CITATION: Hummel v. Jantzi, 2019 ONSC 3571
COURT FILE NO.: 13-42743 (Hamilton)
DATE: 2019-06-13

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Wesley Hummel, Detlev Hummel, Patricia Hummel, Bryan Hummel, Miranda Oakes, Serena Cole and Autumn Okum	
Plaintiffs	David Smye, Q.C. and James Cavanaugh, Counsel for the Plaintiffs
– and –	
Philip Jantzi, David Jantzi and 1340305 Ontario Limited carrying on business as All Star Tap & Grill House	
Defendants	Kathleen Robb and Emily Hill, Counsel for Philip Jantzi and David Jantzi
	Daniel Reisler and Blaine Edson, Counsel for 1340305 Ontario Limited carrying on business as All Star Tap & Grill House
	HEARD: October 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 31, November 1, 2, 5, 6, 7, 9, 13, 14, 15, 16, 19, 20, 21, 22, December 10, 11, 12, 13, 2018, January 14, 15, 21, 22 and 23, 2019

THE HONOURABLE MR. JUSTICE G.E. TAYLOR

REASONS FOR JUDGMENT

Introduction

[1] On June 7, 2012, at approximately 1:30 a.m., Philip Jantzi ("Philip") was operating a motor vehicle owned by David Jantzi, eastbound on College Street approaching a T intersection

at Station Street in the community of Fonthill, in the Town of Pelham. Wesley Hummel ("Wesley") was seated in the front passenger seat of the vehicle and was not wearing a seatbelt. Philip was operating the vehicle at a speed of 80 kilometres an hour when the posted speed was 50 kilometres an hour. Philip failed to observe the stop sign at the intersection. The vehicle left the roadway, hit a tree, rotated 180 degrees and came to a rest facing west on the front lawn of the residence at 1389 Station Street. Wesley suffered serious injuries including a comminuted, depressed fracture to the right rear of his skull.

[2] On the evening of June 6, 2012, Wesley, Philip and four other friends or acquaintances had been at the All Star Tap & Grill House ("the All Star") in Fonthill where they consumed some draft beer. The concentration of alcohol in Philip's blood at 3:10 a.m. on June 7, 2012 was 192 milligrams of alcohol in 100 millilitres of blood. The concentration of alcohol in Wesley's blood at 2:25 a.m. on June 7, 2012 was 102 milligrams of alcohol in 100 millilitres of blood. Philip was charged with, and pleaded guilty to, operating a motor vehicle while impaired by alcohol and causing bodily harm to Wesley.

[3] The plaintiffs, other than Wesley, are his parents and siblings. The plaintiffs are seeking damages from Philip and the owner of the vehicle for negligent operation of the motor vehicle and from the All Star for serving alcohol to Philip to the point that his ability to operate a motor vehicle became impaired and failing to take steps to assure that Philip would not then operate a motor vehicle.

Issues

[4] The issues to be decided are:

a) Liability for the motor vehicle accident;

b) Liability of the All Star;

c) Contributory negligence on the part of Wesley;

d) Damages sustained by Wesley;

e) Damages sustained by the other plaintiffs.

Liability for the Motor Vehicle Accident

[5] It is not contested that Philip's operation of the motor vehicle on the morning in question was negligent. His ability to operate a motor vehicle was impaired by alcohol. He was operating the motor vehicle at an excessive rate of speed and above the posted speed limit. He failed to observe and obey the stop sign for eastbound traffic on College Street at the intersection of Station Street. Philip was charged with, and pleaded guilty to, impaired driving causing bodily harm.

[6] There is also no dispute that Philip owed a duty of care to Wesley as a passenger in the motor vehicle he was operating, and that the injuries sustained by Wesley were as a direct result of the negligent driving.

[7] David Jantzi, as the owner of the vehicle being operated by Philip, is also liable for the damages sustained by the plaintiffs by reason of section 192(2) of the *Highway Traffic Act*.

Liability of the All Star Tap and Grill House

[8] In June 2012, Wesley lived in a house on Port Robinson Road in Fonthill ("the Fonthill residence") with his younger brother, Bryan Hummel ("Bryan"). Wesley and Philip were friends with Greg Kozachenko ("Greg").

[9] On the evening of June 6, 2012 a game in the Stanley Cup finals was scheduled to take place in Los Angeles, California. Wesley, Philip, Greg and Bryan had made plans earlier in the day to go to the All Star to watch the hockey game. Bryan invited his friends Kaitlyn Abernathy ("Kaitlyn") and Brianna Caron ("Brianna") to join the group going to the All Star. One of the

reasons for the group going to the All Star to watch the hockey game was because of a draft beer special which was being featured. This was known as the "12 for 12 special". The 12 for 12 special was a tray of 12 glasses or cups of draft beer for $12.

[10] Philip testified that on June 6 he finished work in Hamilton at approximately 5:00 p.m. He drove to his home in St. Catharine, arriving between 5:30 and 6:00 p.m. After getting ready to go out for the evening, he left his home between 6:45 and 7:00 p.m. He did not have anything to eat or drink while he was at home.

[11] In accordance with the arrangements made earlier in the day, Philip picked up Greg at his home in St. Catharines and they proceeded to the Fonthill residence. Along the way they stopped and Philip bought a six pack of James Ready beer. In cross-examination Philip testified that there was a possibility that he took 12 bottles of beer with him to the Fonthill residence. Philip and Greg arrived at the Fonthill residence at approximately 8:00 p.m. Wesley was sleeping when they arrived. They woke him up.

[12] Brianna and Kaitlyn were not present when Philip and Greg arrived. While waiting for Brianna and Kaitlyn, Philip testified that he, Wesley and Greg each had one or two of the bottles of beer which he had brought with him. His recollection was that Bryan did not drink any of the beer. In cross-examination he agreed that if it was a case of 12 beer, he, Wesley and Greg would have consumed more than one or two bottles of beer before going to the All Star. He said he was sober when they arrived at the All Star.

[13] During the time prior to the arrival of Brianna and Kaitlyn, Philip and Wesley drove to the nearby home of Wesley's sister to pick up a Los Angeles Kings jersey for Wesley to wear to the All Star. When they returned to the Fonthill residence, Brianna and Kaitlyn had arrived. At approximately 9:30 p.m., the group left to go to the All Star. Philip drove the group. They arrived at the All Star in the middle of the third period of the hockey game which was around 9:45 or 10:00 p.m. Portions of Phillip's examination for discovery were made part of the evidence of the

plaintiffs' case. At his examination for discovery, he said they arrived at the All Star at 9 or 9:30 p.m.

[14] Philip testified that everyone in the group drank beer. He did not see anyone drinking anything other than beer. He said they purchased four or more trays of the 12 for 12 special. He thought he drank six or seven cups of beer. No food was consumed. At the end of the evening he paid for all the beer consumed by the group. Using his debit card he paid $64.40 which he assumed included a tip of at least 15%. At his examination for discovery, a copy of Philip's debit card receipt for the purchase of the beer was produced.

[15] In cross-examination, Philip testified that everyone in the group had more than enough to drink while at the All Star. He went further and said everyone in the group got drunk at the All Star. Philip also testified that no one employed at the All Star made any inquiries about who in the group was driving.

[16] In cross-examination, Philip testified that when he arrived back at the Fonthill residence he had decided to spend the night because he knew he should not be driving. He also agreed that he did not really know how much beer he consumed at the All Star.

[17] According to Philip, the group left the All Star after midnight. Philip drove the group to a nearby Sobey's supermarket where a frozen pizza was purchased. He then drove the group back to the Fonthill residence. At the Fonthill residence he poured himself a glass of wine provided by Wesley. He said he had one sip of the wine and put the glass on the counter in the kitchen. He and Wesley then went outside to smoke a cigarette. Greg joined them. While outside Wesley asked Philip to drive him to purchase some cigarettes. Initially Philip declined Wesley's request because he did not think any store which sold cigarettes would be open at that time of the morning. Wesley told him that a nearby gas bar was open 24 hours and therefore he agreed to drive Wesley to purchase cigarettes.

[18] The evidence presented by the plaintiffs from the examination for discovery of Philip was that his weight in June 2012 was 155 pounds and he was 6 feet tall. Philip was not questioned at trial with respect to his height and weight in June 2012.

[19] Bryan testified that he was 20 years old on June 6, 2012. He was living with Wesley at the Fonthill residence. He returned home from work at approximately 4:30 p.m. Wesley arrived home from work at approximately 7:00 p.m. As was common, Wesley lay down for a nap when he returned home.

[20] He, Wesley, Philip, Greg, Brianna and Kaitlyn had made arrangements to go to the All Star that evening to watch the Stanley Cup hockey game and partake of the 12 for 12 beer special. Philip and Greg arrived at the Fonthill residence at around 8 or 8:30 p.m. Bryan said Wesley had finished his nap before Philip and Greg arrived. Brianna and Kaitlyn were expected to arrive at approximately 9:30 p.m.

[21] Bryan testified that Philip brought a six pack of James Ready beer with him. In cross-examination, he was confronted with his testimony from the examination for discovery in which he said he could not remember whether Philip and Greg had arrived with a case of six bottles or 12 bottles of beer. While waiting for Brianna and Kaitlyn to arrive, Wesley, Philip and Greg each had one or two bottles of beer. Bryan had consumed some marijuana before Wesley arrived home. He also testified that everyone had a taste of some homemade wine.

[22] Bryan testified that Philip drove the group to the All Star with Brianna and Kaitlyn sitting one on top of the other in the front passenger seat with he, Wesley and Greg sitting in the backseat. They arrived at the All Star at about 10:30 p.m. In cross-examination, Bryan was again confronted with his testimony from the examination for discovery at which time he said they arrived at the All Star at 9:30 p.m. They stayed until approximately 1:00 a.m. Philip ordered four trays of beer for the group. Bryan said he was not keeping track of how much beer each person in the group consumed. He, Brianna and Kaitlyn did not drink as much as Wesley, Philip and Greg.

Bryan said that he was drunk by the time the group left the All Star. He said Philip, Wesley and Greg were all drunk by the time they left the All Star and Brianna and Kaitlyn were "tipsy".

