created by s.193 of the *HTA*. He asserts that the defendants have failed to rebut the presumption of negligence created by that section. He further asserts that Officer Moore breached provisions of the *HTA* by (1) failing to hug the curb as he turned right onto Gill Street and (2) by failing to signal his intention to turn. He specifically relies on ss. 141(2) and 142(1) of the *HTA* which provide as follows:

> 141(2) Where a driver or operator of a vehicle intends to turn to the right into an intersecting highway, he or she shall, where the highway on which he or she is driving has marked lanes for traffic, approach the intersection within the right-hand lane or, where it has no such marked lanes, by keeping immediately to the left of the right curb or edge of the

> roadway and he or she shall make the right turn by entering the right-hand lane of the intersecting highway where the lane is marked or, where no such lane is marked, by keeping immediately to the left of the right curb or edge of the roadway being entered.
>
> 142(1) The driver or operator of a vehicle upon a highway before turning to the left or right at any intersection or into a private road or driveway or from one lane for traffic to another lane for traffic or to leave the roadway shall first see that the movement can be made in safety, and if the operation of any other vehicle may be affected by the movement shall give a signal plainly visible to the driver or operator of the other vehicle of the intention to make the movement.

[55] The plaintiff asserts that Officer Moore is unable to rebut the presumption of negligence because, amongst other things:

(a) He was speeding as he approached the intersection;

(b) He took his turn wide, rather than hugging the curb;

(c) He failed to signal his turn;

(d) There was adequate light in the intersection to have seen Jerry in ample time to stop. He simply was not keeping a careful lookout; and,

(e) He failed to approach the intersection in a careful and prudent manner consistent with the prevailing circumstances.

[56] The plaintiff would have the Court find the defendants one hundred percent at fault for the collision. In other words, he rejects the notion that he was in any way contributorily negligent. Jerry's dark clothing and lack of reflective surfaces are non-issues in the plaintiff's view, given that there was adequate lighting in the intersection to have seen him from a significant distance even without reflection. He accepts that he was in violation of the *HTA* when he rode his bike across a pedestrian crosswalk, however argues that his speed was not significantly greater than that of an average jogger. In other words, he may have infringed a section of the *HTA*, but he did not, in doing so, create a risk greater than that created by others lawfully using the intersection. In his view, his infraction ought not, in the circumstances, to result in any apportionment of liability.

[57] The defendants' position is entirely contrary to that of the plaintiff. In their submissions, Jerry was entirely responsible for this unfortunate collision. He was, contrary to the provisions of the *HTA*, riding at night without a light or reflectors and was in a place where it was unlawful to ride a bicycle. They rely, in part, on ss. 62(17) and 144(29) of the *HTA*, which provide as follows:

> 62(17) When on a highway at any time from one-half hour before sunset to one-half hour after sunrise and at any other time when, due to

> insufficient light or unfavourable atmospheric conditions, persons and vehicles on the highway are not clearly discernible at a distance of 150 metres or less, every motor-assisted bicycle and bicycle (other than a unicycle) shall carry a lighted lamp displaying a white or amber light on its front and a lighted lamp displaying a red light or a reflector approved by the Ministry on its rear, and in addition white reflective material shall be placed on its front forks, and red reflective material covering a surface of not less than 250 millimetres in length and 25 millimetres in width shall be place on its rear.
>
> 144(29) No person shall ride a bicycle across a roadway within or along a crosswalk at an intersection or at a location other than an intersection which location is controlled by a traffic control signal system.

[58] There is an absence of evidence, the defendants argue, that Officer Moore did anything wrong. He had very little time, according to the experts, to apprehend the problem, react to it and to respond appropriately. The collision was unavoidable, from his point of view. On the other hand, Jerry's considered actions created the risk and were responsible for the collision.

[59] Amongst other things, Jerry admitted that he was wearing dark clothing and would have been difficult to see coming onto the roadway. He came from a darkly lit area into an area with greater light. He had no lighting on his bike and he was in a place where he ought not to be riding his bike. There is a strong suspicion, based on the evidence of Ms. Speiran, that Jerry was on his cell phone immediately prior to the collision.

[60] Defence counsel urged the Court to compare the relative positions of Jerry and Officer Moore: Jerry made some very bad decisions when he had time to consider them and he created a situation of danger; Officer Moore did his best to react to that situation of danger, but had insufficient time to do so. In the submission of the defence, the preponderance, if not all, of the fault lies with Jerry. In the alternative, should there be a finding of contributory negligence, the defendants submit that Officer Moore's liability should not exceed twenty-five percent.

Analysis of the Liability Issue

[61] The assessment and apportionment of liability for the collision necessarily requires that the Court make factual findings about how it occurred and the surrounding circumstances in which it occurred. In making factual findings, the Court must assess the credibility and reliability of the evidence provided by those witnesses who testified on the liability issue.

[62] Credibility and reliability are not the same thing. Credibility has to do with a witness's truthfulness, reliability with the accuracy of the witness's testimony: *R. v. C. (H.)*, 2009 ONCA 56, at para. 41, per Watt J.A.

[63] There wasn't a single witness who testified whom I would describe as not generally credible. Each witness, in my view, did his or her best to provide truthful and complete evidence.

[64] Reliability is another matter. It engages a witness's ability to accurately observe, recall and recount evidence. Reliability may be affected by a wide variety of factors, including, without limitation, the circumstances in which observations were made, the condition of the witness at the time of the observations, the traumatic circumstances of the collision and its aftermath, and the limitations and frailties of recollection generally.

[65] With any witness, the Court may choose to accept and rely upon some, all, or none of the witness's testimony. I have not outright rejected the evidence of any witness. But some evidence, as always, I found more reliable than other evidence. Generally, I assessed and tested the evidence of each liability witness against (1) the known, or uncontroverted, facts of the case; (2) the evidence of the other liability witnesses, looking for consistencies and inconsistencies; and (3) the probabilities of the case on the whole.

[66] The determination of liability in any motor vehicle accident case turns on its particular facts. On the constellation of facts present in this case, I find Officer Moore bears the greater responsibility for the collision.

[67] The collision took place on a Friday night in downtown Orillia. Both Officer Moore and Officer Lebarr testified that it was a busy night. To be fair, Officer Moore said that June 13, 2008 was not *particularly* busy, but that was just in relative terms. He confirmed that every night is a busy night for the Orillia detachment of the OPP. Both officers agreed that they were happy to see the prospect of rain, as it would keep intoxicated partiers indoors. I infer from their evidence that it was not uncommon to find intoxicated partiers on the downtown streets of Orillia at 11:30 p.m. on a Friday night in June.

[68] Officer Moore was familiar with the intersection of Front Street and Gill Street. He agreed with plaintiff's counsel that Gill Street is a popular street. He agreed there was enough light in the intersection to see pedestrians. He acknowledged that it was not uncommon to see cyclists riding on sidewalks and not uncommon for them to ride their bikes across pedestrian crosswalks.

[69] Officer Moore said he slowed as he approached the intersection, signalled his turn and braked throughout the turn. He said the collision occured several car lengths south of the crosswalk. I find all three of these statements to be inaccurate.

[70] Following the collision, Officer Moore went home. He declined to make a statement to the SIU investigators, as was his right. He decided to make notes of the incident the following day, rather than contemporaneous with the event. He said he did so because he was, understandably, in shock and he wanted to get his notes right. Nevertheless, his notes do not reflect the speed of his vehicle, where his cruiser came to rest, or where the point of impact was, amongst other things.

[71] There are a number of areas of Officer Moore's testimony where his evidence conflicts with the testimony of others and/or with other objectively verified facts. I find that he was incorrect in his testimony about (1) the location of Ms. Speiran's car, which he said was in the

left turn lane, when it clearly was in the right turn lane; (2) the presence of a second car pulling in behind Ms. Speiran's car, which in fact did not occur; and (3) the point of impact.

[72] I further find that Officer Moore's testimony about his signal light is not correct. It conflicts with Jerry's evidence that he did not see a signal light. That is not to say that Jerry's evidence is *prima facie* preferable to that of Officer Moore. But it must be considered with the balance of evidence on the same issue. For instance, Officer Lebarr failed to note any turn signal light, even though he did note the brake lights of Officer Moore's vehicle flicker on. He was following directly behind Officer Moore and the configuration of the intersection was such that he would have had a clear line of sight to Officer Moore's right turn light at all material times. Ms. Speiran said nothing about seeing a turn signal on Officer Moore's car.

[73] In terms of speed, I find that Officer Moore's pace was at least 60 kph as he travelled the 300 metres along Front Street from King Street to Gill Street. Officer Lebarr testified that his own speed was between 50 and 60 kph and that Officer Moore pulled eight car lengths ahead of him, in a relatively short distance. I accept Officer Lebarr's evidence that Officer Moore's brake lights "flickered". I am satisfied that Officer Moore took the right turn on a wide arc, that he slowed only modestly as he approached the turn, and that his speed at the time of impact was just above 50 kph.

[74] I do not want to be taken as finding that Officer Moore was not credible or that he was tailoring his evidence. I make no such finding. I accept that the collision was a traumatic experience for him and I find that the experience has affected the reliability of his recollection.

[75] I have no difficulty concluding that Front and Gill was a well-lit intersection at the time of the collision. Jerry would have been visible throughout his period of time in the intersection. Granted, that period of time was short, likely a little more than three seconds before the impact.

[76] I find that Officer Moore had the right of way entering the intersection. This is so because Jerry rode his bike across the intersection in breach of s. 144(29) of the *HTA*: see *Bajkov v. Canil***,** [1990] B.C.J. No. 145, 66 D.L.R. (4th) 572 (B.C.C.A.). Even so, having the right of way does not rebut the presumption of negligence established in s. 193 of the *HTA*. As Justice Cartwright held in *Walker v. Brownlee and Harmon*, [1952] S.C.J. No. 56, 2 D.L.R. 450, at para. 46,

> 46 The duty of a driver having the statutory right-of-way has been discussed in many cases. In my opinion it is stated briefly and accurately in the following passage in the judgment of Aylesworth J.A., concurred in by Robertson C.J.O., in *Woodward v. Harris*, [1951] O.W.N. 221 at p. 223: "Authority is not required in support of the principle that a driver entering an intersection, even although he has the right of way, is bound to act so as to avoid a collision if reasonable care on his part will prevent it. To put it another way: he ought not to exercise his right of way if the circumstances are such that the result of his so doing will be a collision which he reasonably should have foreseen and avoided."

[77] In my view, Officer Moore ought to have proceeded more cautiously into the intersection. It was a busy night in downtown Orillia. Gill Street was a popular street. The fact that he had insufficient time to react to seeing Jerry does not rebut the presumption of negligence. I find that his insufficient reaction time was largely due to his lack of caution entering the intersection, his excessive speed and his failure to keep a proper lookout for others using the road. Defence counsel argued that Jerry created a situation of danger that Officer Moore had insufficient time to react to. But recall that Jerry was on a bicycle. Officer Moore was driving a police cruiser. Officer Moore was aware that the intersection was frequently used and it was a busy Friday night in downtown Orillia. He created a greater danger given the speed and lack of caution he exhibited in approaching and entering the intersection.

[78] Jerry is not without fault however. He rode his bike straight out onto the intersection from an area that all witnesses agree was quite dark. Indeed, I find that he would not likely have been visible at all to Officer Moore until he entered the intersection. He was wearing dark clothing without a light or other reflective surfaces, save for two little strips on his pedals that may or may not have been visible. He did not have a light, contrary to the provisions of the *HTA*. I find that he was adequately visible in the intersection even without a light, but a light would have made him visible in the dark area he came from, prior to the collision. It would likely have afforded Officer Moore additional time to react to Jerry's presence.

[79] Moreover, Jerry was riding his bike in a crosswalk, contrary to the provisions of the *HTA*. He was in a place he ought not to have been on a bicycle according to the law. He was travelling at a rate of speed that gave others in the intersection little time to react to his presence. He was almost struck by Ms. Speiran. He was indeed struck by Officer Moore.

[80] There was evidence given by Ms. Speiran that Jerry was on a cell phone as he rode across the intersection. I am not satisfied that he was. Jerry said his cell phone had been disconnected and that he kept it with him to tell the time and to keep track of his contact numbers**.** The cell phone was found at the scene of the accident, but there was no independent evidence as to whether it was active.

[81] Ms. Speiran gave a statement to the police on the night of the collision. She did not mention Jerry being on a cell phone at that time. She told an SIU investigator that she did not actually see a cell phone in Jerry's hand. At trial she said she saw the phone and saw the glow of the phone's light against his cheek. Her evidence is not sufficiently reliable to satisfy me that Jerry was indeed on a cell phone. Had Jerry been on a cell phone while riding across the path of Officer Moore's car, it would have been a point of such significance that I consider it highly unlikely that Ms. Speiran would have failed to mention it when first questioned by the police. Moreover, it strikes me as unlikely that she indeed saw a glow from the phone against Jerry's cheek. According to her evidence, she not see Jerry until the very last second as he passed in front of her car. In that brief moment they turned to look at each other and she said she thought they might have words. At the same time, however, according to her, in that brief instant, he was also talking to someone on his phone and she distinctly saw the glow of the phone light against his face. Such a scenario strikes me as unlikely. When taken with her failure to mention the phone when questioned by police and Jerry's evidence that his phone service was discontinued, I am not satisfied that he was on his phone when the impact occurred.

[82] The apportionment of liability is very difficult. My view is that the greater share of liability must fall to Officer Moore, for the reasons I have discussed.

[83] The defendants provided the Court with two decisions where liability in accidents between motorists and cyclists in crosswalks was apportioned fifty/fifty: one was *Bajkov v. Canil*, as above; the other was *White v. Aransibia*, [2003] O.J. No. 2580, [2003] O.T.C. 586 (Ont. S.C.J.). These cases are instructive to the extent that they apply fault to a cyclist who rides through a crosswalk contrary to a statutory prohibition. They do not establish a rule that there is a default liability apportionment in such circumstances of fifty/fifty. Each case must turn on its own facts.

[84] In my view, an appropriate allocation of liability in all the circumstances of this case is sixty percent to the defendants and forty percent to the plaintiff. In other words, they each bear significant responsibility, but Officer Moore somewhat more so, for the reasons I have stated.

[85] I turn now to a consideration of damages.

III. DAMAGES

CAUSATION

[86] A central feature of tort law is reparation, through compensation. An injured plaintiff is to be restored, so far as money can do it, to the position he or she would have been in, had the tort not occurred. Restoring Jerry to his pre-accident state is a complex proposition. Frankly, it is impossible. Jerry had a lot of problems before the collision with Officer Moore. He has a lot of problems afterwards. Some of his problems are more or less the same afterwards as they were before. Other problems are similar, but made worse by the accident. Still others are entirely new problems. Jerry is not entitled to be compensated for problems he had that predate the collision. Understandably, in a complex case like this, causation is a matter of serious dispute. Jerry is entitled only to be fully compensated for the damages caused by the collision. I noted at the outset of these reason that unpacking the physical, emotional and psychological sequelae of the accident from Jerry's pre-existing issues is not an easy task.

[87] As a starting point, Jerry's circumstances before the collision must be compared to his circumstances after it. It will become clear that his post-accident condition is materially worse. From there, a determination must be made as to whether the collision is the cause of his worsened condition, in whole or in part. Finally, an assessment must be made of the cost to compensate Jerry for any injuries for which the collision is found to be the cause.

Pre-Collision Jerry

[88] Jerry was born on June 13, 1980. He was dealt a lousy hand. His mother was thirteen years old. His father a few years older. The father committed suicide. Jerry never knew him. Jerry's mother couldn't care for him as an infant so he was looked after by his grandmother. He was removed from her care by the Children's Aid Society and ultimately, at about age five, Jerry came to live with the family of his mother's boyfriend. The boyfriend's name was Tyler Slater.

Tyler had three siblings. He lived with his siblings and parents in a trailer parked inside a barn in Stouffville. Needless to say, the living conditions were poor.

[89] Jerry shared a room with Tyler's older brother. The brother sexually abused Jerry, from about the time he was five until he was fourteen.

[90] At the age of about eight, something very positive happened in Jerry's life. He met a man named Doug Browne. Mr. Browne was a volunteer in the Big Brother's organization. Jerry had a previous Big Brother, but was going to lose him. The torch was passed to Doug Browne. This was the beginning of a long and supportive relationship between Jerry and the Browne family.

[91] The Browne family consists of Doug, his wife Janet, and their two children Alicia, now age twenty-nine, and Ronnie, age twenty-two. They live in Richmond Hill and, by all accounts, are very active in the community. Alicia was only a year or two old when Jerry came into the Brownes' lives. Ronnie was not yet born.

[92] Jerry's general condition was of concern to the Brownes from day one. His clothes were dirty and he smelled bad. They decided it would be best for Jerry to spend weekends with them in Richmond Hill. When they went to pick him up from the trailer for his first sleepover, his "Nana", Marg Slater, advised Mr. Browne, "don't give him nuthin' to drink after 8:00 pm or he'll pee the bed and don't show him no affection."

[93] Nana was right about the bed wetting. The Brownes took Jerry to their family doctor for a check-up. There was nothing physically wrong with him. So they took him to see a psychotherapist. She solved the problem in one visit. It turns out Jerry regularly dreamt about being with his mother. His mother had given him up when he was a baby. His longing for her was so strong that he wouldn't want to wake up from his dreams and leave her, even if he had to urinate. The therapist discussed with Jerry the downside to wetting the bed and he never did so again.

[94] Doug Browne described Jerry as an affable boy, well-spoken and polite. He participated in their family functions. They socialized a great deal and didn't hesitate to have Jerry along. Jerry often accompanied them on family vacations. He was one of the family.

[95] Jerry initially attended Whitchurch Public School. It was a fairly affluent school and Jerry was teased by some of the other students because he was poor. Jerry was identified as learning disabled. He struggled at Whitchurch P.S. He had to repeat grade one. His report card from February 1991, when he was in an integrated grade four/five class reflects that he was performing well below his grade level in just about all aspects of communications, reading, writing and arithmetic.

[96] Jerry was referred to the York Centre for Children ("YCC"), which offered him services to assist with his educational issues. In 1993 he began to attend Summitview Public School, where he would be two days per week. He spent three days per week at YCC. His initial report card from Summitview echoed comments reflected in earlier reports from Whitchurch P.S. Jerry

was a pleasant boy but had trouble staying focused. He needed to be kept on task and he needed constant repetition of information to enhance his comprehension.

[97] Generally speaking, Jerry's report cards from school were pretty terrible. The classroom observations of his grade seven teacher, the rather fetchingly-named Ms. Beverly Hill, are set out in a report dated April 27, 1994. She described Jerry as "immature and easily led by others". He was, in her view, "willing to do the work but his finished product is full of errors and incorrect information."

[98] His second term progress report from March 1995 – what appears to be grade eight – is typical of his performance over the years. He had a C in English, an E in math, an E in science, an E in history/geography, a C in art, an E in music, and a C in physical education.

[99] Despite his poor performances year over year he was promoted forward from grade to grade.

[100] Doug Browne described things as going well with Jerry between the ages of eleven and fourteen. He thought Jerry was doing well at YCC, though his report cards from Summitview P.S. do not entirely bear that out. Jerry had chores to do at their house. He looked after his own room. He helped with the dishes. He cut the lawn. He helped clean the pool. He babysat from time to time. Socially he loved going to the movies and to bowling. He loved to swim and he especially loved to ride his bicycle.

[101] The time Jerry spent with the Brownes increased to the point where he was spending about four days a week with them and the other three days back at the trailer in Stouffville. Janet Browne testified that she hated to send Jerry back to the trailer because she didn't think he was treated well there. She had no idea, of course, that he was being sexually abused.

[102] At age fourteen his mother re-appeared in his life. She asked Jerry to come to live with her. He jumped at the chance and re-located to Midland to be with her. Prior to this point the Brownes had never met Jerry's mother. She had made numerous promises to come visit Jerry, but all went unfulfilled. Janet Browne said the thought of Jerry going to live with his mother made her feel sick. She was very concerned because Jerry's mother had let him down so badly in the past.

[103] Jerry enrolled in Midland High School. He did very poorly. It appears he did not earn enough credits to have successfully completed grade nine.

[104] Little is known of Jerry's experiences in the time he was in Midland with his mother. The Brownes had almost no contact with him during that period of his life. In 1997, however, Mr. Browne received a phone call from a Midland police officer. Jerry had done something to offend a number of Midland's more unsavoury characters. One might say that these were just exactly the sort of fellows that you would not want to trust your well-being to. The police officer expressed concerns for Jerry's safety and advised Mr. Browne that he was personally buying Jerry a bus ticket out of town. And so it was that he returned to Richmond Hill and back to the care of the Brownes.

[105] Jerry was seventeen, his school career essentially over. He was no longer a naïve kid. Mr. Browne described him as "street smart" and a bit of a punk.