[23] Bryan testified that all the trays of beer were brought to the table by one female server. She did not speak to him that evening and did not ask any questions of any member of the group. No other employee of the All Star spoke to the group.

[24] While at the All Star, Kaitlyn, in the presence of Brianna, asked Bryan how the group would be getting home. Bryan said that Philip would be driving because he was a "professional drunk driver".

[25] When the group left the All Star, everyone got into Philip's car in the same positions as previously. They stopped at Sobey's to purchase a pizza. When the group arrived back at the Fonthill residence he put the pizza in the oven. Brianna and Kaitlyn went into the living room. Ten or 15 minutes after returning home, Philip, Wesley and Greg decided to leave to purchase cigarettes. No alcohol was consumed when they returned to the Fonthill residence.

[26] Greg testified that he had a poor recollection of the events of June 6 and 7, 2012 as result of the head injury which he suffered in the accident.

[27] He testified that Philip picked him up and they drove together to the Fonthill residence. Along the way they stopped and Philip bought a case of 12 bottles of beer, although he also conceded that it could have been a case of six bottles. He did not remember the time they arrived at the Fonthill residence but Brianna and Kaitlyn were already there. Everyone, including Bryan, Brianna and Kaitlyn drank some of the beer which had been brought by Philip. He did not recall any wine being consumed.

[28] Greg testified that Philip drove the group to the All Star. They arrived at approximately 8:30 p.m. He said that initially he thought the group was served three trays of beer, but after

observing a photograph showing a pyramid of 36 empty glasses and one full glass, he realized that there must have been four trays of beer served. He could not recall if any member of the group had more to drink than the others. He had no recollection of the number of employees working at the All Star. He remembered leaving the All Star at 11:30 p.m. or 12 a.m., after the hockey game was over.

[29] Greg remembered going to Sobey's to purchase a pizza but he had no memory of the drive back to the Fonthill residence. He remembered drinking wine back at the residence. He thought Philip and Wesley had a glass of wine each. Fifteen or 20 minutes after arriving back at the Fonthill residence he, Philip and Wesley left to go to a gas station to purchase cigarettes. He remembered sitting in the backseat. He could not remember if he or Wesley took glasses of wine with them. Wesley sat in the front passenger seat not wearing his seatbelt. He remembered arriving at the gas station and Philip going inside to buy the cigarettes. He said he did not remember if Wesley or Philip were wearing their seatbelts when they left the gas station. After leaving the gas station, his next memory is of waking up in the hospital at 2:30 or 3:00 p.m. on June 7.

[30] Brianna testified that on June 6, 2012 she was four days past her 19th birthday. She and Kaitlyn were friends with Bryan. She did not know Wesley, Philip or Greg. Arrangements had been made for the group to go to the All Star on the evening of June 6. She and Kaitlyn arrived at the Fonthill residence somewhere between 10:30 and 11:00 p.m. In cross-examination she revised the arrival time of she and Kaitlyn to approximately 9:00 p.m. When they arrived, Wesley, Philip, Greg and Bryan were present. They all had bottles of beer in their hands. She was served some homemade wine which she spilled after a couple of sips. She had no recollection of how much beer any of the males consumed.

[31] Brianna said that the group stayed at the Fonthill residence for an hour to an hour and a half, but she did not have a recollection of what time they left to go to the All Star. Philip drove

the group to the All Star. She and Kaitlyn sat in the front passenger seat and the males other than Philip sat in the backseat. The plan was that Philip was to be the designated driver that evening.

[32] Brianna could not remember what time the group arrived at the All Star but when they arrived, she and Kaitlyn went across the road to a McDonald's restaurant to attempt to dry her pants where the wine had been spilt. In cross-examination she said the group arrived at the All Star at approximately 10:00 p.m. They joined the rest of the group at the All Star 10 or 15 minutes after arriving and there was a tray of beer on the table. She said there were four trays of beer served to the group and all the beer was consumed before they left. She recalled two female employees working but neither of them spoke to her.

[33] Brianna said she drank four or five glasses of beer and Kaitlyn had three or four glasses. In cross-examination, Brianna said she consumed three or four cups of beer. They left the bar at between 1:00 or 1:30 a.m. She agreed in cross-examination that they were at the All Star for approximately three hours. She described herself as intoxicated, but not falling down drunk. She and Kaitlyn were concerned about Philip's condition. They raised their concern with Bryan who told them that Philip was a "pro drunk driver".

[34] After leaving the All Star they purchased some food at Sobey's and then Philip drove the group back to the Fonthill residence. She described Philip's driving on the return trip as more erratic than when they drove to the All Star. When they arrived back at the residence, Wesley, Philip and Greg went outside to smoke a cigarette. They said they were going to go to purchase cigarettes. They were urged not to leave. She did not see anyone drinking back at the Fonthill residence. She fell asleep on the couch and the next thing she remembered is a police officer at the door.

[35] Kaitlyn testified that her date of birth was May 27, 1993. She and Bryan were friends from high school. On June 6, 2012, Bryan asked her and Brianna to join him and a group of friends at the All Star to watch a hockey game. Her grandmother drove them to the Fonthill

residence. They arrived at 9:00 or 9:30 p.m. When she arrived, Wesley, Philip, Greg and Bryan were present. She had not met Philip or Greg previously. She could not remember if Philip had anything to drink before they left to go to the All Star. They were only at the Fonthill residence for 30 minutes or less.

[36] Kaitlyn said they arrived at the All Star at between 10:00 and 10:30 p.m. Upon arrival the group went inside and then she and Brianna went across the road to the McDonald's restaurant where they stayed for 10 or 15 minutes. When they returned to the All Star there was a tray of beer on the table where the males were seated. She said she drank two cups of beer throughout the entire evening. The group only drank beer and no food was ordered. She was not certain as to the quantity of beer consumed by the four males.

[37] Kaitlyn testified that there were two female servers at the All Star. Neither of them spoke to anyone at the table or asked any questions. She thought there were three trays of beer served to the group and possibly four. Shortly before leaving the All Star, she and Brianna spoke to Bryan about Philip driving them home. Bryan told them that Philip was a "pro drunk driver". No employee of the All Star spoke to any member of the group as they were leaving.

[38] After leaving the All Star they went to Sobey's and bought a pizza. On the drive back to the Fonthill residence she said Philip was driving recklessly. She described Wesley, Philip and Greg as drunk when they arrived back at the Fonthill residence. Bryan was sick to his stomach in the bathroom. Wesley, Philip and Greg each poured themselves a glass of wine and then went outside. She told him not to go anywhere. She then went back into the house to attend to Bryan. By this time Brianna was asleep on the couch. When she returned from attending to Bryan in the bathroom, Wesley, Philip and Greg were gone. The next thing that happened was a telephone call from the police.

[39] Two photographs depicting the pyramid constructed using the empty cups in which the beer in the 12 for 12 special had been served were made exhibits. One of the photographs was

taken using Wesley's cell phone. Detlev Hummel, Wesley's father, was able to determine from the properties application for the cell phone that the photograph was taken at 12:31 a.m. on June 7, 2012. In both photographs, there are 36 cups in the pyramid plus an additional full cup of beer.

[40] Wesley had no recollection of the accident or being at the All Star the evening prior to the accident.

[41] Bradley Cole ("Bradley"), Wesley's brother-in-law, testified that he drove past the All Star on the evening of June 6, 2012 and saw Wesley and Philip standing outside having a cigarette. Between 11:08 and 11:56 p.m. he exchanged text messages with Philip. These text messages were made an exhibit. Philip confirmed in his evidence at examination for discovery that the text exchange with Bradley took place while he was at the All Star.

[42] Jovica Stankovic ("Jovica") testified that he owned the All Star through a corporation. It opened in 1998 or 1999 and he sold it in 2013. He was not at the All Star on the evening of June 6, 2012.

[43] The All Star was located on Highway 20 in the Town of Fonthill. There was a Sobey's store and a McDonald's restaurant across the highway and strip plazas on either side.

[44] The manager on duty that night was Jennifer Page ("Jennifer") who was working with Jaime Fedoni ("Jaime"), the server. Both were experienced employees. They began their shift at 7 p.m. The bar was open until 2 a.m.

[45] Jovica testified that every employee working at the All Star was required to have a Smart Serve certificate. He said the basic rules were that minors and intoxicated persons were not to be served alcohol and customers were not to be over-served alcohol to the point of intoxication.

[46] On Wednesday night there was a 12 for 12 special at the All Star. The purpose of the special was to attract younger customers. The glasses used for the special were designed to hold 6 ounces of beer. There was no problem with persons drinking too much beer when the 12 for 12 special was being featured.

[47] In cross-examination, Jovica testified that the staff were expected to use common sense to avoid over-serving beer. There was no procedure in place to monitor how much beer an individual patron was consuming when the 12 for 12 special was being offered. He said it would be easy for a server to observe if someone in a group was drinking more than others. He agreed that, with the 12 for 12 special, the equivalent of a bottle of beer cost two dollars. The regular price for a bottle of beer was $4.25.

[48] The policy of the All Star was that if a person appeared to be drunk or intoxicated, inquiries would be made about how that person was getting home. If a person was not drunk, no inquiry would be made because of concern that the customer might be offended.

[49] There was no blood alcohol chart posted at the All Star. He was not familiar with the expression “chat and check”. He saw no reason for servers to provide water to customers who were partaking of the 12 for 12 special. There was no system in place for counting the number of drinks that a person consumed.

[50] Some of Jovica’s answers to questions put to him at examination for discovery were entered as evidence as part of the plaintiff’s case. He stated that when the 12 for 12 special was being served he did not keep track of how many glasses of beer each person in a group drank. If someone appeared to be drunk they would be refused service. He said that although the All Star did not employ security staff, sometimes there would be a person checking identification “and things like that”. There was no such person working at the All Star on the evening of June 6, 2012.

[51] Jennifer testified that she was the manager on duty at the All Star on the evening of June 6, 2012. At the time she was the holder of a Smart Serve certificate. Jaime was working as the bartender that evening. The 12 for 12 special was featured that night. A hockey game was on the television. She said the All Star was very strict about checking identification of it patrons. She said she thought Jaime had checked the identification of the members of the group.

[52] Jennifer testified that she remembered the group from that night. She said it was not a busy night so both she and Jaime had time to chat with the members of the group. She said the group of two females and four males arrived before the start of the hockey game. She remembered joking with the person who was wearing the Kings jersey. She said the group was served two or three trays of beer from the 12 for 12 special. She served the group one of the trays herself. The members of the group were well behaved. The group left when the hockey game was over. She said the group was "perfectly fine" when they left the All Star. It was a tradition at the All Star to build a pyramid using the empty glasses in which the 12 for 12 beer special was served. She said she used the building of the pyramid as an indication as to how much beer a group drank.

[53] The statement given by Jennifer to the police on June 12, 2012 was introduced as evidence. In that statement Jennifer said she remembered a group of about eight people, one of whom was wearing a Kings jersey, who were at the All Star on the evening of June 6, 2012. There were two females in the group. The group was drinking the 12 for 12 special and making towers with the empty glasses. She said it was difficult to know how many trays of beer the group ordered because both she and Jaime were serving. She thought the group ordered 4 trays of beer. The group was not rowdy. The guys were not inebriated when they left between 10 and 11 p.m. right after the game was over. She did not see the group leave but there were two guys on the door helping out that night.

[54] Jamie was working as a server at the All Star on the evening of June 6, 2012. She obtained her Smart Serve certificate in 2004 or 2005 after she began to work at the All Star. She

said she recalled the evening in question. There was a hockey game and the Los Angeles Kings were playing. At around 8 or 8:30 p.m. a group of four males and two females arrived. She recognized the males who had been to the All Star previously. The group ordered the 12 for 12 draft beer special. She served three trays of beer to the group and Jennifer may have served a further tray. The group left between 12 and 12:30 a.m. after the end of the hockey game.

[55] Jamie testified that it did not appear that anyone in the group was drinking more than anyone else. No food was ordered. She was constantly at the table talking to the people in the group. The person who paid the bill had no difficulty in doing so. No one appeared intoxicated when they left the bar although in cross-examination she said she did not see the group leave.

[56] In cross-examination, Jamie said that she kept track of the number of drinks a person consumed by the length of time the person was at the bar. She agreed that it was hard to count the number of glasses of beer consumed by any one person when a group ordered the 12 for 12 special. She did not remember the group building a pyramid of empty glasses. She had very little recollection of the two females. She could not say if the females consumed some of the draft beer served to the group. She was shown Phillip's debit card receipt and agreed that a $64 charge would be equivalent of four trays of the 12 for 12 special, tax and a tip.

[57] The statement Jamie gave to the police on June 12, 2012 was introduced as evidence at trial. She told the police that she was working with one other person on the evening of June 6 and that was Jennifer. She said she thought the two females in the group left before the males. She also said she was not sure if the females were drinking the beer.

[58] Det. Constable Jeffrey Inch of the Niagara Regional Police Service was the lead investigator in relation to this motor vehicle accident. He attended at the All Star on June 11, 2012. He described the All Star as being located at 115 Highway 20 East on the north side of the highway. There was parking for motor vehicles in front of and to the side of the building.

[59] Video surveillance from the Target Gas Bar showed Philip and Wesley arriving at 1:31 a.m. on June 7, 2012, entering the gas bar and departing at 1:33 a.m. The accident occurred at 1:37 a.m.

[60] On June 7, 2012 at 3:10 a.m., a sample of blood was obtained from Philip. That sample was subsequently analysed by a toxicologist at the Centre of Forensic Sciences and was found to have a concentration of 192 milligrams of alcohol per 100 millilitres of blood. (Using the terminology adopted at trial, this was referred to as a BAC of 192.)

[61] Dr. David Rosenbloom was qualified as an expert in pharmacology in respect of alcohol and the processing and metabolizing of alcohol by the human body and its effect on the brain and human behaviour. Dr. Rosenbloom was asked to assume a number of facts which were that:

a) Philip was 6 feet tall and weighed 155 pounds;
b) Philip arrived at the Fonthill residence at approximately 7:45 p.m.;
c) while at the Fonthill residence, Philip consumed two bottles of beer and an unknown amount of wine;
d) Philip arrived at the All Star at between approximately 9 and 9:30 p.m.;
e) Philip consumed beer at the All Star in 7 ounce cups;
f) Philip left the All Star between approximately 12:30 and 1 a.m.;
g) after leaving the All Star, Philip returned to the Fonthill residence and consumed a sip of wine before leaving in his vehicle after 1 a.m.;
h) at approximately 1:37 a.m., a motor vehicle collision occurred while Philip was driving;
i) at 3:10 a.m., Philip had a BAC of 192.

[62] Dr. Rosenbloom testified that alcohol is metabolized by a person's liver into water and carbon monoxide. He said that elimination rates of alcohol tend to be in the range of 10 to 25 milligrams of alcohol per 100 millilitres of blood per hour. He said most people eliminate

alcohol at a rate of 17 milligrams of alcohol per 100 millilitres of blood per hour which is the elimination rate he used. He referred to this as the modal rate. Dr. Rosenbloom concluded that based on the modal rate of elimination and assuming the consumption of two bottles of beer and a glass of wine, Phillip would have had a BAC of 53 when he arrived at the All Star.

[63] Dr. Rosenbloom calculated Phillip's BAC based on him leaving the All Star at 12:40 a.m. and the accident occurring at 1:40 a.m. using the BAC of 192 at 3:10 a.m. He calculated Phillip's BAC at the time of leaving the All Star to be between 217 and 254 and at the time of the accident to be between 207 and 229. According to Dr. Rosenbloom, these BACs would translate into Philip having between 8.2 and 9.6 bottles of beer in his system at the time of leaving the All Star. This would have required Philip to have been served the equivalent of between 10 and 11.5 bottles of 5% beer while at the All Star. It was the opinion of Dr. Rosenbloom that the consumption by Philip of a sip of wine between leaving the All Star and the time of the accident would not materially impact his calculations.

[64] Dr. Rosenbloom said that at the BACs that he determined, there would be noticeable signs of impairment including red eyes, staggering, stumbling, slurred speech and impaired fine motor skills. He said these signs of impairment should be apparent to a trained observer.

[65] Dr. Michael Corbett was qualified as an expert in the field of forensic toxicology. When doing his calculations, Dr. Corbett used a range of rates at which alcohol is eliminated from the body of between 10 and 30 milligrams of alcohol per 100 millilitres of blood per hour.

[66] He used the determination of Phillip's BAC of 192 obtained at 3:10 a.m. on June 7, 2012 by the Centre of Forensic Sciences. Based on that BAC he then calculated Phillip's BAC at the time of the accident of between 1:30 and 1:38 a.m. to be between 192 and 242.

[67] Dr. Corbett assumed that Philip started drinking on June 6, 2012 at between 7:45 and 8 p.m. He assumed that before arriving at the All Star, Philip drank between two and four standard

12 ounce bottles of beer containing 5% alcohol. He assumed Philip's weight in June 2012 to be between 176 and 189 pounds based on estimates contained in the Emergency Services and police reports. He specifically rejected Philip's testimony at the examination for discovery that he weighed 155 pounds at the time. He acknowledged that the greater a person's weight the lower that person's blood-alcohol concentration for a given amount of alcohol consumption. He assumed that the time of arrival at the All Star was between 9:30 and 10:30 p.m.

[68] Assuming a weight of 189 pounds and consumption of two bottles of beer beginning at 7:45 p.m., Dr. Corbett calculated that Phillip's BAC would have been between zero and 18 at 10:30 p.m. Assuming a weight of 176 pounds and consumption of four bottles of beer beginning at 8:00 p.m., Dr. Corbett calculated that Phillip's BAC would have been between 59 and 89 at 9:30 p.m.

[69] Next, assuming a weight of 189 pounds and consumption of 6 cups of draft beer (1/6 of three trays) beginning at 10:30 p.m., Dr. Corbett calculated that Phillip's BAC would have been between 8 and 66 at 12:30 a.m. Assuming a weight of 176 pounds and consumption of 8 cups of draft beer (1/6 of 4 trays) beginning at 9:30 p.m., Dr. Corbett calculated that Phillip's BAC would have been between 73 and 163 at 12:30 a.m.

[70] Dr. Corbett said that the consumption of six or seven glasses of beer each containing 6 ounces consumed over a period of three hours would not result in a significant level of intoxication. Dr. Corbett also testified that assuming Philip's weight to be in the middle of the range of 176 and 189 pounds, that he consumed two bottles of beer before attending at the All Star and that he began drinking those two bottles of beer at between 7:45 and 8 p.m., that he arrived at the All Star at 9:30 p.m. and that he consumed no alcohol after leaving the All Star, Philip would have had to have consumed between 16 and 30 cups of 6 ounce draft beer at the All Star in order to achieve the BAC at 3:10 a.m. as determined by the Centre of Forensic Sciences.

[71] In cross examination, Dr. Corbett testified that he thought Philip's actual elimination rate would be closer to 20 milligrams of alcohol per 100 millilitres of blood per hour rather than towards the outer limits of the range of elimination rates.

[72] In cross-examination, Dr. Corbett was asked to assume that Philip had an elimination rate of 20 milligrams of alcohol per 100 millilitres of blood per hour, that he weighed 155 pounds, that he left the All Star at 12:45 a.m. and that he had no more a sip of wine after leaving the All Star. Based on the BAC as determined by the Centre of Forensic Sciences at 3:10 a.m., Phillip's BAC would have been 240 at the time he left the All Star. Dr. Corbett said that at this level of alcohol concentration in a person's blood he would expect there to be significant impairment of one's ability to operate a motor vehicle and observable signs of intoxication. He cautioned however that signs of intoxication might not be readily observable if the person was a heavy drinker with a high tolerance.