[106] Jerry was offered, and accepted, a job with Mr. Browne's brother and sister-in-law at their printing firm, Amanda Graphics, in Toronto. Doug's brother picked Jerry up in the mornings and dropped him off at the end of the day. Things went well there. Jerry was productive. He made his own lunches. He paid room and board. He helped out around the house. He did his own laundry.

[107] Jennifer Phair is Doug Browne's niece. Her parents owned Amanda Graphics. She testified that Jerry worked there for about a year. She spent a lot of time at the business even though she was four years younger than Jerry. She was able to describe his roles in the business. He worked in the bindery department: collating, shrink wrapping, boxing, labelling and eventually folding books. He also worked in shipping and receiving. The work wasn't, as Ms. Phair said, "rocket science", but it did require concentration and attention. Jerry performed his tasks well.

[108] At some point in 1998 Jerry abruptly quit Amanda Graphics. He moved out of the Brownes' home and went back to Midland. The reasons for this abrupt change are not clear. But whatever the reasons, they did not hold Jerry in Midland for long. He returned to Richmond Hill – and, once again, to the care of the Brownes – by early 1999. Again, little is known of Jerry's life in this second period that he lived in Midland. He testified about at least one significant incident that occurred during this time. He was in a car accident. He was the passenger in a vehicle that was being driven down a dirt road. The unidentified driver was, according to Jerry, "showing off" and he flipped the car. Jerry claimed not to have been hurt and said he received no medical attention.

[109] In March 1999 Doug Browne arranged for Jerry to work in the business of a friend. The business is called Jet Ice. They supply paint for ice rinks and they do stencilling and logos.

[110] Jerry worked for Jet Ice from March 1999 to February 2001. He bagged and stacked paint and had additional duties in the warehouse. Linda Hosier testified about Jerry's performance at Jet Ice. Her parents own and operate the business and she works there. She said Jerry was a good worker. He was kind-hearted and respectful. He became good friends with her son, Michael. They used to get together and play music.

[111] During the period of time that Jerry worked at Jet Ice he also obtained a part-time job at a pub in Richmond Hill known as Limericks. He started as a dishwasher but soon began to help out as a short order cook. This was a busy time for Jerry. One might reasonably argue that it was the high water mark of his life. He had a stable and supportive home with the Brownes. He had money in his pockets. He was able to pay room and board. He had a cell phone and kept up with his bills. He had friends and an active social life.

[112] But in August 2000, Jerry again moved out of the Brownes' home. He had fallen in love with a girl. She lived in Bradford and that's just where he moved. He left his life with the Brownes behind him. They would not see him again until 2006. In July 2006 Doug Browne

received a call from a Christian minister. Jerry was a patient at Soldiers' Memorial Hospital in Orillia. He had overdosed on drugs and was on life support. It didn't look good for Jerry and so the Brownes jumped in their car and rushed to Orillia, fearing that this may be the last time they saw him alive.

[113] Jerry obviously went through some significant changes between August 2000 and July 2006. The record of those changes is spotty. But they are of pivotal importance to the issue of damages because Jerry's life appears to have taken some considerably negative turns even before the collision with Officer Moore's cruiser.

[114] Jerry provided his own first person account of his life after leaving the Brownes' home in August 2000. It was a very condensed version and must be supplemented by a review of the limited records that his life generated over the eight year period prior to the collision.

[115] Jerry moved to Bradford when he left the Brownes' home in August 2000. He continued to work at Jet Ice until February 2001 when his employment terminated. He did not remember why he left that job. There is some evidence that he was fired, but it is not sufficiently cogent for me to reach that conclusion. Nothing turns on it either way.

[116] Ms. Hosier agreed during cross-examination that Jerry did not have a drug or alcohol problem, to the best of her knowledge, while he worked at Jet Ice. Nor did he have any apparent psychological problems. He was certainly not suicidal that she was aware of.

[117] Sometime after the Jet Ice job ended, Jerry began to work at a bakery. Keith Wagner and his wife owned the Plaza Home Bakery in Bradford. Jerry just walked into the bakery one day and said he was looking for a job. They gave him a try. Baking is a job that a person might find hard on their constitution. The most intense baking appears to take place in the wee hours of the morning. Jerry generally started his shifts at 3:00 or 4:00 in the morning, sometimes earlier if it was a special occasion like Christmas. Jerry did well at the bakery. He caught on quickly and was soon baking donuts, breads, buns and pies.

[118] Mr. Wagner estimated that Jerry worked at the bakery for about a year on a part-time basis. The relationship went south just after Christmas 2002. Mr. Wagner and his wife left on holiday in early January 2003. While they were gone their house was broken into. Jerry was the principal suspect, though to be fair, Jerry was never charged with the offence. Another concern was that Jerry had agreed to cover their son's paper route while they were away. He failed to deliver half of the papers. Mr. Wagner became concerned that Jerry had a drug problem. He did not explain why, but having said that, it is unlikely Jerry would disagree. Ultimately Jerry quit the job in early 2003.

[119] Details of Jerry's employment after leaving the bakery are quite sketchy. He said he worked, at times, at McDonald's, Kentucky Fried Chicken and East Side Marios. He also received social assistance benefits. His tax returns for the years 2003 to 2011 were filed at trial. In 2003 his total earnings were $622 which he thought could be from the bakery. In 2004 he had total earnings of $3,282 plus $6,070 in social assistance benefits. He did not remember what employment led to those earnings. In 2005 he earned no income. He was on social assistance

benefits all year. In 2006 he had total earnings of $170 and welfare benefits of $6,700. In 2007 he had no income and survived entirely on social assistance benefits. In 2008 he had no income up to the time of the accident and again was subsisting on social assistance benefits.

[120] Jerry described in his direct examination that he began to experience occasional back pain while he worked at Jet Ice. He experienced back and neck pain while working at the bakery. He obtained chiropractic treatment which he said helped.

[121] On February 28, 2001, just after he had left Jet Ice, Jerry began to visit a chiropractor, Dr. Ciulini. He continued to see Dr. Ciulini regularly until September 2003, making some sixty-two visits. On his intake form, Jerry noted the following:

(a) His neck and back pain started with a motor vehicle accident three years previous, involving a rollover;

(b) He suffered from low back pain, neck pain, headaches, dizziness, confusion/depression, amongst other things; and,

(c) His major complaint was upper and lower back pain from a car accident and labour work.

[122] Dr. Ciulini is not the only health professional that Jerry consulted about back pain. On numerous occasions in 2005 and 2006 Jerry visited the emergency room of Soldiers' Memorial Hospital complaining of back pain. Throughout 2005 and 2006 he also visited his family physician at the time, Dr. Longford, some thirteen times complaining of back problems.

[123] It is not easy to get a good feel for how much of Jerry's reported back pain was real. Jerry was addicted to Oxycontin in 2005 and 2006. His medical records are replete with notes of clinic and emergency room physicians from whom Jerry sought prescriptions. He generally complained of back pain arising from a motor vehicle accident (the rollover) in an effort to obtain Oxycontin. He testified at trial that he exaggerated his back pain in an effort to get drugs.

[124] Jerry described, during his direct examination, getting into drugs when he was living in Midland with his mother. He was at a party. A friend offered him a line of cocaine, which he snorted. He liked it. At some point while he was in Bradford he appears to have begun to regularly abuse drugs. He said he was using drugs for seven, eight or even nine years prior to the collision with Officer Moore. He confirmed in cross-examination that he was using street drugs when he was seeing the chiropractor, Dr. Ciulini. He admitted doing drugs while he was working at the bakery. He appeared – though it wasn't entirely clear in his evidence – to associate the loss of his job at the bakery with his drug use.

[125] Jerry has a half-sister, Amanda, and a half-brother, Jessie. Amanda is married to Josh Ladouceur. Josh provided evidence at the trial that helped fill in some of the blank spots in Jerry's history after he left the Brownes' house in August 2000. He said that Jerry had been living in Bradford with his half-brother, Jessie. Jerry and Jessie influenced each other in negative ways. They got into drugs, particularly cocaine according to Josh. Eventually Jerry and Jessie moved up to Orillia together, though it is unclear just exactly when that occurred.

[126] Jerry became addicted to drugs. He described his addiction as "pretty bad". By his mid-twenties, he said, he was a heavy user of illicit drugs. He was abusing cocaine and crack cocaine and ecstasy. He was addicted to prescription narcotics. He was using drugs almost daily. He occasionally drank and sometimes would get drunk. Beer was his choice of alcoholic beverages. He preferred drugs to alcohol.

[127] His introduction to Oxycontin came when he was dating a woman named Sheri. It is not clear to me exactly when he met Sheri, though it appears to have been while he was living in Orillia. An emergency department record from Soldiers' Memorial Hospital in Orillia dated May 24, 2005 listed Sheri Pearson (girlfriend) as his next of kin.

[128] Jerry got an Oxycontin from Sheri's father. Why he got that Oxycontin is yet another fact left unclear in the course of Jerry's history. He was subsequently introduced to the father's family physician who prescribed him Oxycontin. Jerry became addicted to Oxycontin and he engaged in a course of unfortunate conduct designed to wrongfully obtain the drug. Specifically, he made a practice of attending at a variety of physicians' offices, medical clinics and emergency rooms where he made false statements to doctors in order to obtain prescriptions for painkillers including Oxycontin. Generally he described suffering from chronic pain arising from an earlier car accident. Whether this was entirely untrue is not clear to me. But he was clearly double-doctoring and not upfront with the doctors he saw about other prescriptions he had received and about his addiction.

[129] On July 7, 2006 Jerry attempted to commit suicide. He had just broken up with Sheri and he took an overdose of drugs. He was taken by ambulance to Soldiers' Memorial Hospital. He was comatose and required intubation and ventilation. His Glascow Coma Scale ("GCS") was six out of fifteen. The GCS is used as a measurement of consciousness. A score of fifteen reflects no impairment. A score of three is compatible with brain death. Jerry's score of six indicated a profoundly comatose state.

[130] It was not clear, on examination, what substance Jerry overdosed on. A drug screen was positive for methamphetamines, cocaine, marijuana and anti-depressants. But it was negative for opiates. He was diagnosed with an adjustment disorder brought on by the break-up with Sheri. Jerry reported that he had no history of suicide attempts. But a Soldiers' Memorial record from May 24, 2005 reflects that Jerry was hospitalized in Penetang in 1998 for three months following a suicide attempt. At trial Jerry said he had no recollection of such a hospitalization and no idea why the Orillia hospital record would mention it.

[131] Jerry was discharged July 13, 2006. But he was back three months later under similar circumstances. An ambulance report on October 21, 2006 reflects that he was found unresponsive on the floor beside his bed by his roommate. His GCS on admission was seven to eight, again indicative of being comatose. On this occasion he claimed to have taken Valium and Amitriptyline to go to sleep and he woke up in hospital. His drug screen was positive for cocaine, oxycodone and Amitriptyline. He was discharged October 24, 2006 with a diagnosis of accidental overdose.

[132] Drugs are expensive, particularly when purchased illicitly on the street. Jerry admitted that he would have done almost anything to get drugs. He also admitted that finances were always a problem for him. He said, however, that he had only committed theft "a couple of times". One wonders how he could have afforded to feed his drug habits. On one occasion he said he stole some prescription pills from the bedroom of Sheri's parents. Sheri found out about it and kicked him in the face, fracturing some of his facial bones. A clinical note of Dr. Antonyshyn, a plastic surgeon Jerry consulted at Sunnybrook Hospital on November 7, 2006, reflects a fracture of his right orbital bone. It also noted that Jerry had a history of chronic back and hip pain since a motor vehicle accident three years prior.

[133] Jerry continued to struggle with drug abuse issues into 2007. On June 13, 2007, his 27th birthday, he met for the first time with Dr. Robert Cooper, an addiction specialist. Dr. Cooper started Jerry on Methadone, a substitution therapy for people with addictions to opiates. Dr. Cooper testified that Jerry told him he'd been addicted to Oxycontin for three years. He had been lying to get prescriptions and had been stealing daily to support his addiction.

[134] Jerry filled out an initial assessment form for Dr. Cooper. He reported the following:

(a) He'd been using Oxycontin daily, by crushing it and snorting it, for three years;

(b) He had been using cocaine every couple of weeks, snorting it, and had been doing so for 10 years;

(c) He consumed alcohol often;

(d) He smoked marijuana often;

(e) He took Amitriptyline daily;

(f) He was initially prescribed Oxycontin for back pain following a car accident;

(g) He had attempted to commit suicide four times in the past; and

(h) Drug use was affecting his relationships, finances and family. He noted specifically, "everything has been destroyed/I steal daily to pay for pills/family wants nothing to do with me."

[135] Jerry was started on Methadone on June 13, 2007. Urine tests were done weekly between June 13, 2007 and July 26, 2008. For the first eight weeks, Jerry tested positive for Oxycontin use. All but one of those weeks he also tested positive for cocaine. He appears to have gotten his Oxycontin use under control, however, within two months of starting on Methadone. Cocaine was another matter. The collision with Officer Moore occurred on June 13, 2008. Between January 1, 2008 and the date of the collision, Jerry's weekly urine tests were positive for cocaine use all but three times. From February 13, 2008 to June 11, 2008, Jerry tested positive for cocaine each and every week. That is not to say that he used cocaine every week. A single instance of cocaine use may result in positive tests for several weeks. There can be no

doubt, however, that Jerry was continuing to abuse cocaine on a regular basis. He last used cocaine on the afternoon of the collision.

[136] How Jerry occupied his days in the five years prior to the accident is somewhat vague. He described himself at various times as a student. There were, indeed, two periods when he attended the Orillia and District Literacy Council: December 16, 2004 to August 17, 2005 and June 14, 2007 to May 29, 2008. The Literacy Council is a non-profit organization that offers services to assist adults in improving their reading, writing, arithmetic and computer skills to generally improve their lives and to offer them opportunities to move on to the Adult Learning Centre to formally improve their education.

[137] Cathy Graham has been the program manager at the Literacy Council for eight years. She said assessments are conducted on students when they first commence their individualized learning programs. She assessed Jerry at a grade six to eight level at the start of his first session. He was about the same at the start of his second session, though his reading had improved somewhat.

[138] She said Jerry indicated that he wanted to become a chef, so they designed a program for him to upgrade his skills so that he could move on to the Adult Learning Centre in order to obtain his high school equivalency. Her view was that he would need about 18 months at the Literacy Council before he was ready to move on to the Learning Centre. She thought he would be at the Learning Centre for another two years, if everything went according to plan. In other words, it would take three and a half years of dedicated study for him to obtain his high school diploma.

[139] Ms. Graham noted that Jerry had 257 hours of training in his first session at the Literacy Council and another 292 in his second session. Jerry admitted though, on cross-examination, that there were many occasions when he simply signed in for a session and left early. For instance, he would sign in for a five hour session, but leave after thirty minutes.

[140] Jerry had a one-to-one tutor assigned to him during his second session at the Literacy Council. Bryan Bushell was that tutor. He remembers Jerry as pleasant and amiable. He recalled that he did not tutor Jerry all that long, perhaps for a couple of months. He was mainly assisting him with literacy issues. The records of the Literacy Council indicate that he saw Jerry three times in October 2007, no times in November 2007 because Jerry was sick, and no times in December 2007. In other words, Jerry spent very little time with his tutor.

[141] Jerry recalled that he was attending school on a regular basis up to the time of the collision. The Literacy Council records indicate, however, that he terminated his program there about 2 weeks before the collision.

[142] Jerry was receiving student welfare when he attended the Literacy Council.

Summary of Findings about Jerry Pre-Collision

[143] My view of Jerry in the five years prior to the accident is a rather dismal one.

[144] Jerry had, at best, a grade nine education. He had a learning disability and had limited reading, writing and comprehension skills. He did not have a driver's license. He had virtually no marketable skills apart from being able to perform basic labour. He was either unwilling or unable because of back pain to utilize those basic skills to earn a living. His tax returns evidence income of about $4,000 in total in the years 2003 to 2007 inclusive. He survived on social assistance. He appeared to have little motivation to seek out and hold onto any long-term, meaningful employment.

[145] There was evidence that Jerry was performing "volunteer work" at Josh Ladouceur's service station. It is true that Jerry performed some modest helpful functions at Josh's shop, but in my view his efforts were less about a plan to become skilled in the trade of auto mechanics and more about a way to spend his free time. Jerry's lack of education, learning disabilities and lack of motivation make it a virtual certainty that he would never have been accredited as a licensed mechanic.

[146] Similarly, I find that the prospect of Jerry completing his high school equivalency and training as a chef to be entirely speculative. I find that while Jerry was enrolled at the Literacy Council, he was not serious about upgrading his education. His attendance was spotty and, in my view, designed to maintain a continuous flow of social assistance benefits. Again, given his limited motivation, substance abuse problems, learning disabilities and admitted lack of commitment at the Literacy Council, I believe obtaining his high school equivalency was a virtually insurmountable hurdle for Jerry.

[147] Jerry had ongoing back and neck pain. It may have hindered his ability to work in labour intensive jobs. I accept and find that he frequently exaggerated the pain in an effort to obtain prescription painkillers. Nevertheless I find that the pain was real. He saw a chiropractor many times about it. He mentioned it to physicians on numerous occasions unrelated to the pursuit of medications. There was evidence, in the records of Sunnybrook Hospital, that he had suffered at some previous time, a fracture in his cervical spine, at C-5.

[148] I find that Jerry had very serious emotional issues. He had abandonment issues, attachment issues and significant psychological sequelae arising from the long period of sexual abuse he had suffered as a child. He had difficulty maintaining relationships. He was depressed.

[149] Jerry's ability to obtain employment and to keep it was seriously compromised. His ability to cope with the struggles of day to day living was also compromised. He turned to substance abuse. He was a drug addict – addicted to opiates – and a regular user of cocaine. He lied and stole to obtain drugs to feed his addictions.

[150] I generally found Jerry to be a truthful witness. He testified entirely without guile. But he claimed he had stolen only a couple of times to buy drugs. That's not what he told Dr. Cooper. He told Dr. Cooper he stole every day. I think it more likely that he was stealing regularly to support his habits. He was regularly purchasing street drugs including opiates, methamphetamine, cocaine and marijuana. Illicit drugs are expensive. He wasn't making regular purchases on his welfare subsidy.

[151] Jerry was unhappy. He was aimless. He survived on welfare and crime. His volunteer work at his brother-in-law's garage appears to have given him some pleasure. But there is no doubt that he tried to commit suicide at least two times, both nearly successful, both resulting in Jerry being rushed to the hospital in a comatose condition.

[152] Jerry was easily led. He had poor judgment. He had poor coping skills. He was at high risk for continuous substance abuse. He was likely to be supported by the state, in whole or in part, for the balance of his life.

Post-Collision Jerry

Physical Injuries

[153] At the moment of impact with Officer Moore's cruiser, Jerry was thrown over the hood of the car. He smashed his face on either the windshield or the passenger side mirror, or both. He was thrown off the front of the car when it came to rest. Jerry remembered slipping in and out of consciousness. Neither Officer Moore nor Officer Lebarr came to his aid. An unidentified woman comforted him. She told him an ambulance was on its way. He was in pain and part of his nose was gone. He asked the woman how his face was and she said it had taken a beating but would be okay.

[154] The Ambulance Call Report completed by Emergency Medical Service ("EMS") responders indicated that the call for an ambulance was received at 11:27 p.m. The ambulance was on scene by 11:34 p.m. They reported that Jerry was found conscious, alert and oriented. He was transported to Orillia's Soldiers' Memorial Hospital and then transferred to Sunnybrook Hospital in Toronto.

[155] The Trauma Report from Sunnybrook described Jerry arriving alert and oriented. His most significant injuries were to his face. On examination "he seemed to have a sunk mid-face". A CT scan confirmed his facial fractures were limited to his nose and nasal septum. He had other deep facial lacerations as well. There was no evidence of intracranial injury. He was found to have suffered C-6 and C-7 spinous process fractures as well as a T1 spinous process fracture. He also had two broken bones in his right foot: fractures of the head of the fourth right metatarsal bone and the distal metaphyseal area of the fifth right metatarsal bone. Finally, he had two broken bones in the ring finger of his right hand: a transverse undisplaced facture of the fourth mid phalanx and fifth distal phalanx.

[156] Jerry underwent surgery on June 14, 2008 at Sunnybrook to repair his badly damaged nose. His nose needed to be reconstructed using plates and screws. It also required a skin graft using skin from behind his left ear.

[157] Jerry was discharged from Sunnybrook on June 17, 2008.

[158] An occupational therapy report prepared by Nir Tamir for Jerry's counsel on November 27, 2008 listed Jerry's injuries as follows:

(a) closed head injury;

(b) skull fracture;
(c) fractured nose;
(d) right foot fracture;
(e) right hip fracture;
(f) right hand ring finger fracture;
(g) C-6/7 transverse process fracture; and
(h) multiple lacerations.