[73] Robert Simpson testified that commencing in the mid-1980s he oversaw a group that developed a program for bar owners and employees regarding responsible service of alcoholic beverages. Initially the program was called the Server Intervention Program ("SIP"). In 1995 responsibility for SIP was taken over by the Restaurant and Bar Association and renamed "Smart Serve". Smart Serve is currently administered by the Hospitality Industry Training Organization. He acted as a consultant in the process of the transition from SIP to Smart Serve. Although he was tendered by the plaintiffs as an expert in the field of responsible alcohol service standards, he was not qualified as such and therefore was not permitted to give opinion evidence. He was allowed to testify in order to identify those portions of the two Smart Serve workbooks which were made exhibits on consent, with potential relevance to the issues to be decided in this trial.

[74] The Smart Serve workbooks for 2005 and 2011 were made exhibits. According to Robert Simpson, the most significant difference between the two versions was that, in the 2011 revision, licencees were referred to the Alcohol and Gaming Commission of Ontario website for the

creation of policies and procedures. Set out below are some passages contained in the Smart Serve workbooks.

2005 revision

Page 12: Water, juice and non-alcoholic drinks with food, particularly fatty foods, eaten before or during drinking, will dilute and hold alcohol in the stomach longer and slow down the rate of absorption. Food also gives guests something else to do with their hands. The goal is to give guests food before they consume alcohol. Servers should actively promote food sales.

Page 13: It is entirely possible for a guest to be too drunk to legally drive, and still show no signs of visible intoxication. This creates a problem for servers. A greater tolerance for alcohol does NOT lower a person's BAC.

Therefore, the most accurate method to prevent intoxication is to count the number of drinks served to each person. If this guest is served beyond the legal BAC then the guest is violating the law if he or she drives. One solution is to count drinks to calculate BAC.

Page 22: Do not engage in or permit practices which promote a patron's immoderate consumption of liquor. Example[s]: Do not offer liquor at discounted prices.

Page 45: The purpose of the Chat and Check is to find out how much alcohol you can serve your guests. You can do this when greeting and seating guests. "Chatting" with your guests can determine many things:

- ✓ has the guest been drinking before he or she arrived?
- ✓ is your guest driving?

- ✓ what mood is the guest in?
- ✓ is there a designated driver (DD)?

Page: 59: All types and sizes of establishments should have house policies and procedures to help staff and management follow the principles of responsible beverage service.

Page 63: Does your establishment … Prohibit the promotion of drink specials, happy hours, discounts, drinking games or contests

2011 revision

Page 16: Under the Liquor Licence Act, a server is not allowed to sell or serve alcohol to a guest to the point of intoxication. As server must ensure that a guest is not in danger of causing injury or damage to themselves or others;

Page 17: Once a guest is intoxicated, the server and/or the licensee have a further "duty of care" to protect that guest and others from the dangers that relate to the guest's intoxication, and is responsible for that guest until he or she is sober again;

Page 31: Alcohol is metabolized more slowly than it is absorbed. Since this process is slow, servers need to control their guests drinking to prevent intoxication;

Page 58: You must know the number of standard drinks consumed by the guest in order to estimate their level of intoxication;

Page 61: As a server, you must do everything you can to ensure your guests do not become intoxicated. To help you with this, your workplace should have a House Policy that is designed to guide and support you in all aspects of responsible

> alcohol service. This policy should give you clear and consistent guidelines to carry out your establishment's philosophy of responsible alcohol service;
>
> A House Policy should include a goal statement which represents your establishment's overall commitment towards achieving responsible beverage service. Talk to your Manager/Owner about your workplace's House Policy.
>
> Page 63: Manage the buying of rounds – when a guest orders a round for the table, acknowledge the order, then politely and tactfully ask each person if they would like to have the drink ordered for them. Some may turn down the offer.

Findings of Fact

[75] Based on my consideration of the testimony of the witnesses and the relevant exhibits I am able to come to a determination about the events leading up to the motor vehicle accident even though there were discrepancies in the recollection of witnesses.

[76] Philip and Greg arrived at the Fonthill residence at approximately 8 p.m. This is based on Philip's testimony that he and Greg arrived at approximately 8 p.m. and Bryan's testimony that they arrived around 8 or 8:30 p.m.

[77] On the way to the Fonthill residence, Philip purchased a case containing six bottles of James Ready beer. Some witnesses gave evidence from which a conclusion could be drawn that Philip purchased a case of 12 bottles of beer. However, I have concluded it is more likely that he purchased a six pack. It was in cross-examination that Philip agreed there was a possibility that he took 12 bottles of beer to the Fonthill residence. Bryan testified that Philip brought a six pack of James Ready beer. He was confronted with his answer from his examination for discovery in which he said he could not remember whether it was six or 12 bottles of beer that Philip brought with him. He did not resile from his testimony that it was a six pack only. Greg said that Phil

purchased 12 bottles of beer on the way to the Fonthill residence but it could have been a six pack. I discount his testimony on this point because of his poor recollection of the events of the evening of June 6 and early morning of June 7, 2012 as result of the head injury he sustained in the accident.

[78] All witnesses with the exception of Greg agreed that Wesley and Bryan were at the Fonthill residence when Philip and Greg arrived but Brianna and Kaitlyn had not yet arrived. While waiting for the females to arrive, Philip, Wesley and Greg each consumed two bottles of beer. After Brianna and Kaitlyn arrived some homemade wine was served. There is no evidence that any member of the group consumed more than a small amount of wine. Bryan said everyone had a taste of wine. Brianna said she was served some wine which she spilled on her pants after a couple of sips.

[79] The group left the Fonthill residence to go to the All Star between 9 and 9:30 p.m. They arrived at the All Star between 9:30 and 10 p.m. This finding is largely based on the evidence which I accept about the time Philip and Greg arrived at the Fonthill residence. Brianna and Kaitlyn arrived sometime after Philip and Greg. There was general agreement that the group consumed some beer and wine before leaving to go to the All Star. The hockey game was in progress when the group arrived at the All Star. I do not accept Jennifer's testimony that the group arrived prior to the start of the hockey game. I do not accept Jamie's testimony that the group arrived between 8 and 8:30 p.m. I find they were mistaken on this point.

[80] Four trays of beer were served to the group. This is borne out by Phillip's debit receipt for $64 which is consistent with four trays of beer at a total cost of $48 plus taxes and a tip. It is consistent with the photographs showing 36 empty cups plus a full glass of beer. Jennifer said in her statement to the police that the group was served four trays of the 12 for 12 special. Jamie said she served three trays of beer to the table and she thought Jennifer had served an additional one.

[81] The group left the All Star sometime between 12:45 p.m. and 1 a.m. Wesley took a photograph of the pyramid of glasses at 12:31 a.m. Because there is a full cup of beer in that photograph, I conclude that some or all of the members of the group continued to drink beer after 12:31 a.m. Philip was texting with Greg at 11:56 p.m. while still at the All Star. Bryan testified that the group remained at the All Star until 1 a.m. The video surveillance from the Target Gas Bar showed Philip and Wesley arriving in Philip's car at 1:31 a.m. Therefore, the group must have left the All Star by at least 1 a.m. in order for there to be enough time to stop at Sobey's, return to the Fonthill residence, exit the vehicle, re-enter the vehicle and drive to the gas bar.

[82] Philip, at most, had a small amount of wine after returning to the Fonthill residence. Philip testified that he had one sip from a glass of wine which he put on the kitchen counter and then went outside for a cigarette. Greg said he remembered drinking wine back at the residence and that he thought Philip and Wesley had a glass of wine each. He also said that they were only at the Fonthill residence for approximately 15 or 20 minutes before leaving to go to the gas bar. Kaitlyn testified that after returning to the Fonthill residence, Philip, Wesley and Greg each poured themselves a glass of wine and then went outside for a cigarette.

[83] At the time he left the All Star, Phillip's BAC was between 220 and 240. This conclusion is based on the evidence of Dr. Rosenbloom and Dr. Corbett who both calculated back to times earlier in the morning consistent with the time I have found the group departed from the All Star and based on Philip's BAC of 192 at 3:10 a.m. as determined by the Centre of Forensic Sciences. I discount most of Dr. Corbett's testimony because his calculations were based on his assumption that Philip weighed between 176 and 189 pounds. I accept Phillip's evidence that he weighed 155 pounds at the time of the accident. When Dr. Corbett was asked in cross-examination to assume Philip's weight to be 155 pounds, he calculated Phillip's BAC to be 240 at 12:45 a.m. This is consistent with Dr. Rosenbloom's calculations. Dr. Rosenbloom and Dr. Corbett agreed that a person with a BAC in this range would likely be exhibiting signs of intoxication and that person's ability to operate a motor vehicle would be impaired.

[84] While at the All Star Philip, Wesley and Greg, and in particular Philip, drank more than an equal share of the 48 glasses of beer that were served. Bryan said that Philip, Wesley and Greg had more to drink at the All Star then did he, Brianna or Kaitlyn. Brianna said she had four or five cups of beer and Kaitlyn had three or four. Kaitlyn said she only consumed two glasses of beer.

[85] Having concluded that Philip drank two bottles of beer before going to the All Star and had only a small quantity of wine afterward, I find that Philip consumed approximately 20 cups of beer while at the All Star. Dr. Rosenbloom testified that in order to achieve the BAC that he calculated for Philip at 12:40 a.m. he would have had to have consumed the equivalent of between 10 and 11.5 bottles of 5% beer while at the All Star. This translates into between 20 and 23 six ounce cups of beer. Dr. Corbett said Philip would have had to have consumed between 16 and 30 six ounce cups of beer at the All Star in order to achieve the BAC at 3:10 a.m. as determined by the Centre of Forensic Sciences. The differences in the calculations of the two experts, in my view, are explainable on the basis of the different assumptions with respect to weight and the differing rates of alcohol elimination from the body. Also, it seems to me that it is possible, and indeed likely that at least some of the glasses of beer served to the group contained more than 6 ounces. This would increase the BAC for a given number of cups of beer consumed.

[86] In my view, it matters not exactly how many cups of beer Philip drank while at the All Star. What is significant is that he consumed far more than a 1/6 share of the beer that was served to the group.

[87] The All Star did not have a sufficient complement of staff working on the evening of June 6, 2012. There were only two servers. There was no one on the door. There was no one checking to make sure that everyone who came into the All Star was of legal drinking age. I do not accept Jennifer's evidence that she spent time speaking to the members of the group during the evening. Within a week of the accident, she told the police she thought there were eight people in the group when there were only six. She said the All Star was very strict about

checking identification. She assumed Jamie had done so. Jamie did not say that she checked the identification of any member in the group. Bryan testified that the server did not ask questions of anyone in the group and no employee of the All Star, other than the server, spoke to the group. Brianna and Kaitlyn said that neither of the two female employees at the All Star spoke to them. This is significant considering that both were only weeks beyond their 19th birthdays.

[88] No food was offered to the group. No water was served. Neither Jennifer nor Jamie counted the number of glasses of beer any person in the group consumed. There was no effort made to count drinks. Jennifer and Jamie simply assumed that the beer was being consumed equally by everyone in the group and yet Jamie told the police within a week after the accident that she was not sure if the females in the group were drinking the beer. Jamie said that she kept track of the number of drinks a person consumed by the length of time the person was at the bar but she also said that it was hard to count the number of glasses of beer consumed by any one person when a group ordered the 12 for 12 special.

[89] No inquiries were made by Jennifer or Jamie about who in the group was driving. Jennifer told the police that she did not see the group leaving but she said there was somebody on the door who would have seen them leave. Jovica said Jennifer and Jamie were the only two employees working on the evening of June 6, 2012 and there was no one checking identification that night. I do not accept Jennifer's testimony that there was someone at the door who would have observed the group leaving. Jamie told the police that she thought the females in the group left before the males.

[90] There was no policy in place at the All Star to monitor the number of glasses of beer any person in a group consumed when the 12 for 12 special was being offered. Jovica said it would be easy to observe if one or more members of a group were drinking more glasses of beer than other members of the group. He also stated that when the 12 for 12 special was being served he did not keep track of how many glasses of beer each person in a group drank.

[91] The price for the equivalent of 12 ounces of beer in the 12 for 12 special was two dollars whereas the regular price for a 12 ounce bottle of beer was $4.25.

[92] I find that at the time of leaving the All Star, Philip was exhibiting obvious signs of impairment including some or all of the following: red eyes, staggering, stumbling, slurred speech and impaired fine motor skills. In coming to this conclusion I rely significantly on the testimony of Drs. Rosenbloom and Corbett. Bryan said that Philip was drunk when they left the All Star. Brianna and Kaitlyn were sufficiently concerned about Philip's sobriety that they questioned Bryan about whether he was capable of driving the group back to the Fonthill residence. Philip testified that everyone in the group was drunk when they left the All Star.

The Law

[93] Section 39 of the Liquor Licence Act, R.S.O. c. L.19 provides under the heading "Civil liability":

> The following rules apply if a person or an agent or employee of a person sells liquor to or for a person whose condition is such that the consumption of liquor would apparently intoxicate the person or increase the person's intoxication so that he or she would be in danger of causing injury to himself or herself or injury or damage to another person or the property of another person:
>
> 1. …
>
> 2. If the person to or for whom the liquor is sold causes injury or damage to another person or the property of another person while so intoxicated, the other person is entitled to recover an amount as compensation for the injury or damage from the person who or whose employee or agent sold the liquor.

[94] In *Stewart v. Pettie*, [1995] 1 S.C.R. 131, the Supreme Court of Canada stated at paragraphs 28 and 33:

> It is a logical step to move from finding that a duty of care is owed to patrons of the bar to finding that a duty is also owed to third parties who might reasonably be expected to come into contact with the patron, and to whom the patron may pose some risk. It is clear that a bar owes a duty of care to patrons, and as a result, may be required to prevent an intoxicated patron from driving where it is apparent that he intends to drive. Equally such a duty is owed, in that situation, to third parties who may be using the highways. In fact, it is the same problem which creates the risk to the third parties as creates the risk to the patron. If the patron drives while intoxicated and is involved in an accident, it is only chance which results in the patron being injured rather than a third party. The risk to third parties from the patron's intoxicated driving is real and foreseeable.
>
> and,
>
> There is no question that commercial vendors of alcohol owe a general duty of care to persons who can be expected to use the highways.

[95] I therefore find that the All Star owed a duty of care to Wesley. This duty of care arises out of both section 39 of the *Liquor Licence Act* and the common law.

[96] In my view, it was reasonably foreseeable to the All Star and its employees that patrons would arrive and leave in motor vehicles. The All Star was located in the small Town of Fonthill. There was parking for vehicles both in front and to the side of the building. There was no evidence of regularly scheduled commercial transit being available.

[97] In *McIntyre v. Grigg*, 83 O.R. (3d) 161, the Ontario Court of Appeal stated at paragraph 23:

> In Ontario, commercial host liability may be imposed both at common law and by statute where a patron, who subsequently causes injury, has been served while intoxicated or over-served to the point of intoxication, and where it is reasonably foreseeable that the patron will drive a motor vehicle upon leaving the establishment. Commercial vendors of alcohol have an obligation to monitor a patron's consumption of alcohol and should have protocols in place to ensure that all reasonable precautions

> are taken to prevent such patrons who subsequently drive from becoming intoxicated to the point where they cannot safely operate a motor vehicle. Moreover, a commercial host does not escape liability simply by not knowing that the patron became inebriated before driving; the commercial host is liable if it or its employees knew or ought reasonably to have known in the circumstances that the patron was in such a condition. [authorities omitted]

[98] As stated previously, I find that Philip was served the point of intoxication at the All Star. According to the testimony of the two experts, based on his BAC, Phillip would have been exhibiting obvious signs of impairment. There was no policy in place which would guard against the risk of an intoxicated patron operating a motor vehicle after leaving the bar. There was no effort made to count the actual number of drinks consumed by any member of a group when the 12 for 12 special was being purchased. The All Star assumed that all members in a group of patrons would consume an equal number of glasses of beer with the 12 for 12 special. This was an unreasonable assumption. The All Star and its employees failed to fulfil their obligations pursuant to Smart Serve including:

a) checking the identification of persons who were barely over the age of 19 years;
b) counting drinks;
c) engaging customers in conversation for the purpose of assessing sobriety;
d) encouraging the ordering the food;
e) supplying water to the table;
f) offering the 12 for 12 special at a discounted price which made it difficult if not impossible to monitor the consumption of any individual customer; and,
g) making inquiries about the arrangements in place to assure that a group of customers would arrive home safely.

[99] In *Stewart*, the Supreme Court found no liability on the part of the commercial host on the basis that it was not reasonably foreseeable that the intoxicated patron would operate a motor vehicle after leaving the establishment in a state of intoxication. In that case the facts were that the intoxicated driver was in the presence of two sober, mature women and had been for the entire evening. A single server maintained a running total of all alcohol ordered and was aware that the two ladies had consumed no alcoholic beverages throughout the evening. It was held that the intoxicated driver, to the knowledge of the licensed establishment, was in the care of two sober and responsible persons when leaving the establishment.

[100] In the present case, the All Star had no idea whether Philip was in the care of a responsible person. No inquiries were made as to who was the designated driver. It was unknown how much beer any one person in the group had consumed. Unlike in *Stewart*, the servers had no idea whether Brianna or Kaitlyn were capable of caring for Philip and Wesley and assuring that they arrived home safely.

[101] In *Childs v. Desormeaux*, [2006] S.C.J. No. 18, the Supreme Court of Canada compared the duty of care that applies to commercial hosts with that which applies to social hosts, stating at paragraphs 18 to 21:

> First, commercial hosts enjoy an important advantage over social hosts in their capacity to monitor alcohol consumption. As a result, not only is monitoring relatively easy for a commercial host, but it is also expected by the host, patrons and members of the public. In fact, commercial hosts have a special incentive to monitor consumption because they are being paid for service. Patrons expect that the number of drinks they consume will be monitored, if only to ensure that they are asked to pay for them. Furthermore, regulators can require that servers undertake training to ensure that they understand the risks of over-service and the signs of intoxication (see e.g. Liquor Licence Act, R.R.O. 1990, Reg. 719). This means that not only is monitoring inherently part of the commercial transaction, but that servers can generally be expected to possess special knowledge about intoxication.

> Second, the sale and consumption of alcohol is strictly regulated by legislatures, and the rules applying to commercial establishments suggest that they operate in a very different context than private-party hosts. This regulation is driven by public expectations and attitudes towards intoxicants, but also serves, in turn, to shape those expectations and attitudes. In Ontario, where these facts occurred, the production, sale and use of alcohol is regulated principally by the regimes established by the Liquor Control Act, R.S.O. 1990, c. L.18, and the Liquor Licence Act, R.S.O. 1990, c. L.19. The latter Act is wide-ranging and regulates how, where, by and to whom alcohol can be sold or supplied, where and by whom it can be consumed and where intoxication is permitted and where it is not.
>
> These regulations impose special responsibilities on those who would profit from the supply of alcohol. This is clear by the very existence of a licensing scheme, but also by special rules governing the service of alcohol and, as noted above, special training that may be required. Clearly, the sale of alcohol to the general public is understood as including attendant responsibilities to reduce the risk associated with that trade.
>
> The importance of this regulatory environment does not relate to the statutory requirements per se, but what they demonstrate about the nature of commercial alcohol sales and about the expectations of purveyors, patrons and the public. Selling alcohol is a carefully regulated industry. The dangers of over-consumption, or of consumption by young or otherwise vulnerable persons, means that its sale and service in commercial settings is controlled. It is not treated like an ordinary commodity sold in retail stores. The public expects that in addition to adherence to regulatory standards, those who sell alcohol to the general public take additional steps to reduce the associated risks.

[102] The standard of care owed by the All Star to Wesley and others was to refrain serving alcohol to patrons, and in particular Philip, to the point of intoxication knowing that the patron was likely to leave the All Star and operate a motor vehicle. Furthermore, it was the responsibility of the All Star to be vigilant to prevent someone who was intoxicated from putting users of highways at risk by taking steps to assure that the intoxicated patron would not operate a

motor vehicle. The standard of care applicable to the All Star was to implement and enforce the protocols set forth by Smart Serve. I therefore find that the All Star breached its duty of care to Wesley.