[159] I found no indication of a closed head injury, a skull fracture apart from the nasal bones, or a right hip fracture in the clinical records of Sunnybrook Hospital. The closed head injury is a matter of particular contention in this proceeding. The weight of the evidence – as I will review shortly - suggests that Jerry suffered a mild traumatic brain injury, even though the Sunnybrook Hospital records do not reflect such a finding. At the end of the day, it is not, strictly speaking, necessary for me to conclude that Jerry suffered a brain injury in order to dispose of the case. Jerry was a person with a seriously compromised ability to cope with adversity in his life and, particularly, the trauma occasioned by the collision. His compromised ability to cope with the impact and its aftermath, led inexorably to the deterioration of his ability to function on a day-to-day basis.

[160] In reviewing Jerry's post-accident life, I have divided the period of time from June 13, 2008 to the time of the trial into five periods. Each period follows a transition of some sort or another in Jerry's life.

Period One: The Immediate Aftermath (June to December 2008)

[161] Doug Browne arrived at Sunnybrook with his two children to see Jerry on Sunday June 15, 2008. Jerry was, as he described, a mess. The sight of him caused the children to cry. There was never any doubt that he would be coming home with them.

[162] Doug set up an inflatable bed for Jerry in the rec room near a television and bathroom. Jerry had a cast on his right leg, but could get himself back and forth to the bathroom. The Brownes took him to his various medical appointments and doled out his medication for him. They had to take him to Orillia once per week to get his Methadone. He'd get one dose there and six take-away doses.

[163] Doug's impression was that things were progressing reasonably well for the first few months after the accident. Jerry appeared happy just to be alive. Eventually he attempted to travel to Sunnybrook for a medical appointment on his own, by bus. He got lost and so the Brownes just continued to take him to his appointments. He eventually found a local Methadone clinic to attend. He also found a local Literacy Council to attend, though Doug was unable to say how well he did there, or how often he attended. Alicia Browne said Jerry attended for only a few months. She attempted to tutor him, but according to her he didn't "give two shits".

[164] Janet Browne worked from home and spent more time with Jerry than anyone else in the immediate period after the accident. She said he was in regular discomfort. He constantly complained of back pain. He expressed uncertainty about his future. He was very depressed

about the impact of his injuries on his appearance. He arguably had little to be proud of in his life, but he was certainly proud of his looks. The accident physically marred his facial appearance and was a great source of distress to him.

[165] Jerry was generally quiet, according to Janet. He was upset and cried often, sometimes uncontrollably. They tried to lighten his mood. They invited friends over to visit with him.

[166] Alicia Browne described Jerry in a similar fashion to her mother. She said her friends would come over to visit him. In the past, he would be "all over them", but not anymore. He appeared not to want any contact with the outside world. He told Alicia that he did not like to look at himself, that he thought he would never have any friends and never get a girlfriend or get married because of the way he looked. He was depressed. Their conversations became one-sided. He was unresponsive.

[167] Janet said that Jerry changed after the accident. He had no desire to get up and do anything. Once he was more mobile he moved back to his old room in the basement. He slept a lot. He'd be up at night wandering around and sleep a great deal of the day. He would not join them at dinner. He lost interest in doing things he used to like to do. He no longer rode a bike. He used to love watching movies, but Janet could no longer persuade him to go to a show with her.

[168] Jerry did eventually reach a point where he was able to make meals for himself. To be clear, however, his meals consisted of a bowl of cereal or something microwavable. Doug considered that if he was able to make his own meals, he was able to assist with some of the chores around the house.

[169] Janet testified that they tried to get Jerry to do a list of chores. But it was difficult. When he was younger, he'd be told what to do and usually it got done. But no longer. Now actual checklists had to be written out and provided to Jerry. Even then, more often than not, the chores would not get done. Alicia spent time with Jerry going through his checklists. They were meant to help him get back on his feet. A typical checklist would include (1) brush your teeth, (2) have a shower, (3) fill the water jug, (4) feed the dogs, and so on. Yet things were still not getting done. His hygiene was terrible. His room was disorganized and filthy.

[170] The Brownes' water supply came from a well. They would fill jugs of water through a valve in the basement. On one occasion, while performing the simple task of filling a water jug, Jerry fell asleep. He flooded the basement.

[171] The Brownes were getting very frustrated with Jerry and they lacked the experience and training necessary to really assist him in his rehabilitation. They thought it would help if he went back to school. But it didn't. Janet said he didn't last long in school. He could not concentrate. The Brownes began to argue amongst themselves about Jerry and what to do about him. He was becoming a source of real frustration and friction in their home.

[172] In an effort to turn things around for Jerry, Doug once again obtained a job for him. This time with a friend, Scott Patterson, whose family owned a coach line operating out of Schomberg.

Period Two: The CGS Tours Job (December 2008 to June 2010)

[173] Jerry started with CGS Tours in Schomberg in early December 2008. CGS operated a fleet of charter coaches. Jerry's job was to clean the coaches and prepare them for their next use. The job varied from two to four days per week depending on demand for coaches. The hours were generally 8:45 a.m. to 3:45 p.m. Scott Patterson picked Jerry up at the Brownes' home in the morning, drove him to Schomberg and then drove him back at the end of the work day.

[174] Mr. Patterson testified at some length about Jerry's performance during the year or so he worked at CGS. His testimony documented Jerry's deterioration from poor employee to virtually useless and distracting.

[175] Jerry had a basic outline of things that he needed to get done during the day. He would get his cleaning equipment organized. He would start on the inside of the bus, picking up garbage, cleaning the seats and windows. He would dump the toilets and clean the washrooms. Finally he would clean the outside of the bus and it would be moved and refueled.

[176] Jerry was, at first, eager to work. But his attention to detail was lacking. He would forget to do many little things like putting new toilet paper in the bathrooms or putting garbage bags in the bins. Sometimes he would leave the power bar on in the bus and by the next morning the batteries would be dead. After the first few weeks, a checklist was put together for Jerry to help him with details. He needed close supervision.

[177] Jerry stopped too frequently for cigarette breaks. He would do a task and stop for a cigarette, do another task and stop for a cigarette, and so on. He was also constantly texting on his phone. Mr. Patterson had to eventually take away his cigarettes and phone. They would be provided to him to use at break times.

[178] Initially Jerry's work was generally pretty good. He was trying hard, according to Mr. Patterson. But he deteriorated over time. Things really started to go downhill after about three months. Jerry started to regularly have appointments that he had to go to before the usual end of the work day. The quality of his work deteriorated. He dropped down to working two days per week. At lunch times he was regularly going to the LCBO and purchasing beer.

[179] There were occasions when Mr. Patterson picked Jerry up at home in the morning and noticed the smell of alcohol on him. Eventually the deterioration in the quality of his work combined with his drinking led to his termination in about December 2009. Jerry had worked at CGS for about a year in total.

[180] Mr. Patterson's awareness of Jerry's drinking issue was only the tip of the iceberg. Doug Browne testified that Jerry's drinking problem began not long after he started working at CGS Tours. Now he had money coming in and was able to purchase alcohol. Jerry's drinking got pretty bad according to Doug. He would throw up in his room. He would smoke in his room while drunk, even though he knew there was no smoking in the house. One night after drinking he fell asleep with a cigarette in his hand. He started a fire in his mattress and received third degree burns to his arm.

[181] One morning Doug went downstairs to tell Jerry that Scott Patterson was there to pick him up for work. Jerry had a fresh glass of beer on the go. It was 8:00 a.m.

[182] The Brownes tried to get help for Jerry and his alcohol abuse. They found him a detox program in Toronto. He was ejected from their program after trying to smuggle beer in.

[183] The Brownes arranged for Jerry to see their own family doctor. He made a referral to Dr. Peggy Voorneveld, a psychologist in Newmarket. Jerry began to see her in April 2010. His alcohol addiction was so bad by this point that he was bringing beer into her office. During one session, he kept leaving the room to go to the bathroom. It was discovered that he had several cans of beer hidden in the back of the toilet, which he was drinking when he left the meeting room.

[184] Dr. Voorneveld suggested Jerry begin to take Antibuse, which he did, at the end of April 2010. He initially continued to drink while on Antibuse. In May 2010 he had to be taken to York Central Hospital because of suicidal thoughts brought on after combining Methadone, Antibuse and alcohol.

[185] In the late spring or early summer of 2010, Jerry began to receive the services of an occupational therapist, Natalie Zaraska, who was arranged by Dr. Voorneveld. She was qualified at trial, on consent, as an expert in occupational therapy. She said she has met with Jerry some 30 times. On the first occasion that they met, Jerry was slow coming upstairs to meet her. Mrs. Browne told her that Jerry had been downstairs "huffing", in other words, abusing an inhalant. When he came upstairs he was fidgety and had a hard time staying in the conversation. He was dishevelled. He hadn't brushed his teeth or washed his hair.

[186] During her first meeting with Jerry she was able to observe him in his home environment. She observed that his self-care was very poor. He was unable to look after his basic hygiene and grooming. He was unable to follow routines. He had a vulnerability to being influenced by others. His judgment was off. He was making poor decisions, putting himself at risk. He was causing difficulties in the Brownes' home and they were struggling.

[187] She concluded, after the first meeting with Jerry, that he had attendant care needs 24 hours per day.

[188] Jerry did show some marginal improvement as the summer of 2010 approached. By June his alcohol addiction was under control. He continued to take Antibuse and his drinking stopped. But his substance abuse did not stop. On June 5, 2010, Doug Browne went downstairs to get Jerry from his room. Jerry was lying on the floor in a stupor. He had inhaled computer duster gas. This was the last straw. Doug asked Jerry to leave their home.

[189] The next day at breakfast the Brownes were surprised to see Jerry come up the stairs from his room in the basement. He had snuck in through a basement window at night. This time Doug chased him off the property with a rake and told him never to come back.

Period Three: Summer 2010 (June to August)

[190] The summer of 2010 was not a good time for Jerry. After being evicted from the Brownes' home in June 2010, Jerry essentially spent the next two months either living on the street or in a men's shelter in Newmarket known as Porter Place. He continued to see Dr. Voorneveld, which was a positive thing for him. She was able to obtain a Rehabilitation Support Worker ("RSW") through the Statutory Accident Benefits ("SAB") carrier, who began to work with Jerry. The RSW was provided through a firm known as Post-Traumatic Rehabilitation Services, a company owned and operated by Christine Kalkanis.

[191] In July 2010, Jerry disappeared. It turned out he had been tenting in Toronto.

[192] In early August 2010, Doug Browne received a phone call from a duty counsel working at a weekend bail court in Newmarket. Jerry had been found lying in a ditch by the Great Canadian Superstore. He had been arrested for shoplifting and if he had nowhere to go, he was likely going to be held in the Central East Correctional Centre. Once again, he came to live with the Brownes.

[193] On August 19, 2010, Jerry met with Dr. Daiter, who was the Methadone clinic doctor in Newmarket, and told him that he had been "kicked out" of Porter Place and was living on the street. About two weeks later he was admitted to York Central Hospital. A Discharge Summary written by Dr. Zelina, a psychiatrist, noted that he was admitted on August 29, 2010 after he had overdosed by taking 70 tablets of Trazodone. He was discharged from the hospital on September 3, 2010 into the care of the Brownes.

Period Four: The Brownes' Last Stand (September 2010 to October 2012)

[194] Doug Browne read Jerry the riot act in terms of their expectations when he returned to the Brownes' home. Jerry had turned their lives upside down. But at least now they had the support of the RSWs. There was hope. It would not be long before they appreciated that their trials and tribulations were to continue virtually unabated.

[195] Following Jerry's return to the Browne household in September 2010, he was more closely supervised, being in the company of the Brownes or his RSW for most of the time.

[196] Jerry apparently obtained a part-time job in a restaurant. On September 30, 2010 he advised the Brownes that he was going to meet a girl at the restaurant where he worked. Instead, he went to Toronto. He met someone at Jane and Finch and somehow managed to get arrested for buying cocaine. He arrived home with a black eye.

[197] On October 23, 2010 the Brownes had to take Jerry to York Central Hospital again, this time because he was having hallucinations. He was hearing voices. He thought he could hear people talking outside of his bedroom window, plotting to come in and get him. He got a tape recorder and put it outside to try to record the voices. He tried to take pictures of "shadow people" with his cell phone.

[198] Jerry was held overnight at York Central for observation. He was prescribed an anti-psychotic medication.

[199] By the late fall of 2010, Jerry was on a variety of medications to try to control his behaviour. He was taking Methadone for his opiate addiction. He was taking Antibuse for his alcohol addiction. He was taking an anti-psychotic medication to control his hallucinations. He was taking sleeping pills.

[200] Jerry began to sleep a good part of the time. Doug Browne reported that Jerry was often just getting up when the rest of the family was returning home at the dinner hour. They would eat dinner and by 7:00 p.m. Jerry would be asking for his sleeping pill again. He'd go back to bed and then get up in the middle of the night to eat. His hygiene was deplorable; his room a mess. He had no genuine friends of his own. If he went out, it was with his RSW.

[201] Doug Browne controlled what little money Jerry had. He put Jerry on an allowance of $5 per day. That money would get Jerry a coffee and something from McDonalds. Jerry would rise in the morning and torment Doug for his money, asking him repeatedly for it. He would then go out for a few hours with his RSW. He'd return home, go to bed, get up near dinner, eat and go back to bed. He gained a substantial amount of weight.

[202] Janet Browne described the RSWs as "Godsends". She said they began to get Jerry out of the house for four to five hours per day, something he really needed. They took him to his medical appointments, freeing the Brownes up from that task. They took Jerry to the gym and got him active. Still, Jerry was not without his troubles.

[203] Jerry was unable to care for himself. He perseverated about things. On one occasion, he somehow lost the data on his cell phone. He was so disturbed about it that he attempted to kill himself. He took a bunch of pills. He left a note expressing that he was so upset about losing his contacts that he no longer wanted to live. It may very well be that this incident is one and the same as the admittance to York Central Hospital on August 29, 2010, but the record is not entirely clear.

[204] Natalie Zaraska continued to meet Jerry throughout the fall of 2010 and into the beginning of 2011. She typically met him outside of the Brownes' home. It was clear to her that the Brownes were really struggling with Jerry's behaviour. His insight and judgment were poor. He was having a hard time coping with life after the collision.

[205] Ms. Zaraska wrote a report to the SAB insurer, Zurich Insurance, in February 2011, in which she indicated that Jerry was continuing to struggle with the activities of daily living. He struggled with his daily routine, hygiene, making plans and carrying through on them. He had memory issues. He would make appointments and fail to attend them because he had forgotten about them. It appeared he was in a downward spiral.

[206] In September 2011, Ms. Zaraska performed standardized occupational therapy tests over the course of 2 days. She administered the independent living skills test which involves issues like managing money and health and safety. Jerry gave wrong answers to simple math. He made memory errors. He was unable to do a problem that involved paying bills. He incorrectly addressed an envelope. On the second day of testing she conducted a functional abilities assessment. Jerry struggled with the name and substance of a story. His memory was poor. His

ability to recall details was poor. At the same time, she observed that Jerry's living space was beyond messy. It was unkempt and very unhygienic. His basic self-care was lacking. His social adjustment was in the low range.

[207] At some point in 2011, the SAB funding for occupational therapy ran out and Ms. Zaraska's services were significantly cut back. By early 2012 Jerry was designated catastrophically impaired and his benefits were increased. Ms. Zaraska next had contact with Jerry in about February 2012. His substance abuse was now by and large under control. He had developed routines, with the assistance of his RSWs.

[208] The issues at the forefront of Jerry's care plan, by February 2012, included finding appropriate housing for him and getting him engaged in some volunteer work in the community. Both were significant undertakings.

[209] In the Spring of 2012 Jerry was deemed incapable of managing his own financial affairs and the Public Guardian and Trustee ("PGT") was appointed for that purpose.

Period Five: The Post-Browne Months (October 2012 to Present)

[210] Jerry continued seeing Dr. Voorneveld on a regular basis throughout the period he was living with the Brownes. Her services were paid for by the SAB insurer. Jerry was a burden on the Brownes that could not go on indefinitely. Jerry needed alternative accommodation. In mid-October 2012, a room for him was located at Bradford Manor. It was a supervised residence. There was a no alcohol or drugs policy. The doors were locked at 11:00 p.m. Jerry was under constant supervision. He signed in and out. They kept track of who he was with.

[211] It was hard for Jerry to leave the Brownes' home, but he adjusted reasonably well. Unfortunately, Bradford Manor was sold several months after Jerry moved in. All residents were required to relocate. After some intense searching by Jerry's occupational therapist, a spot was found for him in a residence in Newmarket. It was referred to throughout the trial as "Heidi's Place" because it has no official name. It is an unlicensed residence, run by a woman named "Heidi". Heidi is a personal support worker ("PSW") who worked at Bradford Manor. She opened her own residence after Bradford Manor closed. As at the date of the trial there were seven men living at Heidi's Place, all facing their own unique challenges.

Jerry's Description of His Current Circumstances

[212] Jerry has his own room at Heidi's Place, together with an ensuite bathroom. There is no mirror in the bathroom. He rises between 6:30 and 7:00 a.m. Heidi gives him his Methadone at 7:00 a.m. He watches television for about an hour then he eats breakfast, which is prepared by Heidi. After breakfast he has a shower. Sometimes Heidi has to remind him to have one. He then waits for his rehabilitation support worker ("RSW") to arrive. His RSW is James Arsenault.

James arrives around 9:30 a.m. and checks to make sure he has showered and put on clean clothes. Some days he is depressed and doesn't like to shower. James will ensure that he does.

[213] He and James will go to the bank. The PGT has put him on a budget of $10 per day. He has no bank card. He has to get his $10 from a teller. He also gets a cheque from the PGT once per month, made out to him and Heidi jointly, for $270. They go and cash it together and he buys four cartons of cigarettes. He keeps one and gives the other three to Heidi. She'll give him one carton per week.

[214] Jerry and James usually make plans a day ahead for what they will do the next day. Sometimes he has appointments to go to. Other times they'll just go out in the community, go bowling, or to the zoo or something like that.

[215] James brings him back to Heidi's at about 2:30 p.m. He has a nap until about 4:00 or 4:30, then gets up for dinner. He is in bed by about 8:00 p.m.

[216] Heidi hands out his medications, usually three times a day, and watches as he takes them. She does all his cooking and his laundry. She helps him clean his room once per week, usually Wednesdays, though James also assists him daily in making sure his room is tidy.

The Expert Evidence

[217] Jerry has seen a small army of health care practitioners. Some are treating practitioners, while others conducted consultations and assessments at the request of one or another of Jerry's counsel, the SAB insurer, or the defendants' counsel.

[218] Immediately following the collision he was conveyed to Soldiers' Memorial Hospital, then transferred to Sunnybrook Health Sciences for trauma care and, ultimately, surgery. After being released from Sunnybrook he went to stay with the Brownes. He saw a family physician, Dr. Roger Sen, in Richmond Hill, for ongoing care. On January 26, 2009, Dr. Sen completed a Disability Certificate in which he listed numerous post-accident diagnoses, including a closed head injury, acquired brain injury, facial fractures, a nasal fracture with prosthesis, right ankle fracture, right toe fractures, a cervical spine fracture and soft tissue injuries. Jerry was considered, in Dr. Sen's view, to be completely unable to carry on a normal life, due to his physical injuries and related pain, as well as difficulties with fatigue, exhaustion, and cognitive problems due to a brain injury.

[219] Indeed, Jerry's impairments can be separated into two broad categories: physical and psychological.

Physical Injuries

[220] There is little disagreement about the physical injuries Jerry suffered in the collision. They are well documented by the trauma team at Sunnybrook. There is, not uncommonly, some debate among the consulting orthopaedic surgeons, about the impact of those physical injuries as

well as Jerry's prognosis. That said, Jerry's physical injuries are not driving this litigation, so I will only briefly review the medical evidence adduced at trial regarding those injuries.

[221] In a report dated March 25, 2009, Dr. Joseph Schatzker, an orthopaedic surgeon at Sunnybrook Hospital and a consulting physician for Multidisciplinary Assessment Centre ("MDAC"), opined that Jerry's only ongoing impairment for which there was any objective support was pain and inability to walk on his tiptoes. He did not believe that Jerry had suffered a complete inability to carry on a normal life, nor even a substantial inability to perform his pre-accident housekeeping chores. I note that Dr. Schatzker assessed Jerry on just one occasion less than one year post-accident by way of an examination required by the SAB insurer.

[222] Jerry's counsel referred him to Dr. Ken Fern, an orthopaedic surgeon practicing at Lakeridge Hospital in Durham, for an independent assessment. Dr. Fern has rendered several reports, dated August 5, 2009, April 8, 2010, July 5, 2011 and January 8, 2013. He assessed Jerry on three separate occasions, in August 2009, July 2011 and January 2013. His opinion as to Jerry's injuries and their impact on his life is substantially different than Dr. Schatzker's.