[103] The All Star asserts that if it breached the standard of care which it owed to Wesley, nevertheless, the return of the group to the Fonthill residence terminated its liability.

[104] The Ontario Court of Appeal in *Williams v. Richard*, 2018 ONCA 889 stated at paragraph 46 that:

> In a social host liability case, there is no automatic rule that the duty of care expires once the intoxicated driver arrives home safely. The limits of the duty are determined by the facts of the case.
>
> In my view, there is no reason why the passage quoted above should not equally apply to a commercial host liability case.

[105] In *Widdowson v. Rockwell*, 2017 BCSC 385, Kent J. dealt with the argument that a commercial hosts liability terminates when the intoxicated patron arrived home safely as follows at paragraph 81:

> In my view, there is little logic to the bald proposition that a safe arrival home "breaks the chain of causation" or otherwise discharges the pub's duty of care. Ought it really matter whether the pub-induced intoxication triggers a fall while walking home as opposed to a fall once the drunken patron has successfully crossed the threshold into his house? Does it make any sense that liability can be imposed for alcohol-caused injury to third parties before arrival at home but not if same injury occurs after leaving the home a few minutes later?

[106] I agree with that reasoning. It does not make sense that if Philip had been involved in an accident while driving from the All Star to the Fonthill residence, the All Star would be liable to third parties such as Wesley but the All Star is not liable to Wesley because Philip had driven

him to his home. The same lack of judgement, induced by the consumption of alcohol, which resulted in Philip driving a motor vehicle upon leaving the All Star and Wesley becoming a passenger in the vehicle also was a significant contributing factor to Philip and Wesley leaving the Fonthill residence in Philip's motor vehicle to go to purchase cigarettes. It was the same consumption of alcohol which impacted both poor decisions.

[107] Also, although not determinative of the issue, the Smart Serve protocols provide that the licensed establishment is responsible for the guest until he or she is sober.

[108] I therefore find that the liability of the All Star did not come to an end when Philip and Wesley arrived back at the Fonthill residence on June 7, 2012.

Apportionment of Liability

[109] In *Dryden (Litigation guardian of) v. Campbell Estate*, [2001] O.J. No. 829, Cavarzan J. in apportioning liability as between an impaired driver and a tavern stated at paragraph 216:

> A person who knowingly and persistently continues to drink to excess and drive a motor vehicle on our highways behaves in a dangerous and reprehensible manner. When others are drawn into the vortex of this conduct and are found to have been contributorily negligent, the lion's share of culpability, both morally and legally, should attach to the drinking driver.

This statement was referred to with approval by the Ontario Court of Appeal in *McIntyre* at paragraph 37.

[110] In the present case the majority of the liability as between defendants must rest with Philip. However, I find that the conduct of the All Star was also a significant contributing factor to the cause of the accident. The All Star had no meaningful policy in place to guard against persons becoming intoxicated while on its premises and then operating a motor vehicle. The 12

for 12 special was something that was specifically discouraged by Smart Serve. The employees of the All Star paid little, if any heed, to their responsibility to monitor the consumption of alcohol of patrons, particularly on those evenings when the 12 for 12 special was being offered.

[111] I therefore apportion liability for the motor vehicle accident at 80% against Philip and 20% against the All Star.

Contributory Negligence on the Part of Wesley

[112] Philip and the All Star take the position that Wesley should be found contributorily negligent for the following four reasons:

a) not wearing the seatbelt that was available to him at the time of the accident;

b) entering the vehicle when he knew or ought to have known that Philip's ability to operate the vehicle was impaired by alcohol;

c) encouraging Philip to drive faster; and,

d) grabbing the steering wheel while Philip was driving.

Wesley acknowledges that he was contributorily negligent for failing to wear a seatbelt.

[113] It is common ground that Wesley was served beer at the All Star on the evening of June 6, 2012. He also consumed two bottles of beer at the Fonthill residence before attending at the All Star. Philip testified that everyone in the group got drunk at the All Star. Bryan said that Wesley, Philip and Greg were all drunk by the time they left the All Star. Brianna testified that Wesley was drunk by the time they left the All Star. Kaitlyn described Wesley as "feeling good" and being loud, happy and goofing off.

[114] Jamie testified that when the group left the All Star no one appeared to be intoxicated but she did not actually see them leave. Jennifer testified that when the group left the All Star they were "perfectly fine" but she did not remember the group leaving.

[115] Philip testified that when the group returned to the Fonthill residence he, Wesley and Greg each poured themselves a glass of wine. When they left to go to the store to purchase cigarettes, Wesley and Greg took their glasses of wine with them in the car. Kaitlyn testified that when they returned to the Fonthill residence Philip, Wesley and Greg each poured themselves a glass of wine which they did not finish.

[116] Philip's testimony at examination for discovery was that each of he, Wesley and Greg poured a glass of wine when they returned to the Fonthill residence. They then went outside to smoke a cigarette. Philip also testified at his examination for discovery that Wesley and Greg took their glasses of wine with them in the car when they went to purchase cigarettes. He said Wesley only poured himself one glass of wine.

[117] Philip said that when they left the Fonthill residence to go to purchase cigarettes, Greg sat in the backseat and Wesley sat in the front passenger seat. Philip testified that neither he nor Wesley put on the seatbelts that were available in the car. At the gas station he and Wesley entered the store and purchased cigarettes. After buying the cigarettes he and Wesley re-entered the vehicle and again did not put on their seatbelts. They took a different route to return to the Fonthill residence. He followed Wesley's directions.

[118] Philip testified that on the trip back to the Fonthill residence, Wesley and Greg encouraged him to drive faster, which he did. He said Wesley also reached over and grabbed the steering wheel. This was shortly before he came to the stop sign at the intersection of Station and College Streets. As he reached over to punch Wesley for grabbing the steering wheel, he saw a red blur and he tried to turn the vehicle to the left but he did not make it. In cross-examination he

agreed that it was a sharp turn to the left. He did not recall the actual collision but he knew the car hit a large tree.

[119] Philip was taken from the scene of the accident by ambulance to a hospital for treatment of a badly fractured ankle. When he was released from hospital his father drove him to the hospital in Hamilton where Wesley was. He spoke to Wesley's parents, Patricia and Detlev Hummel ("Patricia" and "Detlev"). He told them he was very sorry about the accident and that Wesley and Greg had encouraged him to drive faster but he did not mention anything about Wesley trying to grab the steering wheel. He did not tell Patricia and Detlev about Wesley grabbing the steering wheel because he did not want to blame Wesley for causing the accident.

[120] Det. Constable Inch, a member of the Motor Vehicle Collision Reconstruction Unit of the Niagara Regional Police Service, testified that he arrived at the accident scene at 3 a.m. When he arrived at the scene he assumed responsibility for the investigation. He arranged for a series of photographs of the accident scene and the surrounding area to be taken.

[121] Det. Constable Inch located and photographed a tire mark five metres in length just west of the stop sign at the intersection of College Street and Station Street. He located and photographed a tire mark four metres in length in the northbound lane of Station Street which ended just before the ditch. There was a .5 metre long tire mark to the north of the four metre long tire mark and a fourth tire mark on the sidewalk to the east side of Station Street which began at the edge of the ditch and continued into the front lawn of 1389 Station Street.

[122] Det. Constable Inch arranged for the Jantzi motor vehicle to be taken to a garage where he examined it on June 7, 2012. There was hair and blood in the centre of the windshield. The passenger side glove box airbag had deployed and was covered in blood. The rear view mirror was broken off. He observed black hair and blood on the right front dashboard vent. There was an intrusion into the left front of the vehicle measuring 74 centimetres at a point 35 centimetres from the ground.

[123] The vehicle was examined by an automobile mechanic in the presence of Det. Constable Inch. The report of the mechanic was made an exhibit on consent. In the Mechanical Vehicle Examination Report dated June 7, 2012 the following was stated:

> This vehicle is equipped with dual air bags, curtain bags and side air bags. Left side all deployed. Right side only dash deployed.

[124] Jennifer Tourond, a Constable with the Niagara Regional Police Service was not called as a witness at the trial but a written statement prepared by her was introduced as evidence on consent. In that statement, Cst. Tourond said that at the accident scene she arrested Philip for impaired driving, advised him of his right to counsel and read a police caution. Philip said he did not want to speak to a lawyer but said "They [the guys in the car] were telling me to go fast, so I did". Subsequently, after being rearrested and asked if he understood the charges, Philip stated "Yes. I was stupid".

[125] In a report prepared by ambulance attendants Wesley Doig and Justin Fitzpatrick, which report was made an exhibit on consent, the authors recorded that, while at the scene of the accident, Philip told them that he was driving fast and failed to stop for a stop sign.

[126] Philip did not recall if he told his insurance company that Wesley had reached over and grabbed the steering wheel just prior to losing control of the vehicle. Philip said it was months after the accident before he first mentioned anything about Wesley attempting to grab the steering wheel. His explanation for failing initially to say anything about Wesley grabbing the steering wheel was that he did not want to blame Wesley for the accident when it was uncertain whether Wesley would live or not.

[127] In a report prepared by ambulance attendant Jaclyn VanLeerzem which was made an exhibit on consent, she recorded "front passenger unconscious, leaned over toward driver".

[128] At 2:25 a.m. on June 7, 2012, a sample of Wesley's blood was taken at Welland General Hospital. It was analysed to contain 26 mmol of ethanol per litre of serum.

[129] Dr. Rosenbloom testified that based on Wesley being 6 feet tall and weighing 175 pounds a concentration of 26 mmol of alcohol per litre of blood serum was the equivalent of a BAC of 102. Dr. Rosenbloom then calculated back from that BAC at 2:25 a.m. and determined that Wesley's BAC at the time of departing the All Star would have been between 122 and 152. This would have required Wesley to have consumed the equivalent of between 4.5 and 6.5 bottles of 5% beer at the All Star. Dr. Rosenbloom said that at those BAC levels there might be observable signs of impairment as well as some impact on information processing and risk-taking.

[130] Dr. John Wells, a neurosurgeon, performed surgery on Wesley on the morning of June 7, 2012 at the Hamilton General Hospital. He referred to a number of hospital records which were made exhibits. He explained that Wesley suffered a depressed, comminuted fracture to the right rear of his skull. The fracture was depressed up to 6 millimetres. Dr. Wells performed surgery to the right rear skull fracture and removed bone fragments to relieve pressure on the brain and reduce swelling. The bone fragments were later replaced.

[131] Dr. Thomas Jenkyn was qualified without objection as an expert in biomechanics and automobile accident reconstruction. Dr. Jenkyn testified that he used computer software to create a simulation of the motor vehicle accident that occurred at the intersection of College Street and Station Street in the early morning hours of June 7, 2012. To create the simulation, Dr. Jenkyn used software called Human Vehicle Environment ("HVE"). Within HVE are two modules which were used for the simulation called Engineering Dynamics Simulation Model for Automobile Collisions 4 ("EDSMAC4") and Graphic Articulated Total Body ("GATB"). EDSMAC4 simulates the movement of the motor vehicle involved in the collision and GATB simulates the movement of the occupant or occupants within the vehicle during the collision.

[132] Dr. Jenkyn explained how he created the simulation by inputting into the software the physical details of the accident scene obtained from the police investigation. In the simulation, by using a speed of 80 km/h he was able to re-create the collision with the tree on the front lawn of 1389 Station Street and then have the vehicle come to rest, pointing in the opposite direction to which it had travelled along College Street, on the front lawn next to, but without hitting, the southernmost tree. Using the EDSMAC4 module he was able to determine the acceleration pulses occurring within the vehicle at various points in time during the course of the collision. It was important to Dr. Jenkyn's analysis that the Jantzi vehicle was turning sharply to the left immediately prior to the collision with the tree. From the simulation, Dr. Jenkyn concluded that when the vehicle collided with the tree Wesley's body accelerated forward. He also concluded that when the vehicle collided with the tree Wesley's body was initially accelerated towards the right, then to the left and then back again to the right.

[133] Dr. Jenkyn concluded that when the Jantzi vehicle collided with the tree it was travelling forward and turning to the left at approximately 80 km/h. Dr. Jenkyn explained that Delta V is the change in speed of a vehicle following a collision. In a straight on collision between a vehicle and an immovable object such as a tree at 80 km/h, the Delta V would be approximately 80 km/h. In the collision in this case, some of the force when the vehicle collided with the tree was transferred to the rotation of the vehicle. He calculated the Delta V of the Jantzi vehicle when it collided with the tree to be 54.6 km/h. Dr. Jenkyn also determined that after the collision, the Jantzi rotated in a counterclockwise direction**.**

[134] Dr. Jenkyn concluded, based on his simulation, that when the vehicle collided with the tree Wesley's body moved forward and to the left, came into contact with the front airbag which caused the body to rebound backwards while experiencing lateral outward acceleration. In the opinion of Dr. Jenkyn, this resulted in the right rear of Wesley's head coming into contact with the B-pillar of the vehicle. Dr. Jenkyn testified that where Wesley's body ended up in the simulation was consistent with the EMS reports about the actual location of his body within the

vehicle. He also stated that if the side airbag on the passenger side had deployed, it is designed to curtain the right side of the vehicle including the passenger side window and the B-pillar.

[135] Dr. Jenkyn created another simulation using the identical input data but with the passenger being restrained by a lap and torso seatbelt. In that simulation, the body moved forward, came into contact with the front airbag and was then accelerated backward and towards the outside of the vehicle. Based on this simulation, Dr. Jenkyn concluded that the right rear of the head of a seat belted occupant would still have struck the B-pillar but with less force than an unrestrained occupant.

[136] Dr. Jenkyn said he did not believe the skull fracture sustained by Wesley was caused as a result of his head hitting the dashboard of the vehicle as his body was thrown forward after the collision with the tree. Firstly there would have been a rotation his body of 100 degrees or more which would likely have resulted in a neck injury. Secondly, he would have expected significant damage to the dashboard and there was not.

[137] Raffi Engeian was qualified without objection as an expert in the field of mechanical engineering and motor vehicle accident reconstruction. Mr. Engeian dealt with the collision of the Jantzi vehicle with the tree located on the front lawn at 1389 Station Street. In forming his opinion, Mr. Engeian considered the information and documentation from the police investigation including photographs of the accident scene and the Crown disclosure pertaining to the charges against Philip. Mr. Engeian testified that he entered data from the police accident reconstruction into a computer program called PC Crash. He also compared the collision in question with an exemplar from a staged crash test of a similar motor vehicle.

[138] Based on his review of the accident investigation by the Niagara Regional Police and in particular the location of the skid marks in the accident reconstruction, he concluded that, while there was some leftward steering, the Jantzi vehicle essentially travelled on a straight trajectory just prior to striking the tree. Mr. Engeian determined that at the point of impact between the

Jantzi vehicle and the tree, the Delta V was approximately 78 - 79km/h and the Principal Direction of Force ("PDOF") was rearward and slightly to the right.

[139] Mr. Engeian calculated that the Jantzi vehicle rotated in a counterclockwise direction after colliding with tree at a maximum speed of 170° per second. Mr. Engeian then presented his calculations to his colleague Dr. Chad Gooyers who addressed the movement of Wesley's body in the vehicle following the collision.

[140] Dr. Gooyers was qualified as an expert in biomechanics including occupant kinematics, biomechanics in seatbelt and airbag effectiveness and biomechanics regarding injury mechanisms and injury biomechanics. His role in the analysis of the present accident was to determine Wesley's movement within the vehicle after the collision assuming he was wearing a seatbelt and then not wearing a seatbelt.

[141] He testified that he utilized two key pieces of information from the analysis done by Mr. Engeian. Those were the Delta V and the PDOF. He testified that when the Jantzi vehicle struck the tree it was travelling at about 80 km/h. He said that an occupant in the vehicle would move in accordance with the Delta V and in the direction of the PDOF. This is important because the movement of the occupant of the vehicle will be with the force of the Delta V and in the direction of the PDOF vehicle.

[142] Dr. Gooyers testified that after hitting the tree, the Jantzi vehicle rotated counterclockwise but in his opinion, as a result of this rotation, Wesley would have moved away from the B pillar and towards the centre of the vehicle. He also testified that Wesley's head was likely rotated to the left when the vehicle collided with the tree. It was Dr. Gooyers' opinion that if Wesley had been properly restrained he would not have not have experienced any rigid head or face contact with the interior of the vehicle during the initial forward motion but he might have suffered a concussion during the post impact rotation of the vehicle. Although Dr. Gooyers acknowledged that if Wesley had been wearing a lap and shoulder seatbelt, there might have

been some contact between his head and some part of the interior of the vehicle, but it would not have been of sufficient severity to cause a comminuted right rear skull fracture.

[143] In cross-examination, Dr. Gooyers' testified that although he was unable to say how Wesley sustained the right rear comminuted skull fracture he thought it unlikely that it was caused when Wesley's head struck the B-pillar.

[144] I am faced with a stark contrast in the opinions of two highly qualified experts. Dr. Jenkyn opined that Wesley's skull fracture was caused as a result of his head striking the B pillar. Dr. Gooyers said that if Wesley had been wearing a seatbelt his head would not have struck the B pillar and he would not have suffered a right rear skull fracture.

[145] One of the key differences between and the assumptions relied on by Dr. Jenkyn on the one hand, and Mr. Engeian and Dr. Gooyers on the other hand, is the direction of travel of the Jantzi vehicle when it came into collision with the tree. Dr. Jenkyn assumed that the vehicle was rotating as a result of the left hand turn executed by Philip as the vehicle entered the intersection. Mr. Engeian assumed that the vehicle was travelling in a straight line when it struck the tree. Phillip's evidence was that he had turned the steering wheel sharply to the left as he entered the intersection. Based on this evidence, it seems more likely to me that the car was rotating in a counter-clockwise direction when it struck the tree.

[146] Another difference in the evidence given by Dr. Jenkyn and Dr. Gooyers is that Dr. Jenkyn provided an opinion about the likely mechanism that caused Wesley's head injury whereas Dr. Gooyers simply testified that Wesley would not have suffered a comminuted depressed skull fracture if he had been wearing a seatbelt but he expressed no opinion about how the injury could have been caused. Although not specifically expressed, it seems to me that the inference sought to be drawn by the testimony of Dr. Gooyers is that the skull fracture was caused when Wesley's body moved forward within the vehicle after the impact with the tree. This seems to me to be unlikely.

[147] Firstly, Wesley would have had to have been almost facing towards the rear of the vehicle at the time it collided with the tree. Secondly, while I acknowledge the evidence about hair and blood on the dashboard vent on the right side of the Jantzi vehicle it seems to me Dr. Jenkyn's evidence makes sense that if the right rear of Wesley's head had struck the dashboard with sufficient force to cause a depressed skull fracture there would have been a significant depression, and none was noted in the police or EMS reports.

[148] Considering the testimony of Dr. Jenkyn, Dr. Gooyers and Mr. Engeian, I find myself preferring the opinion of Dr. Jenkyn. I conclude that Wesley suffered a comminuted, depressed fracture to the right rear of his skull when his head struck the B-pillar as the Jantzi vehicle rotated counterclockwise after the vehicle struck the tree. I also accept the evidence of Dr. Jenkyn that Wesley would still have suffered a significant head injury had he been restrained. However, I find that the failure to wear a seatbelt was a significant contributing factor to Wesley suffering a comminuted, depressed skull fracture and that had he been wearing a lap and shoulder seatbelt the injuries he sustained would have been much less severe.

[149] I am satisfied that Wesley's contributory negligence includes entering a motor vehicle knowing it would be operated by an impaired driver. Wesley and Philip had been together for the entire evening before the accident. There was some evidence that the plan was for Philip to be the designated driver. It must have been apparent to Wesley that Philip was consuming a sufficient quantity of beer that he was not honouring his commitment to be the designated driver. Others in the group thought Philip had consumed alcohol to excess and observed his erratic driving after leaving the All Star.