[223] In his initial report, Dr. Fern expressed the following conclusions:

(a) Jerry's facial smash injury has resulted in a permanent and significant facial disfigurement;

(b) Jerry has chronic pain in his neck, back and right foot and has developed a chronic pain syndrome;

(c) Jerry will have ongoing problems with activities that involve repetitive bending, lifting and twisting of his lower back and neck. He will have difficulty with activities that require prolonged static postures and with activities that require significant prolonged weight-bearing;

(d) The cumulative effect of his orthopaedic and spinal injuries significantly impact on his ability to carry on the activities of daily living, to participate in recreational activities and to fulfill his vocational requirements to the fullest. Indeed, Jerry suffered a complete inability to carry on a normal life;

(e) The overall prognosis is extremely guarded; and,

(f) The physical injuries are causally connected to the collision on June 13, 2008.

[224] In July 2011, Dr. Fern expressed a similar opinion. He went on to indicate that, in his view, Jerry's physical injuries were likely catastrophic in nature. He considered Jerry's impairments with respect to his neck, upper and lower back, right foot and face to be significant and permanent.

[225] Dr. Fern maintained the same views in his final report, authored in January 2013. He noted that Jerry had almost certainly achieved maximum medical recovery and that he had developed a chronic pain disorder and chronic pain syndrome with respect to all areas of injury.

His long term prognosis was said to be "extremely dismal". His impairments are likely catastrophic in nature and Jerry is, in his opinion, extremely unlikely to ever return to gainful employment. His physical impairments have resulted in a substantial inability to return to a normal life.

[226] Jerry described the effects of his physical injuries during his testimony at trial. He said the pain in his neck has improved a little bit since the early days after the accident. Still, his neck bothers him when he looks up, down, left or right. It causes him to have headaches. At night, when he moves around, he has trouble getting comfortable.

[227] His back is also sore. It clicks and cracks. He has poor posture. He can't sit or stand up straight. He has trouble bending down and picking things up. He has trouble twisting left or right. Running is out of the question and he has trouble with long periods of walking. His foot really bothers him. He can walk for about a half mile before it hurts. He has to walk on the ball of his foot.

[228] Bicycling, something he used to love to do, is now difficult. He said he used to be able to ride for almost thirty miles. Now he can go a mile.

[229] Frankly, little trial time was consumed on Jerry's physical injuries. Jerry's psychological injuries are where the real dispute is found in this case. The extent of those injuries and their cause(s) are very contentious issues. I turn then to a review of the post-accident expert evidence regarding the psychological impact of the collision.

Psychological Injuries

[230] Recall that the ambulance call report prepared by EMS responders to the collision noted that Jerry presented with a GSC of 14 out of 15. The emergency records of Soldiers' Memorial Hospital dated June 14, 2008 record a GSC of 15. A neurotrauma clinic report of Dr. T. Shahi, dated July 14, 2008 reflects a normal neurological examination.

[231] An occupational therapist, N. Tamir, conducted an in-home functional assessment of Jerry in November 2008. He noted that Jerry reported difficulties remembering, concentrating and organizing his activities. He was having nightmares and flashbacks about the accident. He was feeling depressed and anxious and had frequent spells of anger. On testing, he exhibited difficulties with attention and concentration. He had significant ongoing problems with memory. He had difficulty completing a sequence, copying a cube and drawing a clock. He was having difficulty initiating, following through and organizing.

[232] A psychiatric evaluation of Jerry took place in March 2009, apparently as part of a multidisciplinary assessment concerning the level of non-earner, attendant care and housekeeping benefits to be provided by the SAB insurer. This evaluation was undertaken in accordance with the provisions of s. 42 of the *Statutory Accident Benefit Schedule*. Although it was not entirely made clear, it appears that Dr. Schatzker's orthopaedic examination was a part of the multidisciplinary assessment as well. In any event, the psychiatric evaluation was undertaking by Dr. S. Shapiro.

[233] Dr. Shapiro found Jerry to be fully alert, attentive and focused on the assessment. His memory, recent remote memory recall, concentration and attention were not impaired, though it is significant to note that no formal testing of these functions was conducted. He diagnosed Jerry with an Adjustment Disorder with mixed depression and anxious mood of a mild to moderate degree.

[234] In the Spring of 2010 Jerry was referred by his family physician to Dr. Peggy Voorneveld, a psychologist practicing in Newmarket, Ontario. Jerry has continued to see her on a regular basis since that time. Dr. Voorneveld testified at trial and her clinical notes and records were filed as a trial exhibit. I found her evidence to be of particular significance since she has been a treating psychologist for Jerry for three years. Her length of involvement with him attracts particular significance in this case because of the complexity and layered nature of Jerry's psychological problems. I attach a good deal of weight to her findings and opinions.

[235] In addition to Dr. Voorneveld's ongoing care, Jerry was assessed by a neuro-psychiatrist, Dr. Robert van Reekum, at the request of his own counsel. At the defendants' request, he consulted with Dr. Duncan, a psychologist who performed a neuro-psychological assessment, and Dr. Lawrie Reznek, a staff psychiatrist at Sunnybrook Hospital. In addition, at the request of the SAB insurer, he was examined twice by Dr. William Gnam, a psychiatrist who works in the Psychological Trauma Program at the Centre for Addiction and Mental Health in Toronto. The examinations with Dr. Gnam were conducted as part of an assessment to determine if Jerry was catastrophically impaired. The significance of being designated catastrophically impaired was that substantially greater accident benefits became available for rehabilitation and attendant care expenses.

[236] I will review the substance of the opinions of the mental health professionals who have dealt with Jerry, beginning with Dr. Voorneveld.

[237] Dr. Voorneveld was, on consent, certified as an expert in clinical, neuro and rehabilitative psychology. She described her therapeutic approach, which emphasizes treatment. She begins with an intake interview. It appears, in Jerry's case, that the intake interview took place, in the presence of Doug and Janet Browne, on April 12, 2010.

[238] Assuming sufficient funding is available, she will retain an occupational therapist to conduct a functionality assessment. She wants to know about the patient's ability to function on a day-to-day basis. She considers the person's needs in terms of functionality, safety and attendant care. In this case, she engaged Natalie Zaraska to provide occupational therapy assistance. I have reviewed much of Ms. Zaraska's evidence in my summary regarding Jerry's circumstances from the latter half of 2010 to the present.

[239] Dr. Voorneveld's immediate concern with Jerry was his lack of control over his behaviour. The Brownes were struggling with him. He had ongoing problems with memory, attention and concentration. The Brownes had to constantly prompt and remind him of things as simple as his basic hygiene on a daily basis. There were concerns about his judgment and decision-making and he required constant supervision. He had been abusing alcohol. Jerry's behaviour was causing anxiety and stress in the Brownes' home.

[240] On May 7, 2010, Dr. Voorneveld wrote to Albert Cara, an adjuster at Zurich Insurance, and provided her preliminary opinion regarding Jerry's issues and her proposal for treatment. She advised Mr. Cara that her overall impression was that Jerry had a frontotemporal lobe impairment. She recommended ongoing psychological intervention as well as the services of an RSW to assist him in his supervision and reactivation in the community. She recommended to Jerry that he consider taking Antibuse to help him in his struggle with alcohol addiction.

[241] Jerry began taking Antibuse later in May 2010, but he continued to try to drink, which made him ill. He continued to cause difficulties in the Browne home and was, as I indicated, asked to leave in early June 2010.

[242] The occupational therapist and RSWs came on board in June 2010. Jerry initially was uncooperative with the RSWs. He was continuing to inhale aerosol cans to get high. He disappeared in mid-July 2010 and was found tenting in Toronto, where he was arrested for shoplifting and using inhalants.

[243] Dr. Voorneveld wrote a second report to Mr. Cara on August 23, 2010. She documented Jerry's continued struggles and sought approval for a residential treatment program for him for substance abuse. She suggested Homewood, but ultimately no such residential program could be arranged for him.

[244] On November 15, 2010, Dr. Voorneveld submitted a request to Zurich Insurance for a designation that Jerry was catastrophically impaired, based largely on his significant behavioural disturbance secondary to the motor vehicle collision. Her impression was that he was exhibiting marked impairment in virtually all areas of his life.

[245] A further update to Mr. Cara was provided by report of January 15, 2011. Dr. Voorneveld indicated at that time that Jerry was continuing to struggle with ongoing issues arising from the collision, including brain injury sequelae, facial scarring, adjustment issues, and ongoing post-traumatic stress symptoms. She noted that the occupational therapist, Ms. Zaraska, indicated that Jerry required 24 hour attendant care given the nature of his brain injury, his impulsivity, poor judgment, vulnerability to others, and ongoing addiction issues.

[246] Dr. Voorneveld has consistently expressed the view that Jerry suffered a mild traumatic brain injury ("mtbi") and she views many of his psychological and cognitive problems as the sequelae of that mtbi. On December 18, 2010 and January 30, 2011 she conducted a neuropsychological assessment, the results of which are contained in her report to Mr. Cara dated July 21, 2011. Her preference would have been to conduct the examination earlier, but she needed to wait for Jerry to be in a more stable condition. The assessment involved the administration of an extensive battery of tests. Jerry required encouragement throughout the testing and he worked slowly. He required a second day to complete testing.

[247] Dr. Voorneveld found that Jerry exhibited good engagement during the testing process. His general learning ability fell in the upper end of the extremely low range (68th percentile), with performance in the low average range on measures of perceptual organization and processing speed (83rd and 82nd percentile respectively). He performed in the extremely low

range on measure of verbal comprehension and working memory (1st percentile). He exhibited impairment on measure of confrontational naming, psychomotor speed, attention and concentration and verbal learning and memory. Sensory perception and motor functioning were within normal limits and he exhibited strengths in word generativity, colour naming and word reading.

[248] Overall, Dr. Voorneveld concluded that the neuropsychological assessment revealed impairments in keeping with a traumatic brain injury, with prior issues of ADHD and substance abuse. The usefulness of neuropsychological testing is, she conceded, a matter of some debate. The testing results must be supplemented by behavioural observations. In this instance, she noted that the test results are supplemented by behaviours characterized by impulsivity, an inability to delay gratification, poor judgment and decision-making, and an inability to self-monitor his behaviour. She diagnosed Jerry with evidence of a post-traumatic stress disorder, cognitive disorder associated with an mtbi, ADHD, and features of a chronic pain disorder.

[249] A critical question in this case is causation. Given Jerry's pre-accident history, to what extent are his present psychological difficulties, as identified by Dr. Voorneveld, related to the collision with Sgt. Moore? Dr. Voorneveld expressed her opinion in the following language: "While Mr. Pelletier clearly exhibited pre-morbid issues prior to the subject accident, this has only made him more vulnerable to the effects of his subject accident."

[250] Before 2011 came to a close, Jerry's counsel referred him to another psychologist, Dr. Shulamit Mor, this time for a comprehensive vocational assessment. Dr. Mor described the purpose of the assessment as "to determine if [Jerry] suffers from any ongoing psychological injuries or impairments of function as related to the…accident."

[251] Dr. Mor prepared a detailed report of his findings, much of which related to a history provided by Jerry, self-reporting of symptoms by Jerry, and a review of Jerry's damages brief. Dr. Mor ultimately expressed the following opinions:

(a) He diagnosed Jerry as having a chronic pain disorder, features of a post-traumatic stress disorder, substance dependence and general anxiety disorder;

(b) Jerry sustained serious physical and psychological injuries including a traumatic brain injury as a result of the collision with Sgt. Moore;

(c) Jerry's pre-accident substance abuse may have predisposed him to post-accident vulnerability for psychological problems and substance abuse, though even individuals with a more benign background would have been severely traumatized by the collision;

(d) From a psychological perspective, Jerry suffers from a complete inability to carry on a normal life;

(e) Jerry's learning potential was poor: grade 7.5 in reading pronunciation, grade 5.8 in vocabulary, grade 5.5 in spelling and grade 2.9 in arithmetic;

(f) Jerry is a person of modest intellectual ability with a longstanding history of significant learning problems. He has weak literacy and numeracy skills which are unlikely to improve significantly even with intensive attempts at upgrading. His limited skillset means that his employability was dependent on his physical abilities. Those abilities are significantly compromised. He is effectively not competitively employable. From a vocational perspective, he is completely disabled; and,

(g) Not only is Jerry completely disabled from a psychological and vocational perspective, but he is completely disabled from living independently and without supervision due to the sequelae of his brain injury.

[252] By the end of 2011, Jerry had not yet been designated catastrophic. Due to funding issues, the occupational therapist had to be significantly cut back. Dr. Voorneveld wrote Mr. Cara again in December 2011 to urge him to designate Jerry as catastrophically impaired. That designation was made in early 2012.

[253] In the context of the claim for a catastrophic designation, the SAB insurer sent Jerry for an evaluation by a psychiatrist, Dr. William Gnam. Dr. Gnam is also associated with MDAC. He assessed Jerry on two occasions: November 22, 2011 and January 22, 2013. His findings support the opinions expressed by Dr. Voorneveld in many respects and were, in my view, instrumental in the designation of Jerry as catastrophically impaired.

[254] Dr. Gnam's first examination consisted of the preparation by Jerry of an intake questionnaire, as well as a review of file documentation and an examination of Jerry that took just over two hours.

[255] Dr. Gnam formed the opinion, expressed in his report of January 20, 2012, that there is no convincing evidence that Jerry's current psychological, emotional, cognitive and behavioural problems are directly attributable to an mtbi. He did not rule out the possibility of an mtbi but his view was that Jerry's cognitive problems are more likely explained by a pre-existing attention deficit disorder ("ADHD") and by the effects of pain, sleep impairment, anxiety and the side-effects of medications he takes.

[256] Dr. Gnam diagnosed Jerry as having post-traumatic stress symptoms, a Cognitive Disorder Not Otherwise Specified ("NOS"), ADHD, an Anxiety Disorder NOS (with features of post-traumatic stress disorder ("PTSD")), Major Depressive Disorder, in partial remission, a Pain Disorder Associated with both Psychological Factors and a General Medical Condition, Opioid Dependence, and Alcohol Dependence, in full remission.

[257] Dr. Gnam also opined about the matter of causation. He began with the following observations about Jerry's pre-accident status:

> Mr. Pelletier's history in adolescence and early adulthood strongly suggests several significant dysfunctional personality characteristics (including impulsivity, suicidal behaviours, difficulty controlling anger, affective instability, and deficits in independence) that warrant the

> additional DSM-IV diagnosis of Personality Disorder Not Otherwise Specified (with borderline and dependent personality features). These characteristics are important to recognize because in my opinion they predisposed Mr. Pelletier to utilize substance abuse as a (maladaptive) method of affect regulation and coping.

[258] During cross-examination at trial, Dr. Gnam expressed a sentiment that I, as the trier of fact, had been harbouring for some time: Jerry's diagnoses are of the most complicated nature. Jerry had a complex and significant pre-accident history of dysfunctional personality characteristics, mental disorders and substance dependency. He had a history of depression with several suicide attempts. It is not so simple as saying that Jerry had problems before the accident that were made worse by it. While Dr. Gnam thought that statement to be true to a point, there were diagnoses that he said were related solely to the accident. There is evidence, he said, of a worsening of all of Jerry's conditions, plus additional problems in functionality. For instance, entirely attributable to the collision are:

(a) Accident-specific post-traumatic symptoms that have attenuated over time but not remitted;

(b) Intrusive chronic pain that contributes to a sleep impairment, which in turn causes further impairment to task persistence and attention;

(c) A facial disfigurement that creates persistent psychological stress; and,

(d) Significant decrements to Jerry's ability to independently manage the activities of daily living and in social and vocational functioning.

[259] In his report of January 20, 2012, Dr. Gnam expressed the opinion that the collision with Sgt. Moore's cruiser made a material contribution to Jerry's Cognitive Disorder NOS, Pain Disorder, Major Depressive Disorder, and Anxiety Disorder NOS, and associated mental impairments. On the other hand, he said Jerry's Opioid Dependence and ADHD pre-dated the accident and, in his view, those disorders were not materially affected by the collision. Having said that, in cross-examination, he conceded that Jerry is at a greater risk post-accident than he was pre-accident for relapse in terms of substance abuse. Pre-accident he was at risk for periodic relapse. Now he is at high risk most of the time.

[260] At the request of Jerry's counsel, Jerry was assessed by Dr. Robert van Reekum on September 8, 2011. Dr. van Reekum was qualified, on consent, as an expert witness in neuro-psychiatry with a specialization in acquired brain injuries.

[261] Dr. van Reekum took a history from Jerry, conducted an assessment, then reviewed the records in his medical brief. He concluded, as everyone has, that Jerry had a troubled life prior to the collision. He thought Jerry may have neuro-developmental delays. He was the product of a teen pregnancy. He was exposed to sexual abuse after being placed in a foster home. He may have suffered from depression, as well as other disorders like dysthemia (low grade depression), and personality disorders. He suffered from drug abuse with at least two cases of overdose with cerebral toxicity. He had a learning disability and/or ADHD.

[262] Jerry's pre-accident circumstances left him vulnerable, in a "thin skull" sense, to future disorders including mood, substance, personality, and cognitive disorders.

[263] From a physical point of view, Dr. van Reekum concluded that Jerry had been subject to forces in the collision that put him at risk of suffering a traumatic brain injury. He said exposure to such a risk is an important, but not conclusive, element of a diagnosis of traumatic brain injury. It is also necessary to look at clinical signs in the hours and days post-collision. In Jerry's case, his symptoms were all non-specific, which means they could be related to an mtbi or to something else. But in his view, there were enough signs present here to assess it as probable that Jerry suffered an mtbi. Having said that, a conclusive determination can only be made after autopsy. In the meantime, Jerry's psychological sequelae may have occurred independent of an mtbi. An mtbi provides one possible explanation for the impairments Jerry has, but it is not the only pathway.

[264] Dr. van Reekum expressed the opinion that it is probable that the collision has made a material contribution to the following:

(a) Chronic pain, probably due to his physical injury and various psychological functions;

(b) Facial disfigurements;

(c) Sleep disturbances, which in turn creates a risk for depression and other mood disorders;

(d) Anergia which is a lack of adequate energy and a common outcome following injury to the brain;

(e) Chronic major depression, which he was not being treated for. His differential diagnosis would include a chronic adjustment disorder. Jerry had suicide attempts in the past that made him at risk for suicide in the future. He can't be certain about a diagnosis of depression in the context of substance abuse because the two have similar characteristics, so it's impossible to say whether he'd had depression in the past;

(f) PTSD and anxiety;

(g) Difficulties in interest and motivation;

(h) Apathy Syndrome. He thought Jerry was at risk for apathy for a lot of accident-related reasons, including chronic pain, sleep problems, major depression, and losses;

(i) Impulsivity. Jerry is at high risk for impulsive behaviour, partly because of his pre-accident history. He is at risk of being more impulsive afterwards;

(j) Cognitive difficulties. Jerry exhibited these in the interview. He did not do formal testing for this himself, but by November 2008, he had been diagnosed with cognitive impairments through testing. He did not get the neuro-psychological report that had been done by Dr. Voorneveld. Chronic pain, sleep disorder, anxiety, mtbi, depression, all place Jerry at risk for cognitive impairments on a number of levels. He recommended further testing be done; and,

(k) Weight gain. Jerry apparently gained seventy pounds. He appeared to be mildly overweight. Jerry reported eating to excess, which is associated with depression and he was also less active than he had been pre-collision.

[265] Dr. van Reekum concurred with others that Jerry's situation is extremely complicated. The sequaelae Jerry was and is experiencing would likely significantly impair his ability to carry on a normal life, by the standards that most of us would apply to "normal". But of course Jerry's "normal life" had been highly variable over time and what was normal for Jerry is hard to assess.

[266] During cross-examination, Dr. van Reekum was asked his opinion about the two known instances of drug overdoses pre-collision. He expressed real concern about the level of drug toxicity Jerry experienced. In the first overdose, in July 2006, the ambulance report noted Jerry's GSC as four out of fifteen. This is an extremely troubling number because three is the lowest a human being can go before brain death. Jerry was profoundly unconscious. His GSC later increased to seven or eight out of fifteen, but even that is very troubling. The level of toxicity experienced by Jerry certainly creates a risk of long term brain damage. In Dr. van Reekum's view, Jerry's post-collision impairments do not have their genesis in the suicide attempt(s) because there is evidence that Jerry was doing better by the time of the collision. He had been attending school, working part-time and had gotten himself on a Methadone program.

[267] Long term opiate use could also cause cognitive dysfunction, though the current research is not conclusive. Jerry continues to take Methadone and, as such continues to take opiates, which may also contribute to dysfunction.

[268] Again, during cross-examination, Dr. van Reekum conceded that Jerry had many impairments that predated the collision. His chaotic home life, including prolonged sexual abuse, put him at risk of emotional turmoil in his life, substance abuse, difficulty in personal relationships, difficulty with academic success, and maintaining a job. Jerry had difficulties with all of these things before the accident. Dr. van Reekum expressed the view that the collision aggravated Jerry's risk for some of the pre-existing issues, but also created new ones.

[269] At the request of the defence, Jerry was assessed by two mental health professionals. Dr. David Duncan, who I qualified as an expert in neuropsychology, conducted a neuropsychological assessment of Jerry over three days in February 2013. Dr. Lawrie Reznek, who I qualified as an expert in psychiatry and competent to give evidence regarding mtbi and resulting sequelae, as well as the impact of child sexual abuse, saw Jerry on March 4, 2013.

[270] Dr. Duncan testified at trial. He said that on the first day that Jerry attended at his office, he completed a questionnaire and personality inventory. On the second and third days, he

completed a battery of tests. The tests administered by Dr. Duncan were similar, though not identical, to those administered by Dr. Voorneveld, during her neuropsychological assessment of Jerry.

[271] During the initial interview Jerry displayed a normal range of affect. He spoke quickly but was not tangential. He was not fidgety or distracted. He was able to follow the questions and remember them. He did appear fidgety and restless, however, when completing the written tests.

[272] Some of Jerry's test results suggested that he may not have been putting in a full effort. Questions must therefore be asked about the validity of his test results. Poor results may not, in the circumstances, reflect cognitive dysfunction. Instead they may reflect poor effort. For instance, on the full-scale IQ test administered, he scored in the lowest two to eight percent of the population. This is a lower IQ score than he achieved in testing in school in 1994 and in the neuropsychological examination conducted by Dr. Voorneveld in 2011. The results were consistent between 1994 and 2011, so the question arises as to why his IQ fell significantly between 2011 and 2013.

[273] On the other hand, Jerry performed well on processing speed, problem solving, and executive functions. These functions were still at the levels of his pre-accident findings, according to the file review Dr. Duncan performed.

[274] Dr. Duncan summarized his findings as follows:

(a) Acute injury characteristics indicated that Jerry sustained an uncomplicated mtbi;

(b) Most likely, the mtbi was followed by a favourable course of recovery with no ongoing symptoms beyond three months;

(c) He could not find objective evidence that Jerry was experiencing significant, persistent cognitive impairment that would affect his activities of daily living; and,

(d) It would be extremely unlikely more than two years after an accident that the sequelae of an mtbi would be having a significant impact on Jerry's day-to-day functioning. This view reflects the research that indicates that the vast majority of people who suffer mild traumatic brain injuries recover completely within several months. Dr. van Reekum said that while the majority of people suffering an mtbi do fully recover, ten to thirty-five percent report ongoing symptoms. Dr. Duncan expressed the opinion that the notion that up to twenty percent of people do not fully recover from mtbi is based on some questionable studies and reflects, to a great degree, self-reporting, as opposed to objective confirmation.

[275] Under cross-examination, Dr. Duncan agreed that test results do not tell the whole story and that the more information one can gather about the patient the better. In this case, his secondary information came from a file review. He did not speak with the Brownes or with James Arsenault. Unlike many other test subjects, Jerry came to them with a substantial amount of background material, which he was satisfied with.

[276] Ultimately he came to the conclusion that all observations of significant cognitive dysfunction began at some time considerably *after* the collision. That said, he ended his cross-examination with the concession that there may be significant and relevant psychological issues that are affecting Jerry, but he was asked only to assess whether there was a brain injury that is affecting cognitive functioning.

[277] Dr. Lawrie Reznek met with Jerry in March 2013. He conducted an intake interview. He observed Jerry's appearance, grooming and demeanour. He administered some cognitive tests and in addition tested for malingering, which he defined as the conscious exaggeration of symptoms for external gain. He tested Jerry for malingering for two important reasons: (1) because many psychiatric diagnoses require testing for whether there is a conscious exaggeration of symptoms, and (2) there is an additional obligation in medico-legal cases because in such cases there is an obvious incentive to exaggerate one's symptoms.

[278] Dr. Reznek considers malingering as a spectrum. In his view, Jerry was not a complete fraud, but he thought that there was some amplification of symptoms. One of the tests he administered and on which he relied to form his opinion about malingering is called the SIMS test. It is a seventy-five question test that he believes carries a great deal of validity. Dr. van Reekum disagreed with the validity and/or usefulness of that test.

[279] Like others, Dr. Reznek considers Jerry's case to be a complicated one to parcel out pre-collision issues from post-collision ones. His view was that Jerry had similar problems after the collision to the ones he had before: depression, post-traumatic stress symptoms, memory problems, and substance abuse. There has been some exacerbation of those symptoms after the accident, but it is hard to know how much, particularly in view of his concerns about symptom exaggeration. He believes, for instance, that Jerry has a pain disorder, but that he exaggerates it for gain in the lawsuit. He agreed, in cross-examination, that Jerry's pre-accident symptoms made him more vulnerable to the effects of the accident.

[280] Dr. Reznek also pointed to Jerry's childhood sexual abuse as a significant contributing factor in his pre- and post-accident dysfunction. Jerry's case is consistent with the research literature that correlates childhood sexual abuse with a variety of adult psychiatric disorders including depression, post-traumatic stress symptoms, substance abuse, and somatoform pain disorders.

[281] He further opined that while Jerry likely suffered an mtbi, it is not the cause of any current cognitive impairments.

[282] Finally, he suggested that Jerry is just the kind of person who would readily become dependent on help if it was provided to him.

Conclusions regarding Causation

[283] Listening to the evidence of the many experts who testified in this case, I was left with the very strong impression that each of us is equipped with an emotional immune system, the vitality and efficacy of which varies across individuals. Like a physical immune system, one's emotional immune system - and the coping mechanisms associated with it - may be healthy and

strong or may be compromised, depending on a combination of one's genetics and life experiences. How one copes with the day-to-day struggles of life, and, more significantly, unexpected traumas, depends in large part on the health of one's emotional immune system.

[284] Pedalling across Gill Street just before 11:30 p.m. on June 13, 2008, Jerry Pelletier was very much an emotionally compromised and vulnerable person. His emotional immune system was weak. He was an emotional "thin skull".

[285] There is a well-established principle in tort law that a tortfeaser must take his or her victim as found. The principle is known as the "thin skull rule". In terms of damages, the rule renders a tortfeaser liable for a plaintiff's injuries even if they are unexpectedly severe due to a pre-existing condition: see *Athey v. Leonati,* [1996] 3 S.C.R. 458 at page 473.

[286] Most often, the thin skull rule is engaged by a pre-existing physical condition, but it is not limited to physical ailments. It certainly applies where, as here, the plaintiff's pre-existing condition was one of psychological frailty.

[287] There were at least two observations that were made consistently by the experts who testified and with which I am in complete agreement:

(a) Jerry's situation is extremely complex; and,

(b) Jerry had impairments before the collision and he had impairments after the collision. Some of the impairments after the collision were more or less the same as the ones before the collision, others were of the same character but exacerbated by the collision, and still others were new impairments.

[288] Jerry's circumstances before June 13, 2008 were really quite tragic. Born to a thirteen year old, he spent his formative years bounced from home to home. He was clearly the poorer for it. He felt abandoned by his mother. He never had a chance to form a secure and lasting bond with a primary caregiver. Nana Slater's preliminary advice to the Brownes not to show Jerry any affection was Dickensian in its bleakness. It underscores the lack of emotional security in Jerry's life during his childhood. His already insecure home life was made immeasurably worse by the prolonged sexual abuse he endured.

[289] Augmenting Jerry's unfortunate life experiences were genetic handicaps that included low intellectual ability coupled with ADHD. Nature and nurture conspired against him. Jerry was simply ill-equipped to cope with the stresses in his life.

[290] One area of consensus among the participants in this trial is the admiration and respect all of us have for the Browne family and the Herculean efforts they have made over the years to support Jerry. But there was only so much that they could do. When Jerry removed himself from their care in his early teens to be with his mother in Midland, he gave up the only real security net he'd ever had. It is not surprising that he first turned to drugs when he was in Midland.

[291] Over the years substance abuse became more prevalent in Jerry's life as a maladaptive coping mechanism. His learning disability and poor school performance left him with few, if any, marketable skills. His personal history and the effects of years of abuse left him vulnerable to others, easily led, with difficulty forming and maintaining meaningful relationships. Anxiety and depression became constant companions. Suicide attempts were unsurprising. Without a support network, or the inherent means to cope with the stressors in his life, he became a very active substance abuser.

[292] Officer Moore did not strike Lou Gehrig, or any other model of resilience and durability. He struck Jerry Pelletier. Jerry was far from the luckiest man on the face of the earth. Nor was he just about to turn his life around, as suggested, unenthusiastically, by his counsel. He was in bad shape and the collision and its aftermath were just too much for him to cope with.

[293] Most of Jerry's physical injuries are readily connected, causally, to the accident. The test to establish causality is a common sense one. The Supreme Court set it out in two simple sentences in *Athey v. Leonati*, as above, at para's. 13 and 14,

> Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: Snell v. Farrell, [1990] 2 S.C.R. 311; McGhee v. National Coal Board, [1972] 3 All E.R. 1008 (H.L.).
>
> The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: Horsley v. MacLaren, [1972] S.C.R. 441.

[294] Jerry's sunken face and smashed nose, the deep laceration to his forehead and the lasting scar, the broken bones in his hand and foot and the spinous process fractures were all clearly caused by the collision with Sgt. Moore's cruiser. Less obvious is whether Jerry suffered an mtbi. I find that he did. The weight of expert evidence does support this finding. Dr. Voorneveld, his treating psychologist, who has unarguably had substantially more professional involvement with him than anyone else, is firmly of the view that he suffered a frontal lobe injury. She has conducted a neuropsychological examination, which is part of her specialty, has observed and assessed Jerry over scores of sessions and has met and consulted with numerous collateral sources. She is in the best position of any of the expert witnesses to opine about an acquired brain injury. I have no reasonable basis on which to reject her evidence and in fact I wholly accept it.

[295] It is true that there was no evidence of a brain injury on the CT scan Jerry had while at Sunnybrook immediately after the collision. But that is not surprising, according to Dr. van Reekum, nor definitive. In addition to Dr. Voorneveld, Dr. Mor, Dr. van Reekum, Dr. Duncan and Dr. Reznek all concluded that it was probable that Jerry suffered an mtbi in the collision. Dr. Gnam did not rule it out.

[296] Dr. Voorneveld gave the strongest evidence in support of a finding that the mtbi had not resolved and was a contributing cause to a number of Jerry's current functional disabilities. Dr. Duncan and Dr. Reznek were both of the view that, statistically at least, it is highly likely that the mtbi resolved within a few months post-accident. Dr. Reznek, Dr. van Reekum and Dr. Gnam, all highly qualified psychiatrists, shared the opinion that Jerry's current impairments need not be explained by an mtbi. To be fair, Dr. Reznek's view was that Jerry's current impairments are more or less the same as his pre-accident impairments. There may be some worsening of symptoms, but it is hard to differentiate because of the presence of conscious symptom exaggeration (malingering).

[297] I do not find Jerry to be a malingerer. I found his testimony to have been given entirely without guile. I do agree with Dr. Reznek that Jerry is the type of person who will quickly become dependent on whatever supports are given to him. That is to be expected given his history, the lack of ongoing supports he has had in his life (other than the Brownes) and his severely compromised emotional immune system/coping mechanisms.

[298] The evidence of the Brownes was compelling. They just could not deal with all of Jerry's complex and difficult issues after the collision despite their best, combined and considerable efforts. There is no question in my mind that Jerry was suffering from very debilitating impairments following the collision and he continues to so suffer. If there has been any symptom exaggeration it is immaterial in my view.

[299] There was considerable consensus among the mental health experts who testified, and I find and accept, that Jerry has the following impairments following the collision, which were caused by the collision:

(a) Chronic Pain Syndrome. He has ongoing and chronic pain in his neck, back and foot that is significantly debilitating, particularly when combined with his other psychological problems. Jerry was not without back pain prior to the collision, but I find he exaggerated it prior to the collision in an effort to obtain prescriptions for opiates. To the extent that he had ongoing or chronic pain prior to the collision, it has been considerably exacerbated by the accident;

(b) Symptoms of PTSD, which include flashbacks, nightmares, anxiety and depression;

(c) Major Depression, which was certainly present prior to the collision, but which has worsened post-accident, particularly as a result of his facial scarring;

(d) A sleep disturbance, which may be connected to his depression, or his post-traumatic stress symptoms, or to the medications he has been taking following the collision. In any event, I find it is related to the collision and it exacerbates his deficiencies in memory, attention, concentration and initiation;

(e) Apathy; and,

(f) Cognitive Deficiencies, which I associate with an mtbi that has not resolved. I rely on Dr. Voorneveld's evidence in making that finding. Even if she and I are wrong

> about that diagnosis, it is clear, in my view, that Jerry suffers from cognitive impairments. If they are not the sequelae of an unresolved mtbi, then they are related, as Dr. van Reekum opined, to chronic pain, a sleep disorder, anxiety and depression, all of which are, in turn, related to the collision.

[300] Jerry continues to have ADHD, which affects his daily functioning, but in my view that has remained materially unchanged since before the collision. He also has a substance abuse issue, which was also present prior to the collision. I find that it is somewhat worsened since the collision. While Jerry's substance abuse is presently under control, I accept Dr. Gnam's view that the risk of relapse is materially greater post-collision than it previously was.

[301] Jerry is a different person after the accident than he was before it. No one could dispute that he was previously troubled, in fact very much so. But he was living independently. He was able to, on his own initiative, apply for and obtain social assistance, obtain periodic employment, enrol in and attend an educational program, and obtain assistance for his opiate addiction through a program of Methadone treatment. He managed his own funds, as limited as they may have been. He sourced out and obtained housing for himself. Though there was no evidence directly on point, he obviously was able to acquire other necessaries of life as well – food, clothing and ongoing health care. He was evidently resourceful enough to find a way, through crime or otherwise, to fuel his expensive drug habits. This is not to say, of course, that Jerry should ever be put back into the position where he is able to efficiently commit crimes and acquire illegal street drugs. I mention it strictly for comparative purposes in terms of his former level of functionality.

[302] The accident has caused a significant and lasting deterioration in his ability to function and to carry out the activities of daily living. It appears to me highly unlikely that Jerry could independently accomplish any of the tasks referred to in the previous paragraph in his present state. Again, I agree with Dr. Reznek that Jerry has readily become dependent on others to do things for him. But having said that, he was given every opportunity and encouragement by the Brownes to become self-reliant again after the collision and appears to have been almost completely unable to do so.

[303] At this point, I will turn to an assessment of damages to, insofar as is possible, restore Jerry to the position he was in prior to the collision.

QUANTIFICATION OF DAMAGES

[304] It is impossible, of course, to restore Jerry to the position he was in prior to the collision. No one would reasonably even strive to do so. The goal now must be twofold: (1) to compensate Jerry for the pain, suffering and loss of enjoyment of life that he has suffered, and (2) to provide for his additional medical/rehabilitation and attendant care needs necessitated by injuries sustained in the collision.

[305] One of the many complicating features of this case is that we have a very incomplete portrait of Jerry in the several years prior to the collision. It should be clear to the reader by this point that Jerry has been the subject of much poking, prodding and assessing in the last five

years. He had none of that in the period prior to the collision. One area of great contention, in terms of damages, is the value of attendant care Jerry requires in the future. A number of experts gave their opinions on this very topic during the trial and I will turn to those opinions momentarily. The plaintiff's argument is that attendant care is required for Jerry essentially to protect him from himself – from his impulsivity, his poor judgment and decision-making, his substance-abuse problems – and to assist him with reintegrating socially and with other basic aspects of daily living. As I will explain in a moment, I accept that Jerry requires attendant care, more or less on a full-time basis. But I wonder, as I expressed to counsel, what the small army of experts who have assessed Jerry would have described as his needs in the weeks and months leading up to the collision. At that time he was impulsive, had poor judgment, poor social skills, depression, substance abuse problems and had attempted suicide, according to him, at least three times. One might reasonably be forgiven for wondering whether attendant care, whether full or part-time, would have been recommended prior to the accident as well.

[306] While Jerry is not going to be restored to his original position, for obvious reasons, that position is of great importance in the assessment of damages. The defendants are not required to put Jerry into a position better than his original position.

[307] With these general comments in mind, I turn to an assessment of the various heads of damages advanced.

GENERAL DAMAGES

[308] The plaintiff seeks general damages assessed at the level of the "cap", which counsel advised is now $338,000. The defendants urge me to award significantly less, in the range of $200,000 to $250,000.

[309] In this instance, I favour the upper end of the defendants' suggested range. The cap level suggested by the plaintiff may well have been appropriate had Jerry come to the table without the host of impairments that he presented with at the time of the collision.

[310] Jerry's physical injuries are significant. He has chronic pain in his neck, back and foot. It impacts his ability to function on a daily basis. It affects his ability to ride a bike, which was not only something he enjoyed doing very much since he was a child, but which was also his primary means of conveyance. The scar on Jerry's face is of great significance to him for reasons I have expressed. It has had a devastating effect on him emotionally. The daily pain and the impact of the facial scar have contributed to Jerry's depression and substance abuse and, in turn, the breakdown of his relationship with the Brownes. While the physical injuries Jerry suffered are substantial, the psychological injuries are worse. Jerry was a man with a very compromised coping system. He had been teetering on the edge of functionality for several years. The accident pushed him over that edge. He was simply not emotionally equipped to contend with the pain, the anguish, the rehabilitation, the limitations and the disfigurement caused by the collision.

[311] While there is no doubt that Jerry's injuries – both physical and psychological – are substantial, it cannot be forgotten that Jerry was a levee with a lot of cracks before the accident.

[312] Taking into account Jerry's pre-existing impairments, which were many and profound, I value his general damages at $250,000.

ECONOMIC LOSSES

[313] I have divided the discussion about economic losses into two broad categories: income loss (both past and future) and future care costs. The assessment of the cost of future care is, in turn, broken down into a number of sub-categories, including attendant care, rehabilitation expenses, psychological services and case management. The costs of Jerry's care to the date of trial have been covered, for the most part, by the SAB insurer, though there remains an issue about whether the Brownes are entitled to be compensated for the value of the care they provided to Jerry after the collision. I will address the issue of the Brownes' compensation under the general heading of future care costs, even though this issue clearly relates to past care.

Loss of Income (Past and Future)

[314] Recall that Jerry had a poor earnings history. In the years 2003 to 2007 inclusive, he had total accumulated earnings from employment of less than $4,000. In 2003, his total earnings were $622 which he said could have been from the bakery in Bradford. In 2004, his total earnings were $3,282, topped up by $6,070 in social assistance benefits. In 2005 he earned no income. He lived on social assistance benefits that whole year. In 2006, he had total earnings of $130, topped up by social assistance benefits of $6,700. In 2007 and to the time of the accident in 2008 he had no earnings from employment and lived on social assistance benefits. Subsequent to the collision, Doug Browne helped Jerry get a job cleaning buses. In 2009 he improved his income to $5,772 which he received from CGS Tours.

[315] Even before the collision Jerry's vocational prospects were poor. He has a relatively low IQ. He has a learning disability. He struggles with ADHD. He has, at best, a grade 9 education. He has low self-esteem. He has few, if any, marketable skills beyond physical labour. He was limited in the physical labour he could perform because of pre-existing back pain. He has never had a driver's license.

[316] While Jerry had been enrolled at the Literacy Council, ostensibly with a view to upgrading his education, I have found that one significant motivation in doing so was to maintain his social assistance benefits. His attendance was not altogether consistent and he was no longer attending at all by the time of the collision. Cathy Graham testified that, in Jerry's circumstances, with all his grade nine credits and two grade ten credits, it would likely take him three and a half years to complete his upgrading at the Literacy Council and the Learning Centre to achieve his grade twelve equivalency, if he was motivated and conscientious. In my view, he was not sufficiently motivated and conscientious to complete his upgrading in that time frame. Moreover, that time frame assumes that Jerry would be in a position or condition to continue his attendance uninterrupted, which is overly optimistic considering the regular upheaval in Jerry's life prior to the collision. I am not persuaded that Jerry would even now have completed his grade twelve equivalency in absence of the collision.

[317] Going forward, I accept that there is no reasonable prospect that Jerry will ever be gainfully employed. The extent to which he would have worked and the income he likely would have made, had the collision not occurred, is difficult to determine. It is important to be clear about the burden of proof. For past lost income, the onus is on Jerry to satisfy the Court that it is likely that he would have earned a certain amount of income. Should he establish that loss, on a balance of probabilities, he is entitled to be awarded the loss so established. For future losses, Jerry need only satisfy the Court that there is a real and substantial possibility that the loss will be incurred in the future. This burden is something more than mere conjecture or speculation. If he meets the "real and substantial possibility" threshold, then the Court must assess the likelihood that a loss will be suffered and award damages according to that likelihood: see *Graham v. Rourke* (1990), 75 O.R (2d) 622, 74 D.L.R. (4th) 1, [1990] O.J. No. 2314, at para 40.

[318] Both sides presented evidence from economists regarding Jerry's past and future losses of income. I did not consider the expert opinions about the likelihood of Jerry's past and future earnings to be particularly helpful. My comment is not meant as a criticism, but merely an observation.

[319] For past loss of income – that is, the little more than five years since the collision – the best barometer for future earnings is, in my view, Jerry's past earnings. They were minimal in the five years pre-collision to say the least. That said, Jerry had demonstrated the motivation and initiative to get himself into the Methadone program and to stop using opiates. He was not so consistent in his efforts to cease using illicit drugs altogether, but he at least took a major step in the right direction. Moreover, he maintained his participation in the program for some months before the collision. He was motivated to improve his circumstances.

[320] I am satisfied that, on a balance of probabilities, Jerry would have slowly and gradually sought out and obtained remunerative employment. I do not believe he would have earned any significant income, but am prepared to assess his past loss at a rate of, on average, $3,000 per year, which is approximately what he earned in his best earning year in the five years immediately prior to the collision. By saying "on average" I mean to reflect that I expect Jerry would have continued to receive social assistance benefits for some time had the collision not occurred. I expect there would have been times he made greater than $3,000 per year, and other times when he would have been making less. Over the five and a quarter years since the collision, taking into account that a plaintiff injured in Ontario may not sue for past lost income during the first seven days post-accident, I assess the gross past lost income at $15,750. This income is so minimal that any source deductions from it would be negligible, so the award will not reflect any such deductions. Ontario law permits recovery of only eighty percent of past lost income. The net award is therefore $12,600.

[321] Future loss of income is a more difficult beast to tame.

[322] Jerry's counsel obtained a vocational assessment on February 12, 2013 from Reva Katz-Ulster, who operates a firm known as Vocational Rehabilitation Associates. Ms. Katz-Ulster opined about Jerry's pre-accident earning capacity. She began as follows,

> Prior to his accident, Mr. Pelletier dreamed of becoming an automotive mechanic. While he had spent a number of years upgrading his education towards this goal, and had been offered an apprenticeship at a garage, this was not a certain outcome for him.

[323] To suggest that Jerry dreamed of becoming a mechanic is an overstatement. Jerry testified at trial that he thought that if he went back to school he might become a chef. He also wanted to be a mechanic. I do not find that being a mechanic was his dream. Nor is there evidence that he spent a number of years upgrading his education with that goal in mind, nor is there evidence that he was offered an apprenticeship at a garage. Jerry testified that his step-father offered him a job in his garage if he got his mechanic's license.

[324] Ms. Katz-Ulster conceded that there was not a strong likelihood that Jerry would have been able to master the mathematics required to become a mechanic. More probably, she said, he would have ended up working as an "automotive servicer and installer", a job with a starting wage of $12 or $13 per hour.

[325] She went on to say that it is possible that Jerry would have pursued his "first love", which was cooking. Again, her language is unjustifiably romantic. Her suggestion that he likely would have earned $35,000 to $40,000 per year in that field is implausible, having regard to the numerous impediments in Jerry's life.

[326] Jerry had suffered extreme sexual abuse for many years. The effects of that abuse on his life were palpable. He had substance abuse problems and relationship problems. He had concentration difficulties and poor judgment as reflected in his school records and in the decisions he made in his life. Jerry was unable to appreciate when things were going well for him and he seems inevitably to have made decisions that resulted in self-sabotage. He left the Brownes' residence to be with his mother in Midland when he was fifteen, an understandable but catastrophically poor decision. He ended up back with the Brownes and got a good job at Amanda Graphics which he quit abruptly due to the influence of others. Doug Browne testified that Jerry "could not see that he had a career there". Still later, Doug got him a job at Jet Ice. He worked there for more than a year then quit for reasons that remain unclear. The poor decisions go on and on and there is no reason to believe that Jerry had somehow addressed the underlying problems that plagued him.

[327] Plaintiffs who are relatively down on their luck prior to an accident are often said to be just on the verge of turning their lives around. Jerry's counsel suggested as much about him. I do not accept that suggestion in this instance. The Methadone program was a positive step for Jerry, but other substance abuse continued. Jerry had in no way addressed the underlying issues that caused him so much difficulty in his life.

[328] The expert economists who testified spoke of "participation rates" to describe the likelihood that Jerry would not work on a full-time basis in the future – in other words that he was likely to be a person who was not always fully employed. They used statistics that compared Jerry's attributes to others in the general public.

[329] Dr. Eliakim Katz, called by the plaintiff, calculated Jerry's future income loss at $919,000. He based his calculations on a number of assumptions, which included:

(a) Jerry would not have worked for the first 18 months post-accident;

(b) After 18 months Jerry would have commenced employment as an auto mechanic, though he utilized Reva Katz-Ulster's report, so I believe he meant to say an "automotive mechanical servicer and installer";

(c) In 2010 Jerry would have earned $31,855 if he was working full-time and, again assuming full-time employment, he would have earned $32,556 in 2011. To arrive at these rates he looked at Statistics Canada data reflecting the average earnings of a garage helper with no high school diploma;

(d) He applied a fifty percent reduction for participation rates, given the expectation that Jerry would not work full-time throughout his career. This significant reduction includes an element for Jerry's individual issues relating to his troubled past;

(e) He calculated Jerry's loss over a career that would end at 65; and,

(f) He added 12.7 percent for benefits.

[330] During cross-examination, Dr. Katz opined that if Jerry worked at minimum wage jobs, with average participation to age sixty-five, his future income loss would be about $410,000.

[331] Dr. Douglas Hyatt was called to testify at trial as the defendants' expert economist. He said it was not possible for him to calculate a future income loss for Jerry because there wasn't a sufficient earnings history from which to make predictions about future earnings.

[332] To further complicate the calculation, there is evidence that Jerry's life expectancy is compromised given his serious pre-existing issues, which included depression, suicide attempts, substance abuse and smoking. Post-accident he has additional issues that exacerbate the problem, but my focus in calculating future income loss is on his life expectancy as at the date before the collision. The report of Dr. Lawrence Segal on mortality makes it clear that the reduction in Jerry's life expectancy is due almost entirely to factors that existed prior to the collision: smoking, substance abuse, depression and suicide attempts. Of eight hundred "mortality debits" he attributed to Jerry, only fifty related to the injuries suffered by Jerry in the collision. For all intents and purposes, Jerry's reduced life expectancy is entirely the result of pre-collision impairments.

[333] There is a general consensus among the experts who provided evidence about the life expectancy issue that Jerry had a life expectancy of about thirty-one and a half years at the date of the trial, at which time he had just turned thirty-three. His life expectancy is therefore just under sixty-five years. This life expectancy, however, is predicated on a model of post-trial care that continues to ensure that Jerry stays clear of substance abuse, depression and suicide attempts. Absent that intense care, his life expectancy is only another 27.53 years, or just over

sixty years. For the purposes of the calculation of a future loss of income, I am proceeding on the basis that, before the collision, Jerry's life expectancy was just over sixty years of age and am assuming he would have stopped work at age sixty.

[334] In my view, given Jerry's substantial limitations, he would not have worked at much above a minimum wage position throughout his working career. The current minimum wage in Ontario is $10.25 per hour. Undoubtedly that wage will rise over the period that would have represented Jerry's working life. Using an average wage of $15 per hour, I calculate that there is a real and substantial possibility that Jerry would have earned $30,000 per year, based on a fifty week work year. Factoring in a fifty percent participation rate, reduces those earnings to $15,000 per year.

[335] I have not yet assessed Jerry's future care costs. As will become clear, my view is that Jerry requires round-the-clock attendant care. The costs I will assess as associated with that care, include housing and meals. It is necessary to reflect in the overall damage award the fact that Jerry would have incurred, but for the collision, expenses for housing and food.

[336] I have very little evidence to go on in terms of future housing and food costs. Dr. Katz, under cross-examination by Mr. Rogers, opined that such costs would be no less than $25,000 per year.

[337] In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 8 A.R. 182, 3 C.C.L.T. 225, 83 D.L.R. (3d) 452, 19 N.R. 50, [1978] 1 W.W.R. 577, Dickson J., as he then was, held that the projected cost of necessities of life should be included in the calculation of future care costs, but a deduction should be made from the award of future earnings for the percentage of earnings attributable to the necessities of a person in a normal state.

[338] I am not critical of Dr. Katz's suggestion that food and lodgings generally would cost a person no less than $25,000 per year. I am not able to find that Jerry, but for the collision, would have spent that kind of money on food and lodgings. Jerry had been living on welfare of less than $7,000 per year. My award for future lost income is based on an average income, after accounting for participation rates, of $15,000 per year. Jerry would not have been able to spend $25,000 per year on necessities of life with an income of $15,000 per year. He would have had to make do with what he had, as he had been doing for years.

[339] There is necessarily an element of arbitrariness to my calculation, given the absence of evidence, but it seems to me reasonable to deduct $10,000 per year for necessities, including food and lodgings. I have selected this figure with three significant factors in mind: (1) $10,000 a year for food and lodgings is an extremely modest amount; (2) Jerry had been making do on less than $7,000 per year, so I suspect if he had a little more money he would spend a little more on necessaries; (3) Jerry would not, however, have spent his entire income on necessities. It would be unfair to entirely decimate his loss of future earnings award on the theory that he would have spent all of his income on necessities.

[340] In the result, I reduce the award of future income, on account of an allowance for obtaining the necessities of life, by $10,000 per year, leaving a net loss of income of $5,000 per year.

[341] Applying a present value multiplier of 22.4631[1] to that annual figure produces a gross loss of future income of $112,315.50, which I round off at $112,500.

Future Care Costs

Applicable Legal Principles

[342] The cost of future care is the most significant area of dispute in this case.

[343] Jerry has a care team in place that consists of a case manager, Christine Kalkanis, a psychotherapist, Dr. Voorneveld, and an occupational therapist, Natalie Zaraska. They have recommended a plan of future care for Jerry that they say is necessary to avoid deterioration in Jerry's personal circumstances, avoid the risks associated with his poor judgment and addiction struggles, and to ensure his personal safety. Their treatment plan does not, according to Ms. Kalkanis, attempt to unpack Jerry's pre-collision issues from his post-collision issues. Instead, it assesses his current needs and matches services to those needs.

[344] The defendants' position is that the care team's proposal is "excessive, duplicative, and completely lacking in balance." Moreover, it makes no effort to limit the assessed costs to those arising from the injuries Jerry suffered in the collision and fails to screen out the ordinary costs of living that Jerry would have incurred regardless of the collision, including food and lodging, transportation and recreational activities.

[345] Given the deep cleft between the parties' positions, it is important to assess Jerry's future care costs in accordance with settled legal principles.

[346] First of all, it must be conceded that the exercise is necessarily speculative because none of us has a crystal ball to gaze in to see what the future holds, with its seemingly infinite possibilities. The somewhat speculative nature of the exercise was recognized by the Supreme Court in *Andrews v. Grand & Toy Alberta Ltd.*, as above, at pp. 249-50 S.C.R, where Justice Dickson referred to the practice of awarding lump sums for future losses that may be incurred over long periods of time as "illogical".

[347] *Andrews* firmly establishes many of the principles that guide the award of damages for future losses. An overarching principle is that an award must be fair to both parties. Justice Dickson held as follows, at pp. 241-42 S.C.R.,

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[1] From Table 1A of the report of Professor James E. Pesando, marked Exhibit 53 at trial. This table utilizes Dr. Segal's opinion that, absent intense care, Jerry's impairments create a mortality of 800% of standard mortality. This was, for all intents and purposes, the state Jerry was in prior to the collision.

> 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 the position he would have been in if he had 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 a claim.
>
> Contrary to the view expressed in the Appellate Division of Alberta, there is no duty to mitigate, in the sense of being forced to accept less than real loss. There is a duty to be reasonable. There cannot be "complete" or "perfect" compensation. An award must be moderate and fair to both parties. Clearly, compensation must not be determined on the basis of sympathy, or compassion for the plight of the injured person. What is being sought is compensation, not retribution.

[348] *Andrews* directs the Court to remain focussed on the injuries of the plaintiff when assessing losses. Fairness to a defendant is achieved through the application of the reasonableness standard and by ensuring that the plaintiff's claims are legitimate and justifiable.

[349] The reasonableness standard dictates that a consideration of a proposed expense be undertaken with a view to whether a reasonable person of ample means would be willing to incur the expense. Reasonableness would never countenance a squandering of money: see, for instance, *Andrews*, as above, at p. 245 S.C.R., and *Brennan v. Singh*, 1999 CarswellBC 484, [1999] B.C. J. No 520, 86 A.C.W.S. (3d) 537 at para. 70.

[350] Jerry's treatment team proposed a comprehensive package of future care. It was presented, for the most part, by his case manager, Christine Kalkanis. Its principal features included the following:

(a) A one-time expense for a future neuro-psychological assessment, at a cost of $5,000;

(b) Ongoing psychological counselling with Dr. Voorneveld, once per month, for life, at a cost of $2,100 per year;

(c) Ongoing psychological counselling, at a rate of 2 hours per month, to assist Jerry with any ongoing issues relating to family and relationships, at an estimated cost of $4,200 per year, for life;

(d) Report writing and communications with Jerry's treatment team of 2 ½ hours per month at an estimated cost of $5,250 per year, for life;

(e) Two years of occupational therapy, four 1 ½ hour sessions every 3 months to assist Jerry through an assessment of his ongoing needs and to consult with and supervise RSWs, plus 1 hour per month for report writing, at a total cost of $6,517.96 over two years;

(f) Following the first two years, occupational therapy services for life, at a rate of 2 sessions per year at 1 ½ hours per session, together with 1 hour per year for report writing, at an estimated annual cost of $972.19;

(g) Five years of physiotherapy at a rate of 1 hour per month, for an annual cost of $2,852.40 and a cumulative cost of $14,262;

(h) Five years of massage therapy at a rate of one hour per month at a total of $2,118.72 per year and a cumulative cost of $10,593.60;

(i) Twenty-five hours per week for an RSW to provide direct support to Jerry, 5 hours per day, 5 days per week, with his tasks of daily living, his behaviour management and community reintegration. Travel time and mileage reimbursement is additional, at a total estimated expense of $135,980 per year, for life;

(j) An annual gym membership at a cost of $912 per year for life;

(k) Equipment expenses, including a one-time expense of $2,829.99 for a MacBook Pro laptop, plus $500 for software and thereafter an annual reserve of $100 per year for software; a one-time expense of $649 for an iPhone; a one-time expense of $800 for a pressure relief mattress; and $1,920 per year, for life, for bus passes;

(l) Attendant care by a PSW, 24 hours per day, 7 days per week, at an annual rate of $72,691.50 plus $9,072 per year for respite support, for life. This requirement is based on the assertion that Jerry requires supervision 24 hours per day;

(m) Housekeeping support at a rate of $100 per week, or $5,200 per year for life;

(n) Outdoor household maintenance support at the rate of $1,500 per year for life;

(o) A long-term residence program, at a cost of $60,000 per year, being $5,000 per month;

(p) Medications, at an estimated cost of $556.23 per month, or $6,674.76 per year, for life;

(q) A one-time expense of $12,500 for plastic surgery to address his facial scar;

(r) Case management services for the next 2 years, at the rate of 2 hours per month to co-ordinate all services for Jerry, at a cost of $22,680, together with $3,000 for report writing and communications during that two year period; and,

(s) Ongoing case management, after the first 2 years, at the rate of 1 hour long session every 3 months at an annual cost of $1,890 plus $750 per year for communications and report writing, for life.

[351] The calculation of the present-day cost of the future care proposed by the plaintiff's treatment team depends, of course, on Jerry's life expectancy. The consensus of the experts is that provided Jerry receives heavily supervised supportive therapy his life expectancy from the date of trial is 31.53 years. For the purposes of the loss of future income calculation, I proceeded on the basis of Jerry's life expectancy as of the moment prior to the collision. To assess the cost of future care, I am utilizing a life expectancy based on the supportive care model. Accordingly, my calculations proceed on the basis of a life expectancy of 31.53 years from the time of the trial.

[352] The plaintiff's expert economic loss valuator, Dr. Katz, calculated the present-day value of the future care plan outlined above, at $9,062,549, utilizing a life expectancy of 31.53 years from the date of trial.

[353] I have already made note of the defendants' concerns with respect to the proposed plan of future care. To repeat, they raise three main areas of concern:

(a) the plan is excessive, duplicative, and completely lacking in balance;

(b) it fails to limit the assessed costs to those arising from the injuries Jerry suffered in the collision; and,

(c) it fails to screen out the ordinary costs of living that Jerry would have incurred regardless of the collision, including food and lodging, transportation and recreational activities.

[354] In an ideal world, a plan could be created that addresses just the costs of the injuries caused by the collision. But it is impossible to do so. One simply cannot isolate Jerry's post-collision issues from his pre-collision issues. They are inextricably intertwined. That means that inevitably Jerry is going to receive care and attention for problems that he had prior to the collision because those problems are wrapped up so tightly with the problems he is experiencing now. It is impossible to treat Jerry's current issues without, at the same time, treating his pre-existing ones. Moreover it is impossible to apportion the cost of treatment between pre-existing issues and those caused by the collision. In other words, it is simply not possible to say, for instance, that of the psychological counselling Jerry is to receive, a certain percentage could be isolated as relating to issues caused by the collision and another certain percentage as relating to his history of childhood sexual abuse.

[355] The defendants urged the Court to discount the cost of Jerry's future care plan by fifty percent, on the theory that half of Jerry's existing problems pre-existed the collision. I am unable to accede to the defendants' request. All of the care provided for in the course of this Judgment is care that Jerry requires because of the collision. It is impossible not to agree with the defence submission that Jerry could have benefitted from, indeed required, treatments prior to the collision; psychological counselling in particular. But I am unable to conclude that he

would require any *less* treatment now, were he not impaired in the manner he was prior to the collision. I can only conclude that the treatment he receives through the funds provided by this Judgment will address issues caused by the collision and will collaterally address some of the problems Jerry had pre-collision.

[356] The defendants remain liable for the cost of future care necessary to address issues caused by physical and psychological injuries suffered by Jerry in the collision. An unavoidable corollary is that Jerry's care will also address issues that predate the collision. This may appear unfair because the defendants are not liable for injuries that pre-dated the collision. It is not possible, however, to avoid that corollary care without reducing services that Jerry needs because of the injuries he suffered in the collision. As the Supreme Court has directed in *Andrews v. Grand and Toy*, fairness to the defendants is achieved, and must be achieved in this case, by ensuring that the claims made are justifiable and reasonable.

[357] The defendants adduced evidence from their own expert on future care cost assessments, Mr. Terry Pearce. His qualifications are similar to those of Ms. Kalkanis. Both were qualified as experts in the assessment of future care costs.

[358] With respect to the justification and reasonableness of future care needs and costs suggested by Ms. Kalkanis, Mr. Pearce opined as follows:

(a) He agreed with the proposal that Jerry have a neuro-psychological assessment at some point in the future and did not take serious issue with the estimated cost of $5,000;

(b) He further agreed with the suggestion that Jerry should continue to have ongoing psychological counselling with Dr. Voorneveld at a cost of $2,100 per year;

(c) He took issue with the suggestion that Jerry will require $4,200 per year for life for family and relationship counselling, for two main reasons. First, because Jerry presently has no family or relationships that require such counselling. Second, because the need for such counselling was present pre-collision. He conceded that some amount should be allowed for this form of counselling, but did not propose an amount. This form of counselling, I note, is meant to, amongst other things, assist family, friends and romantic partners in dealing with Jerry's unique issues;

(d) He further took issue with the proposal that $5,250 per year be allotted for report writing by Dr. Voorneveld, or any successor. His view is that very little report writing will have to be done once the tort claim is resolved and the SAB insurer is no longer involved. He acknowledged that some amount of communication would be necessary between Jerry's psychologist the rest of his care team and that some report writing may be necessary for the Public Guardian and Trustee, but considered it minimal;

(e) He opined that occupational therapy costs of $1,681.46 were appropriate for a period of one year, not two as proposed by Ms. Kalkanis. He considers one year necessary, but sufficient, to assist Jerry with a transition period;

(f) After the first year, his view was that Jerry would be sufficiency served by the occupational therapy proposed by Ms. Kalkanis, at a cost of $840.73 per year, for life. Again, he took issue with any amount being allocated for report writing;

(g) He would allocate nothing for physiotherapy on an ongoing basis. His rationale was that Jerry had, at one time, been attending for physiotherapy, paid for by the SAB insurer. Jerry voluntarily terminated his physiotherapy, which Mr. Pearce concluded was evidence that Jerry did not legitimately require ongoing physiotherapy or otherwise considered it to be of little or no benefit to him;

(h) He considered massage therapy to be a reasonable expense, at least over the short term. He suggested an annual figure of $1,059.63, which is one-half of the cost proposed by Ms. Kalkanis;

(i) He thought that the services of an RSW would be beneficial and reasonable for a period of one year. His view was that thirty hours per week at an hourly rate of $60 was appropriate. Ms. Kalkanis utilized an hourly rate of $65, which he said is higher than he has ever seen. Moreover, Ms. Kalkanis' opinion is that Jerry requires the services of an RSW for life. Mr. Pearce's view is that Jerry does not require the services of an RSW beyond one year and that a PSW will be adequately able to assist Jerry at a substantially lower rate, namely $26 per hour. He calculated the cost of one year of an RSW to be $93,600. The lifetime cost of a PSW to assist Jerry for thirty hours per week he calculated at $40,560 per year;

(j) He agreed with the cost of a gym membership, but only for a period of five years. Thereafter, in his opinion, the therapeutic benefit has been fully realized and the gym membership would be used only for maintaining general fitness, which is something Jerry would have had to do irrespective of the collision;

(k) He disagreed that Jerry needed a laptop and software. It can, he conceded, be beneficial in rehabilitation, but not so much now, five years post-collision. Moreover, he voiced a concern that a MacBook Pro is one of the most expensive laptops available. He agreed with the purchase of a cell phone and pressure relief mattress. He did not agree with the funding of a bus pass. Jerry has never had a driver's license and always depended on either his bicycle or public transit. In other words, nothing has changed since before the collision;

(l) He testified that it would be reasonable for Jerry to continue to live in a residential setting like the one he is in now. For $24,000 per year he would receive 24 hour monitoring, medication dispensing, meal preparation and basic housekeeping assistance. Supplemented by an RSW for one year and a PSW thereafter, each for thirty hours per week, will provide Jerry with sufficient care to meet the objectives of the treatment team. Jerry would not have housekeeping or outdoor maintenance costs if such an arrangement were made for him. As an alternative, Mr. Pearce suggested a semi-independent living residence. In such a setting, Jerry would have services geared to his needs. One could expect he would receive help with meal

preparation, housekeeping assistance, help with dispensing his medications, and there would also be RSWs on staff 24/7. The cost of such a residence is about $300 per day;

(m) Mr. Pearce agreed with the proposed cost of prescription medications at $556.23 per year for life;

(n) He also agreed that it was reasonable to provide for future plastic surgery costs, but did not provide an estimate of the cost;

(o) He thought $11,340 per year was too high for case management services. Jerry told him that he sees Ms. Kalkanis once every three months or so. Moreover, in his experience, case managers fade out over time after settlements are made. Injured persons tend to rely on their occupational therapist to assist with their case management. He said $1,000 to $1,500 per year was sufficient for case management services.

[359] The defendants' adduced evidence from Dr. Douglas Hyatt, an expert economist, who calculated that the cost of future care, as proposed by Mr. Pearce, would be $2,589,736.

[360] Under cross-examination, Mr. Pearce made some significant concessions. He agreed that Jerry is a person who presents with very complicated issues. He said Jerry is not the most complicated person he has dealt with but "he's up there". He agreed Jerry is particularly fragile and requires more attention than the average person. He indicated that if an RSW is needed to keep Jerry "on the straight and narrow" then it would not be inappropriate. He did not have any concerns about the level of care provided to date, saying, "the proof is in the pudding". In other words, the treatment plan in effect to date has had successes.

[361] Mr. Pearce agreed that a PSW is much more limited in the support he or she can offer, relative to an RSW and that Jerry brings unique problems to the table that may require some case specific knowledge.

[362] Both Dr. van Reekum and Dr. Gnam provided their views with respect to treatment plans for Jerry.

[363] Dr. van Reekum testified that an appropriate treatment plan should include the following elements:

(a) A full metabolic work up to address the cause of his fatigue;

(b) A sleep study;

(c) Participation in a chronic pain program;

(d) Ongoing involvement with an orthopaedic surgeon, regarding his musculoskeletal injuries;

(e) Further neuro-psychological testing;

(f) Rehabilitation, preferably in his home or community, as opposed to a hospital or institution. The focus of rehabilitation should be on all the *sequaelae* of the collision. Jerry's rehabilitation needs will fluctuate over time. They may increase or decrease. He said a case manager should stay involved on an ongoing basis to ensure that needs are met as they change over time;

(g) Support and assistance: attendant care, homemaking assistance, help with parenting;

(h) In terms of his mental health, he should try taking Effexor or Ciprolex for his depression and/or anxiety. A treating psychiatrist should be involved; and,

(i) Cognitive behavioural therapy should be initiated for anxiety and depression. Jerry should receive help with planning and insight, as well as self-awareness and grief. He should be receiving specific treatments for his substance disorder.

[364] Dr. Gnam's opinions in terms of future care were set out in his report dated April 24, 2013. I quote from page 31 of his report,

> In order to contain the risk of impulsivity and substance abuse, Mr. Pelletier requires constant supervision during almost all community outings. He also almost certainly requires a modestly intensive level of supervision in his living quarters, such as the level of supervision provided in a Group Home. To manage his Opioid Dependence, he requires Methadone maintenance treatment provided at a Methadone treatment facility…Mr. Pelletier also requires oversight of his functional rehabilitation/maintenance program by a suitable health professional (that most often would be an occupational therapist) on a bi-weekly to monthly basis, in order to re-evaluate and optimize Mr. Pelletier's functioning at his home and in the community, and to allow him to achieve the highest degree possible of independent functioning. Mr. Pelletier also requires general medical care to manage prescription medications and general medical problems…Finally, it is reasonable and necessary for Mr. Pellieter to have a clinician – either a psychiatrist or a psychologist – who provides overall clinical oversight, some case co-ordination, and crisis intervention as required.
>
> Unfortunately as Mr. Pelletier's mental and behavioural impairments are permanent, he will continue to require these services for years. In my opinion, it would be premature to deem that such high levels of services will be required indefinitely, but indefinite need is a possibility. The only feasible alternative to almost constant supervision in the community is permanent institutionalization. However, this option would likely not be acceptable to Mr. Pelletier, and mental health service research on the

> relative merits of community versus institutional living have predominantly found that quality of life and health outcomes are better in non-institutionalized settings.

[365] In terms of ongoing supervision, it was Dr. Gnam's opinion that it would be reasonable for services to be provided by an RSW, but that an RSW was not specifically necessary. He thought that other suitable trained personnel, such as a brain injury support worker, could provide the same services.

[366] Determining the level of future care required by Jerry is, to say the least, tricky. My view is this. Jerry was a mess before the collision. I've set out my views above and won't repeat them here. But he was still living independently, albeit just barely. He would have undoubtedly benefitted by intervention: a psychologist, an occupational therapist, daily support from an RSW or even a PSW would have made a world of difference to Jerry. He could have used their help, but he didn't strictly speaking *need* that level of help to get by independently. Now he does. Jerry was a thin skull plaintiff. The defendants take him as they found him.

[367] Jerry now needs to be in a residence where his basic needs are provided for him: his meal preparation, basic housekeeping and laundry, and the dispensing of his medications. He needs to have supervision on most occasions when he is out of the home. He needs someone to assist him with initiation and follow through so that he gets out into the community and participates in life, rather than becoming a hermit, more or less confined to his room.

[368] The prognosis for Jerry is bleak. My view is that he has more or less achieved maximum recovery, based on his history – both before and after the accident – and the medical opinions offered by the mental health professionals who testified. The plan going forward ought not to rule out the possibility of advancement, but its main goals appear to be ensuring that Jerry has a decent quality of living and that he doesn't slide back into substance abuse and/or other harmful activities.

[369] With these comments made, I assess Jerry's future care needs – and the costs associated with that care – as follows.

Residential Attendant Care

[370] First of all, Jerry needs somewhere to live. He is presently at Heidi's Place, but it is unlicensed and I accept the views expressed by his treatment team that it is not a long-term solution. A licensed facility will typically have a ratio of patients to supervisors of 3:1, whereas Heidi's Place is more than double that, at 7:1. At Heidi's Place, Jerry's needs are minimally met and Heidi is unable to provide the level of supervision that Jerry requires.

[371] Jerry requires 24/7 supervision, which includes supervision in his home environment and supervision during most community outings. On the evidentiary record before me, it appears there are two viable options for Jerry. The first is that he be relocated to a supportive independent living residence. In other words, a licensed group home specializing in providing care to people with cognitive difficulties like Jerry's. Three were discussed in evidence by Ms. Kalkanis and Mr. Pearce. Community Head Injury Resource Services ("CHIRS") operates a

number of residential facilities in the Greater Toronto Area, as does the Neurologic Rehabilitation Institute of Ontario ("NRIO") and the Peel Halton Dufferin Acquired Brain Injury Service ("PHABIS"). Typically services are geared to need in such facilities.

[372] Mr. Pearce estimated the cost of such a residential facility to be in the range of $300 per day. Ms. Kalkanis testified that a low average cost would be $5,000 per month. Pricing from the NRIO was tendered as Exhibit 50 and it indicated a cost of $245 per day, which includes 18 hours of group attendant care. That equates to $7,452 per month, or $89,425 per year, for life. The present day value of this model is $2,701,529.25 using a multiplier of 30.21[2]. Jerry would, under this model, still need an additional monthly sum to pay for attendant care on community outings.

[373] There are a number of problems associated with the supportive independent living facility model. The institutional nature of the facilities is a significant issue. Jerry does not want to be institutionalized. I can't blame him. Both Dr. van Reekum and Dr. Gnam stated unequivocally that rehabilitation in his own home would be preferable. Dr. Gnam indicated that research studies have predominantly found that quality of life and health care outcomes are better in non-institutionalized settings. None of the residences operated by NRIO, CHIRS and PHABIS are in the community Jerry has lived in since the collision. All would require a move to some other location in the GTA. Finally, availability is entirely indeterminate at this stage. Jerry may be several years before a placement is achieved.

[374] The alternative to the supportive living facility is for Jerry to live in his own apartment, with in-house attendant care. That means a two bedroom apartment must be found and a PSW hired to live there 24/7 with him. The PSW would assist in supervising Jerry, preparing meals, performing light housekeeping functions, and dispensing medications.

[375] Ms. Kalkanis indicated that she expects to be able to arrange 24/7 attendant care for Jerry at a rate of $6,321 per month, which is the equivalent to $72,691 per year. Some respite supplementation is required to cover off vacation time, at an estimated rate of $9,072 per year, for a total of $81,763 per year. This is slightly cheaper than the supportive living residence model, but it does not include the cost of the apartment and food.

[376] Jerry's counsel indicated that the cost of food and residence did not need to be factored in because it would come out of Jerry's future lost income award. I have already deducted a component for necessaries from that award, of $10,000 per year. Jerry's costs for residence and food will be significantly higher, however, if he has to rent a two bedroom apartment suitable for him and an attendant care giver. I have no evidence of the cost of such an apartment. I have Dr. Katz's opinion that annual food and residence costs for Jerry are likely to be about $25,000. I have Mr. Pearce's opinion that a group home and food would likely cost about $24,000 per year.

[377] I expect that the cost of an apartment and food will not be less than the cost of the group home model with food, at $24,000 per year. Adding that to the $81,763 that will be paid to

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[2] From the report of Dr. Katz dated June 26, 2013, marked Exhibit 54 at trial, based on a life expectancy of 31.53 years from the date of trial.

cover 24/7 attendant care, brings the total under the apartment model to $105,763 annually, which is equivalent to $3,195,100.23 when extrapolated over a lifetime. I round this to $3,195,000.

[378] The increase in the apartment model over the supportive independent living model is about $500,000, which is by no means an insignificant sum, but one that I think is more than justified. First, it is spread over 30 years, and represents a $15,000 per year gross difference. But the 24/7 attendant care will reduce, in my view, the number of hours that additional attendant care will be required for Jerry for when he is in the community, which will serve to largely off-set the difference.

[379] Jerry lived independently prior to the collision. The apartment model will allow him to live as close to independently as possible going forward. Moreover, its health and rehabilitative benefits, as opposed to institutionalization, are clearly favoured in the research literature.

Attendant Care for Community Outings

[380] The apartment model includes 24/7 attendant care. This attendant care will provide supervision for Jerry when he is at home. Such supervision should require only modest interventions with Jerry. Jerry will not, however, be housebound. It will be beneficial to him to be, and he will want to be, out in the community. Jerry is capable of being out of his residence for short periods on his own. In addition, it seems reasonable to expect that the home-based attendant care provider will also provide some community-based supervision. So what more supervision, and at what cost, is it reasonable to provide to Jerry?

[381] Here, the debate is really twofold. First, should the care be provided by an RSW or a PSW. Second, how many hours per week should be provided for?

[382] The difference between an RSW and a PSW is not all that clear cut. According to Ms. Kalkanis, whose firm provides the RSWs at a rate of $65 per hour, an RSW typically has a college or university education in the social service department. They typically have a bachelor's degree in psychology or sociology. They have some training in brain injury (a minimum of five years). Her firm provides RSWs with in-house training on acquired brain injury.

[383] The RSW is meant to fulfil a number of roles: implement therapy recommendations; provide crisis management; provide stabilization; cue and prompt the client wherever required; be able to detect social and safety issues and aid in the proper exercise of judgment by the client; and attend therapy appointments with the client to make sure that the client attends and follows through.

[384] Mr. Pearce testified that there is no accredited "Rehab Support Worker" program that he is aware of. Usually people who provide that type of service are, in his view, nice people who want to work with other people. They have a community college diploma and once they are taken into an organization they get some training on dealing with people with brain injuries.

[385] No one gave any detailed evidence of the qualifications of a PSW. Presumably some limited college education is required as well.

[386] Mr. Pearce conceded, in cross-examination, that a PSW would be much more limited in their assistance they could offer Jerry. He acknowledged that the current treatment plan involving RSWs had been successful for Jerry and that the substitution of a PSW for and RSW has not been tested.

[387] The difference in price between an RSW and a PSW is substantial. The going rate for an RSW is between $60 per hour (according to Mr. Pearce) and $65 per hour (according to Ms. Kalkanis). The going rate for a PSW is $27 per hour.

[388] The goals for Jerry do not realistically involve a complete recovery, where he is able to live entirely independently. Jerry has, as I indicated, likely achieved maximum, or close to maximum recovery. The goals now appear to be to aid him in living as independently as he can and to otherwise protect him from himself and from unsavory characters who may lead him astray. He requires supervision to ensure that he is not engaging in substance abuse, not being misled by others, not creating situations of danger for himself through the exercise of poor judgment, and managing his moods.

[389] Dr. Gnam described the rationale for ongoing services as the maintenance of Jerry's ability to live in the community by reducing the risk that he will engage in self-destructive behaviours including substance abuse. The primary objectives of the plan, he said, "are to maintain Mr. Pelletier's permanent and intractable impairments in impulse control, thereby preventing harm and improving or maintaining quality of life. Mr. Pelletier's impairments in impulse control have in the past resulted in him engaging in risky behaviours and severe substance abuse, which in turn have resulted in very adverse health and personal consequences." (Dr. Gnam report, April 24, 2013, page 29)

[390] Dr. Gnam does not believe that it is not specifically necessary to have an RSW provide services relating to attendant care, but thought it was reasonable for one to do so.

[391] Jerry is about to go through a period of significant transition. It will be disruptive to him and, in my view, it is appropriate that the level of care being provided by his current RSW continue. The continuation of RSW support from the date of trial to the end of 2014 should be sufficient to cover the transition period, which will involve the move to a new residence, the introduction of a residential PSW, and the establishing of new routines.

[392] Thereafter, I do not believe that the expense of an RSW is required for Jerry's outings in the community. If the primary goal is to prevent Jerry from engaging in self-destructive behaviour, a decent PSW will be quite capable of providing that service. The attendant care to be provided is not of a sophisticated nature. It is supervisory, for the most part. The model of care going forward will involve a full-time residential PSW. It will involve ongoing case management by Ms. Kalkanis, ongoing occupational therapy by Ms. Zaraska, and ongoing psychological support and counselling from Dr. Voorneveld. In other words, the PSW retained to provide attendant care for community outings will have a wealth of resources and support

available to him or her. The treatment plan must be looked at as a whole and not simply piecemeal. The plan remains viable, reasonable and appropriate if a PSW is substituted for an RSW after the end of 2014.

[393] The provision of a PSW for attendant care during community outings is intended to supplement the attendant care being provided by the residential PSW. As such, a total of 25 hours per week should be more than sufficient. At $27 per hour, the weekly cost of this form of attendant care is $675. The annual cost is $35,100.

[394] Utilizing the present value figures supplied by Dr. Katz[3], I calculate the present value of the cost of the RSW from the time of the trial to the end of 2014 to be $167,310, based on a rate of $65/hr over 30 hours per week. The annual cost is $101,400 and the applicable multiplier is 1.65. I round this amount to $167,000.

[395] I calculate the present value of 25 hours of attendant care per week, for community outings to be $1,002,456, which is based on $35,100 per year, applying a multiple of 28.56, from Dr. Katz's table, for an amount payable from January 1, 2015 over Jerry's life expectancy. I round this amount to $1,000,000.

Past Attendant Care (the Brownes)

[396] I have spoken earlier in this decision of the Browne family in very positive terms. They have provided love and care to Jerry over many years, some of them quite difficult. When they saw Jerry at Sunnybrook Hospital after the collision, they knew he must come home with them. They took him in, voluntarily of course, and provided care, comfort, love and supervision to him for four rather taxing years.

[397] By the end of the trial, all participants had developed a genuine admiration for the Browne family and their efforts.

[398] Jerry's counsel submits that Jerry feels a moral responsibility to compensate the Brownes. He submitted, in closing submissions, that the Brownes should be compensated as voluntary service providers.

[399] Unfortunately, the claim for compensation for the Brownes was not one that was developed throughout the course of the trial. Indeed, counsel weren't in a position to make meaningful submissions about the issue until some considerable time after the balance of submissions were made. Written submissions were ultimately made on the point.

[400] Jerry advances a claim for the sum of $840,109.60 on behalf of the Brownes. He asserts a moral obligation to repay them for the attendant care they provided to him from just after the collision until October 2012. He calculates the sum owing using a market rate of $27 per hour for attendant care, on a round-the-clock basis for four years. He has deducted time when he was out of the Brownes' residence attending work or while out and in the presence of his RSWs.

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[3] Exhibit 54

[401] The defendants made a multi-pronged submission in response to the claim advanced on behalf of the Brownes. They submit:

(a) The claim was not properly pleaded or advanced during the trial, leaving the defendants in the position of not knowing that this claim was being made against them. In other words, as a matter of trial fairness, it ought not to be allowed to proceed;

(b) Relying on *Mortimer v. Cameron*, (1994), 17 O.R. (3d) 1 (C.A.), they argue that there is a rebuttable presumption in Ontario that a family member who performs domestic or nursing services for a close relative does so out of love, or a sense of duty and is not entitled to be paid for his or her services. The Brownes were, in effect, close relatives of Jerry's and their care was provided gratuitously. There is an insufficient evidentiary basis to rebut the presumption that no compensation is payable; and,

(c) A claim for past attendant care is a claim for special damages and must be specifically proven at trial. In this case there is an absence of evidence particularizing the actual time the Brownes spent providing attendant care to Jerry and detailing the specific care provided.

[402] The amount Jerry seeks on behalf of the Brownes is of an arresting magnitude: almost a million dollars for their four years of trouble. Jerry, of course, as I have found, has profound cognitive impairments and can be forgiven for what, in my view, is an obvious over-reaching.

[403] The balance of Jerry's claim – the claim he advanced on his own behalf – was meticulously prepared, fully documented and supported by an abundance of evidence. By contrast, the claim on behalf of the Brownes is ill-defined, ill-prepared, and lacking a clear and cogent evidentiary record. It has the real feel of an after-thought.

[404] The first hurdle to the claim is whether it is recoverable under Ontario law at all. The plaintiff's factum on the issue begins "In summary, claims for the value of past attendant care, provided by volunteers, with or without a promise to pay, are legitimate."

[405] Jerry supports this aspect of his claim on a statement made by Professor Ken Cooper-Stephenson found at page 173 of his text, *Personal Injury Damages in Canada*, 2nd ed. (Toronto: Carswell, 1996), where the author declared, "It is now clear that a plaintiff can claim damages in respect of expenses incurred or services voluntarily rendered by third parties, even though no reimbursement for the expense or services was actually promised or made."

[406] Professor Cooper-Stephenson, and in turn Jerry's counsel, relies on a brief excerpt from *Andrews v. Grand & Toy Alberta Ltd.*, as above. There, the injured plaintiff was living in his own apartment with private attendant care. A suggestion was made that he could live more economically in his mother's home and under her care. Dickson, J, as he then was, made the following observation,

> The evidence showed that the mother of the appellant James Andrews was living alone, in a second-floor apartment and that relations between Andrews and his mother were strained at times. This should have no bearing in minimizing Andrews' damages. Even if his mother had been able to look after Andrews in her own home, *there is now ample authority for saying that dedicated wives or mothers who choose to devote their lives to looking after infirm husbands or sons are not expected to do so on a gratuitous basis*. (emphasis mine).

[407] The "ample authority" referred to by Justice Dickson appears to be found in a line of English cases which include *Cunningham v. Harrison et. al.*, [1973] 3 W.L.R. 97 and *Donnelly v. Joyce*, [1973] 3 W.L.R. 514. The principled basis on which recovery of otherwise "gratuitous" services may be made was set out by Lord Justice Megaw at page 519 of the *Donnelly* decision as follows:

> The loss *is* the plaintiff's loss. The question from what source the plaintiff's needs have been met, the question who has paid the money or given the services, the question whether or not the plaintiff is or is not under a legal or moral liability to repay, are, so far as the defendant and his liability are concerned, all irrelevant. The plaintiff's loss, to take this present case, is not the expenditure of money to buy the special boots or to pay for the nursing attention. His loss is the existence of the need for those special boots or for those nursing services, the value of which for purposes of damages--for the purpose of the ascertainment of the amount of his loss--is the proper and reasonable cost of supplying those needs. That, in our judgment, is the key to the problem. So far as the defendant is concerned, the loss is not someone else's loss. It is the plaintiff's loss.
>
> Hence it does not matter, so far as the defendant's liability to the plaintiff is concerned, whether the needs have been supplied by the plaintiff out of his own pocket or by a charitable contribution to him from some other person whom we shall call the "provider"; it does not matter, for that purpose, whether the plaintiff has a legal liability, absolute or conditional, to repay to the provider what he has received, because of the general law or because of some private agreement between himself and the provider; it does not matter whether he has a moral obligation, however ascertained or defined, so to do. The question of legal liability to reimburse the provider may be very relevant to the question of the legal right of the provider to recover from the plaintiff. That may depend on the nature of the liability imposed by the general law or the particular agreement. But it is not a matter which affects the right of the plaintiff against the wrongdoer.

[408] The principle expressed in *Donnelly v. Joyce* has been adopted in Canadian authorities including *Teno et. al. v. Arnold et. al.*, [1974] O.J. No. 2248 (H.C.), *Thornton et. al. v. Board of School Trustees of School District No. 57 (Prince George) et. al.*, [1976] B.C.J. No. 1390 (varied

in other respects on appeal to the S.C.C., reported at [1978] S.C. J. No. 7), and *Johnson v. Shelest*, [1988] B.C.J. No. 106 (B.C.C.A.).

[409] With the greatest of respect to Professor Cooper-Stephenson, I am not satisfied that the law in Ontario regarding recovery for voluntary services is as clearly settled as he declared.

[410] The defendants cited the Court of Appeal's 1994 decision in *Mortimer v. Cameron*, as above. Mr. Mortimer was badly injured when he fell down a set of stairs while attending a party. Following his injury he lived with, and later married, a physiotherapist who provided daily care to him. The trial judge awarded the physiotherapist $25,000 for her services, which had otherwise been provided gratuitously. The Court of Appeal set aside the award. Robin J.A., held,

> Stephanie Brocklehurst lived with Mortimer after he left the hospital in January 1990. She is a physiotherapist. In the 14 months between January 1990 and the trial, Ms. Brocklehurst provided daily care which everyone agrees was extraordinary. Without this care Mortimer could not have lived outside a hospital environment.
>
> Ms. Brocklehurst was not a party to the action. Although they have since married, she was not Mortimer's spouse at the time of trial. She therefore had no claim under the Family Law Act, 1986. The trial judge valued her services at $25,000 and awarded Mortimer this amount indicating that, if requested, he would consider imposing a trust on the $25,000 in favour of Ms. Brocklehurst.
>
> In my view the trial judge erred in making this award. The authority relied on in support of the award is Dziver v. Smith (1983), 41 O.R. (2d) 385, 146 D.L.R. (3d) 314, a decision of this court. In that case a claim for damages was allowed so that the plaintiff could pay her close relatives for extraordinary services they had rendered to her prior to the trial. The reasoning in the case, however, rested on the relationship between the plaintiff and the service providers and the expectations created between them. Writing for the court, Weatherston J.A. stated at p. 387:
>
> > There is a presumption that a member of a family who performs domestic or nursing services for a close relative does so for love or out of a sense of duty and is not entitled to be paid for his or her services, but that presumption is rebuttable. The presumption has been in many cases rebutted, where the services were of an extraordinary nature or where they were performed under a promise by the recipient to pay a reasonable sum if and when possible.

> In the present case, Ms. Brocklehurst was not, at the time of the trial, a close relative of the plaintiff. Furthermore, and despite the unquestionably extraordinary nature of her services, there was no evidence that they were provided due to a promise of compensation. In my view, therefore, the trial judge erred in awarding damages to the plaintiff for the services rendered by Ms. Brocklehurst.

[411] In my view, the Court of Appeal's decision in *Mortimer* is inconsistent with the observation of Dickson J. in *Andrews v. Grand & Toy*, as above. Frankly, I have a difficult time understanding the *ratio decidendi* of the decision. It appears to suggest that a plaintiff's ability to recover a sum for services gratuitously rendered to him or her prior to trial rests on the relationship between the plaintiff and the service provider and/or whether there was a promise of compensation.

[412] The fact that Ms. Brocklehurst was not a close relative of Mr. Mortimer appears to have worked against the claim. But it strikes me that a claim to compensation for the third party service provider would be more, not less, compelling when the provider is not a close relative of the plaintiff. The notion that services were provided out of love and affection and without expectation of compensation – if those matters are relevant – is diluted when the service provider is not a close relative.

[413] In any event, the *ratio* appears to be inconsistent with the principles set out in *Donnelly v. Joyce*, as above, which appear to have been followed in *Andrews v. Grand & Toy*.

[414] It is unclear to me whether the law in Ontario remains consistent with *Mortimer*. More recently, in *McIntyre v. Docherty*, 2009 ONCA 448, the Court of Appeal commented as follows, with respect to housekeeping work done by third parties prior to the trial,

> 75 The law is well established that where a plaintiff incurs a pre-trial out-of-pocket loss by hiring a replacement homemaker, the plaintiff may claim the reasonable replacement cost of that homemaker as special damages. Similarly, if there is evidence that the plaintiff agreed or was otherwise obliged to compensate a third party for services rendered pre-trial, the plaintiff may claim that amount as special damages.
>
> 76 In this case, the respondent seeks compensation for the gratuitous work done by her family members. However, the respondent failed to plead or lead sufficient evidence to support such a claim. Neither the family members nor the respondent provided any particulars of the time the family members spent assisting the respondent as a result of her injuries during the pre-trial period, which was seven years. Rather, respondent's counsel presented the case in terms of percentage impairments, which blurred the evidence relating to past housekeeping inefficiency and the work she was unable to do that was being done by others.

[415] The plaintiff in *McIntyre* was awarded $10,400 by a jury for past lost housekeeping. The award was challenged by the defendant on a principled basis, including whether the plaintiff was entitled to an award for work performed by her family members. The award was ultimately upheld by the Court of Appeal.

[416] Whatever confusion I may be left in with respect to Court of Appeal decisions cited to me, it is clear that I must follow the Supreme Court's guidance in *Andrews & Grand and Toy*. In my view that means, with respect to Jerry's claim, that it matters not from what source Jerry's attendant care needs have been met, or who has provided the attendant care. It matters not whether Jerry is under a legal or moral liability to repay. Jerry's loss is the existence of the need for attendant care, the value of which, for the purpose of calculating his damages, is the proper and reasonable cost of providing the attendant care.

[417] Having concluded that Jerry may, in law, advance a claim for a loss relating to the attendant care provided by the Brownes, there are two significant further hurdles to cross. The first relates to trial fairness. The second relates to quantum.

[418] In terms of trial fairness, the issue is whether the defendants were aware of the case they had to meet, or whether they have been unfairly surprised.

[419] Jerry's counsel could have and should have been more clear that they were making a claim for attendant care provided by the Brownes. The defendants have indicated that they did not know that such a claim was being advanced until closing submissions. The statement of claim is drafted expansively enough to include the claim, but it is not expressly particularized. Nothing was said about this claim in opening submissions. In closing, past attendant care was initially valued at $150,000. In follow-up written submissions it ballooned to over $800,000.

[420] There was a dearth of evidence provided during the trial about the specific attendant care being provided by the Brownes and the number of hours during which it was provided. Defence counsel did not canvass the issue because they were unaware it was on the table.

[421] My visceral reaction was that this claim was sprung on the defendants unfairly. But after anxious reflection, I am of the view that I should deal with the claim now, for the following reasons:

(a) Parties are entitled to expect trial fairness. But that does not mean the fairest of all possible trials. It means a trial that is fundamentally fair: see *R. v. O'Connor*, [1995] 4 S.C.R. 411, per McLachlin J., as she then was, at para. 193. The Browne claim wasn't articulated or advanced in a manner that was entirely fair to the defendants. But I am satisfied that the trial remains, procedurally, a fundamentally fair one;

(b) The claim for compensation for past attendant care provided by the Brownes is a legitimate one. One of the principal functions of the Court, in ensuring substantive fairness to a defendant, is to ensure that claims advanced are legitimate and reasonable;

(c) The claim to past attendant care, while perhaps not articulated as clearly as it ought to have been, would not seriously have taken the defendants by surprise. It was well known that Jerry had been living with the Brownes for most of the post-collision time period and that they had been caring for him. Further, that they had been receiving some form of compensation for attendant care from the SAB insurer (who is also the tort insurer), after a certain point in time. It would have been reasonable for the defendants to anticipate a claim that the Brownes be compensated for any periods not otherwise already compensated for; and,

(d) The evidentiary record is not a strong one in terms of this part of the claim. The manner in which Jerry's counsel seeks to overcome the evidentiary gaps is to assert that the attendant care provided by the Brownes was almost entirely "supervisory". They suggest that Jerry needed 24/7 supervision and the Brownes provided that. In my view, their suggestion is not persuasive. The onus is on Jerry to prove the past loss claims on a balance of probabilities. It is not sufficient to simply say he required round-the-clock supervision and leave it at that. Jerry's needs varied over time. Moreover, there were many, many occasions when he was left alone, at home or otherwise. At the end of the day, it is the plaintiff and/or the Brownes who are predominantly prejudiced by not having adequately identified and comprehensively advanced this part of the claim.

[422] I come now to the valuation of the claim for attendant care provided by the Brownes. I noted that the Brownes have apparently already received some money on account of their provision of attendant care. I have no idea how much.

[423] The Brownes had no expectation of recovery. They did not provide care for any reasons apart from love and compassion. They did not keep track of specific care that they provided. The evidentiary record is woefully short, though not entirely bereft, of such details.

[424] That said, clearly some level of attendant care was provided by the Brownes. Jerry had a need for attendant care arising from the collision. He suffered a loss in that regard. The loss is his need for such care.

[425] I do not know the exact amounts already paid to the Brownes for attendant care. I have, however, considered that they have received some funds already through the SAB insurer. It remains an otherwise impossible exercise, based on this evidentiary record, to attempt to determine how many hours of attendant care were actually provided and how many remain unpaid. I have already rejected the plaintiff's argument that the Brownes provided 24/7 supervision. In the absence of evidence that would enable me to calculate the number of outstanding and unpaid hours of attendant care, there is no basis on which to apply market rates to the hours of care provided.

[426] I am left in a position of entirely rejecting that part of the claim relating to the attendant care provided by the Brownes, for want of evidence, or alternatively doing my best to provide a reasonable amount to compensate them based on the slim evidentiary record that I have. I prefer

the latter approach because there certainly is evidence that significant, if unquantified, attendant care was provided.

[427] I have determined that the fairest approach is to fix a lump sum, having considered the evidentiary record and the fact that the SAB provider has already made some provision for the Brownes. I fix the sum in the amount of $50,000, which notionally represents about $1,000 per month over the time that Jerry resided with the Brownes. This amount is intended to be a net figure – that is net of any deductions for legal fees or attendant care fees already paid. It remains subject to the adjustment for liability. It is also to be held in trust by Jerry for the Brownes.

Counselling Services

[428] There is no dispute that Jerry ought to have future neuro-psychological testing, at a cost of $5,000. There will be an award of that sum.

[429] There is also no dispute that Jerry will required ongoing psychological counselling. One session per month, at a cost of $2,100 per year, for life, is not disputed. Utilizing a multiplier of 30.21, the award for future personal counselling is $63,441, which I round off at $63,500.

[430] Jerry also seeks a sum for additional "family/relationship" counselling. Two sessions per month, at an estimated cost of $4,200 per year for life is sought. I am not prepared to award the sum sought, though I am prepared to make a modest allowance for this form of counselling. Jerry presently does not require these services. That said, I accept that there is a real possibility that he will require them in the future. But Jerry required this form of counselling before the collision. He required counselling for personal issues that he has lived with since his childhood: abandonment and sexual abuse being chief amongst them. The provision for one therapy session per month *for life*, which I have already made, arguably over compensates Jerry because a good deal of that therapy is required to address pre-existing conditions. In my view, a reasonable and fair compromise is for Jerry to utilize some of his monthly sessions, already provided for, to address family and relationship issues.

[431] I do recognize that some of the sessions will be for third parties to learn how to best deal with Jerry. I am prepared to top up the number of sessions already provided for an additional four sessions per year, at a total annual cost of $700, which extrapolates to $21,147 over Jerry's lifetime, which I round off at $21,000.

[432] With respect to the controversial matter of report writing and communications, my view is that the amount sought is grossly overstated. Once the litigation is concluded and the SAB insurer is out of the picture, there will be substantially less report writing going on. There may be occasional reports required for the PGT. There will certainly be ongoing communications between members of Jerry's care team. But I expect that there will be a significant reduction in the necessity for reports almost immediately and a gradual decline in communications.

[433] I am prepared to award a flat rate of $1,000 per year for Dr. Voorneveld's report writing and communications. That translates to $30,210 over Jerry's expected lifetime, which I round off at $30,000.

Occupational Therapy

[434] Ongoing occupational therapy will be important for Jerry. There is no dispute about that, or, for the most part, about the amounts sought. I have provided for a transition period to the end of 2014 where Jerry's RSW will remain involved with him. He will require additional occupational therapy hours during this transition period. The amount sought by the treatment team during the transition period is valued at $1,681.46 per year for treatment plus $1,577.52 per year for report writing and communications. I am prepared to award the sum sought for treatment, but as with Dr. Voorneveld, I limit the award for report writing to $1,000 per year. The total award for occupational therapy over the transition period (to the end of 2014) is $2,681.46 per year, multiplied by a year and a half, for a total of $4,022.19, which I round off at $4,000.

[435] On an ongoing basis, there is little dispute about the ongoing occupational therapy needs, which are estimated at one-half of those required during the transition phase, plus one hour per year for report writing, which seems eminently reasonable to me. I award $972.19 per year, which I multiply by a factor of 28.56[4] for a total of $27,765.75, which I round off at $28,000.

Physiotherapy

[436] An hour a month of physiotherapy is recommended for Jerry. Mr. Pearce discounted this claim on the basis that Jerry had decided on his own to stop attending physiotherapy, from which he inferred that it was of no benefit. The simple fact is, Jerry cannot be relied upon to make the right decisions for himself. He suffers from chronic pain. He has been limited in the amount he can ride his bike, something that gave him a lot of pleasure before the collision. In my view, Jerry should be continuing with physiotherapy as recommended. I am prepared to award the sum sought, which is, in total, $14,262, and which I round off at $14,000.

Massage Therapy

[437] There isn't a significant dispute about the provision of massage therapy and its reasonableness, at least over the next 5 years, as a part of Jerry's treatment plan. I award the cumulative total sought, which is $10,593.60, which I round off at $10,500.

Gym Membership

[438] Jerry needs to stay active and fit. He can no longer ride his bike like he used to be able to. He can no longer walk for significant distances due to the pain in his foot. He has gained a substantial amount of weight. The benefits of exercise on the body and psyche are well documented. I am of the view that this expense is well warranted. I view the claim of $912 a year as excessive. I appreciate that the only evidence in the record in terms of price is $912, but I am entitled to apply my own experience and common sense to the award of damages. I award $500 per year for life, which translates to $15,105, which I round to $15,000.

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[4] Also from Dr. Katz's table, reference at footnote 2.

Housekeeping

[439] A housekeeping allowance of $100 per week is sought. I award one half of that, or $100 every two weeks. Jerry should be capable of attending to some of his own light housekeeping, particularly in view of his live-in attendant caregiver. Moreover, that same caregiver will also be doing some light housekeeping. It will be beneficial to Jerry, in terms of his rehabilitation, to take care of himself and his apartment.

[440] I am prepared to allow for a housekeeper once every other week, at a total of $2,600 per year, for life, which is $78,546, which I round to $78,500.

[441] I award nothing for outdoor maintenance. Realistically, Jerry will not have these types of expenses.

Medications

[442] There is no dispute about the provision for ongoing prescription medications for Jerry, or their cost, which is estimated at $6,674.76 per year, or $201,644.50, which I round to $201,700.

Plastic Surgery

[443] It will be beneficial to Jerry, who always prided himself on his looks, to pursue plastic surgery to correct or improve his obvious facial scar. The estimated cost is $12,500,which I award.

Equipment Expenses

[444] I am not persuaded that it is reasonable or necessary that Jerry be provided with a laptop. There is no dispute, apparently, about an iPhone, which is valued at $650 or the provision of a pressure relief mattress at a cost of $800. I award a total of $1,450 for these two items.

[445] A bus pass is sought for Jerry. This is a difficult issue. Jerry has never had a driver's license and so he was always reliant on either public transit or his own steam. Jerry's mobility is reduced because of the collision. He can no longer ride his bike or walk like he used to. I believe he is now going to be significantly more reliant on public transit and accept that an annual bus pass is reasonable. The estimated cost is $1,920 per year, which translates to $58,003.20 over a lifetime, which I round to $58,000.

Case Management

[446] The extent to which Jerry will require case management on an ongoing basis is controversial. I expect that he will require more case management over the next year and a half – the transition period – and then a reduced amount over his life expectancy. There are many services to co-ordinate. The damage award is essentially a reflection that Jerry will require more or less a steady and even stream of services. But that's not reality. In reality, his needs will ebb and flow. At times he will be in crisis and will require more services. Other times less.

[447] In my view, the proposal for 2 hours bi-monthly over the transition period is reasonable. The estimated cost is $125 per hour, which is $6,000 per year, or $9,000 over the transition period. In addition, I allow $1,000 per year for report writing, for a total of $10,500. Mileage of 150 km per visit is to be added at a rate I fix at $0.50 per kilometre. Mileage is therefore $75 per visit. There will be 36 visits over the transition period, so an additional sum of $2,700 will be added, bringing the total for case management over the transition period to $13,200.

[448] After 2014, I accept that one two hour session every three months is reasonable. That is the equivalent of $1,000 per year, with mileage added at $75 per visit ($300 per year). The claim to 30 minutes per month for report writing and communication seems reasonable to me. That adds $750 per year for report writing and communication. The total annual cost for case management after January 1, 2015 is $2,050 or $58,548 over a lifetime, which I round off at $58,500.

IV. CONCLUSION

[449] In summary, the following amounts are awarded:

(a)	General Damages	$250,000
(b)	Past Lost Income	12,600
(c)	Future Lost Income	112,500
(d)	Attendant Care – Residential	3,195,000
(e)	Attendant Care – Community	1,000,000
(f)	Past Attendant Care (Brownes)	50,000
(g)	Counselling – Individual	63,000
(h)	Counselling – Family/Relationship	21,000
(i)	Counselling – Report Writing	30,000
(j)	Occupational Therapy - Transition	4,000
(k)	Occupational Therapy – Ongoing	28,000
(l)	Physiotherapy	14,000
(m)	Gym Membership	15,000
(n)	Housekeeping	78,500
(o)	Medications	201,700

(p)	Plastic Surgery	12,500
(q)	Equipment	1,450
(r)	Bus Pass	58,000
(s)	Case Management – Transition	13,200
(t)	Case Management – Ongoing	58,500
	Total	$5,218,950

[450] The total award is subject to a reduction of forty percent given my findings on liability. The adjusted gross award is $3,131,370.

[451] I will need further submissions from the parties on the issues of applicable pre-judgment interest, any mark up for PGT fees and the matter of costs. I ask that counsel contact my assistant, Jennifer Beattie by email at jennifer.beattie@ontario.ca, to arrange a conference call regarding such further submissions.

Boswell J.

Released: November 7, 2013

APPENDIX "A"

Sketch of the Intersection of Front Street and Gill Street, Orillia, Ontario