[150] I conclude that both Wesley and Greg encouraged Philip to drive faster after they left the convenience store having purchased cigarettes. I accept Philip's testimony on this point. From immediately after the accident, Philip consistently maintained that he was encouraged to drive faster. As he testified, "for some dumb reason" he went along with the encouragement and drove faster than he should have.

[151] The final aspect in relation to Wesley's contributory negligence is the claim by Philip that Wesley grabbed the steering wheel of the Jantzi vehicle. I conclude that this aspect of contributory negligence has not been proven. Most significantly, Philip did not mention anything about Wesley grabbing the steering wheel until well after the accident. He did not mention it to any of the police officers or EMS personnel who attended at the scene. He did not mention it to Wesley's parents when he spoke to them at the hospital later in the day of the accident. Philip had no hesitation, immediately following the accident, blaming Wesley and Greg for encouraging him to drive faster. I do not accept his explanation for failing to mention about the grabbing of the steering wheel because he did not want to cast blame on Wesley at a time when it was uncertain if Wesley would live.

[152] I was invited by counsel for the Jantzis' to assign a percentage of contributory negligence to each component of that negligence and then total the percentages. I decline to take that approach. In my view it is appropriate to consider Wesley's contributory negligence in its totality. I conclude that Wesley's contributory negligence for failing to wear a seatbelt, entering a vehicle which he knew would be operated by an impaired driver and encouraging Philip to drive faster should collectively result in a reduction of his damages by 25%.

[153] It is submitted that as it relates to the All Star, Wesley's contributory negligence should be reduced because the All Star was responsible for over serving Wesley so that his judgement was impaired.

[154] *Pilon v. Janveaux*, [2005] O.J. No. 4672 is a case factually similar to the present. Two friends were drinking together at a licensed establishment. Both became intoxicated. When they left the bar, one of the friends drove and the other was a passenger in the vehicle. There was an accident in which the passenger was seriously injured. At trial, the defendant driver and the bar together admitted liability for the injuries suffered by the plaintiff passenger without apportionment of responsibility between them. The jury then assessed the contributory negligence of the plaintiff passenger for failing to wear a seatbelt and entering a vehicle that he

knew was about to be operated by a person who was intoxicated. The Court of Appeal held that the jury should also have been required to determine the responsibility of the bar for over serving the plaintiff passenger. At paragraph 28, the court stated:

> In this case, two aspects of the tavern's liability should have been identified for the jury: liability for causing or contributing to the accident by its negligent conduct toward the driver, and liability for causing or contributing to the damage by its negligent conduct toward the appellant passenger. The jury should have been asked to apportion the degree of fault for each aspect of the liability of the tavern separately, along with the liability of each of the other respondents for the accident and for the damage and of the appellant for the damage.

[155] In supplementary reasons reported at *Pilon v. Janveaux*, [2006] O.J. No. 887, the Court held that typically the commercial host should bear a similar level of responsibility for allowing the passenger to become impaired as for the driver.

[156] In *McLean v. Knox*, [2013] O.J. No. 2487, the Court of Appeal instructed that when determining liability in cases such as the present where a commercial host over-served alcohol to two patrons, one of whom was the driver of a motor vehicle which was involved in an accident and the other was the injured passenger in the vehicle, the correct approach to apportioning liability is to firstly apportion liability for causing or contributing to the accident between the driver, for driving while intoxicated, and the commercial host, for over-serving the driver. Then liability for causing or contributing to the plaintiff's damages should be apportioned among the driver, for driving while intoxicated, the plaintiff, for accepting a ride from the intoxicated driver, and the commercial host, for over-serving both the driver and the plaintiff (paragraph 67).

[157] I have previously apportioned the All Star’s liability for the accident at 20%. For the same reasons, I conclude that the All Star breached its duty to Wesley to monitor his consumption of alcohol and to take steps to see that he would arrive home safely. The members of Wesley’s group described him as drunk. The servers at the All Star did not observe the group

leaving. I have considered Dr. Rosenbloom's testimony that Wesley's BAC at the time of leaving the All Star was less than that of Philip. However, I find that Wesley was still over-served. The difference in the respective BAC's of Wesley and Philip, in my view, are not sufficient to differentiate between the liability of the All Star for failing to properly monitor the alcohol consumption of each. I therefore find the All Star to be 20% responsible for over-serving Wesley.

Damages Sustained by Wesley

Non-pecuniary General Damages

[158] Wesley was transported by ambulance from the scene of the accident to the Welland General Hospital. Arrangements were promptly made to transfer him to Hamilton General Hospital.

[159] Wesley was airlifted to Hamilton General Hospital arriving at approximately 3:50 a.m. on June 7, 2012. He had a reading of 5 on the Glasgow Coma Scale which means a significant impairment of consciousness. A CT scan revealed a depressed and comminuted right side skull fracture. His injuries were summarized as a comminuted, depressed skull fracture, subarachnoid hemorrhage, subdural hemorrhage, intraparenchymal hemorrhage and diffuse axonal injury. Wesley was transferred to the Intensive Care Unit for a neurosurgical consultation.

[160] Dr. John Wells, a neurosurgeon, performed surgery on June 7, 2012 to remove cranial bone fragments in order to relieve pressure on the brain. He also removed some permanently damaged brain tissue. A ventricular drain was inserted and a bovine patch was applied to the area. He described the surgery as successful. Further surgery was performed on June 8, 2012 by Dr. Nuresh Murty, who is also a neurosurgeon. The surgery performed by Dr. Murty was similar to that of Dr. Wells but in a different location. On September 26, 2012, Dr. Wells replaced the bone flaps which had been removed from Wesley's skull on June 7 and 8.

[161] Wesley was discharged from the Hamilton General Hospital on July 15, 2012. He was transferred to Welland General Hospital to await an opening at the Acquired Brain Injury Program at Hamilton General Hospital. Wesley was admitted to the Acquired Brain Injury Program on August 1, 2012 where he remained until October 23, 2012. He was discharged to his parents' residence.

[162] Dr. Amadeo Rodriguez was qualified as an expert in the field of ophthalmology and neuro-ophthalmology. He first met Wesley on November 15, 2012. Wesley was referred to him because of loss of vision as result of a brain injury. Dr. Rodriguez concluded that Wesley had left-sided homonymous hemianopsia which is a loss of vision on the left side of both eyes. This condition is as a result of the right-sided brain injury. Dr. Rodriguez saw Wesley again on August 8, 2013 at which time the condition was unchanged. The prognosis is that there will be no improvement to the left side loss of vision. As a result of this condition, Wesley is unable to obtain a driver's license.

[163] Dr. Flor Muniz was qualified as an expert in physical medicine and rehabilitation with respect to acquired brain injuries. She saw Wesley for the purpose of a medical legal examination and report on October 9, 2015. She did an extensive review of Wesley's medical records, conducted an interview with Wesley in the presence of his father and his wife and performed a physical examination.

[164] One of the documents reviewed by Dr. Muniz was a report dated February 12, 2014 of a neuropsychological assessment of Wesley by Storrie, Velikonja and Associates which was conducted on December 2, 5 and 9, 2013. The assessment identified Wesley's strengths as expressive vocabulary, verbal reasoning, cognitive inhibitions and abstract problem solving. However a number of deficits were also noted including weaknesses in visual perception and scanning, visual-spatial skills, visual construction ability, processing speed, attention, learning and memory, verbal fluency, confrontational naming and cognitive flexibility. The assessment report noted that Wesley's mathematical and spelling skills were very low. He showed reduced

tactile perception and fine motor skills particularly on the left side. The assessment also indicated that Wesley experiences depression and anxiety. This is common for brain injured persons. Dr. Muniz found nothing surprising in the results of the neuropsychological assessment.

[165] Dr. Muniz concluded that Wesley had suffered a severe traumatic brain injury which has resulted in significant cognitive consequences. He has also experienced physical difficulties including left sided loss of sight, seizures, speech difficulties including communication and lack of coordination on the left side. She did not think that Wesley was capable of engaging in gainful employment. She said he needs 24 hour supervision because it would be unsafe to leave him alone. She said there could be deterioration in Wesley's condition in the future. The aging process could be more severe and it could occur earlier. She said there could be a higher likelihood of dementia. Dr. Muniz recommended the ongoing involvement of a physiotherapist to assist Wesley in maintaining his level of fitness.

[166] Dr. Michel Rathbone was qualified as an expert in the field of neurology. He began treating Wesley in March 2013 as result of seizures which had begun in January 2013. He explained that when a person begins to have seizures several months after a traumatic brain injury the prognosis is poor as compared to a person who has seizures immediately following the brain injury. Seizures that start several months after the injury are called late onset seizures. The seizures which Wesley began to experience in January 2013 were late onset seizures. Dr. Rathbone continued to see Wesley on a regular basis until November 2016. At that time, he referred Wesley to Dr. Perumpillichura who is an epilepsy specialist. Dr. Perumpillichura has continued to monitor and treat Wesley's seizures.

[167] Dr. Rathbone performed a neurological examination of Wesley. On the Montreal Cognitive Assessment ("MoCA"), Wesley's score was 17 out of 30. A MoCA score of 26 out of 30 is considered normal. A score of 17 on the MoCA is what would be expected of a person with well-established Alzheimer's disease.

[168] Dr. Rathbone testified that Wesley's injuries arising out of the motor vehicle accident were a severe traumatic brain injury with multiple skull fractures, cognitive deficits, left side homonymous hemianopsia, seizures, fractures of the transverse process of the L2-L4 vertebrae, a small bilateral pulmonary contusion and multiple complications while at Hamilton General Hospital. He said Wesley's cognitive deficits will continue and there is an increased likelihood of him developing dementia in his 50s or 60s. The homonymous hemianopsia or left-sided vision deficit is permanent. The seizures will likely increase in frequency and improvement is unlikely. Wesley will be required to take anticonvulsant medication permanently and will need to be monitored by a neurologist. Dr. Rathbone suggested that in the future Wesley will require a neuropsychological assessment, physiotherapy, speech therapy and occupational therapy to maintain his level of functioning.

[169] According to Dr. Rathbone, Wesley has lost approximately one third of his brain cells and the connectors between his brain cells. This is a significant loss of brain function. He doubts that there will be any further recovery.

[170] Dr. Sherrie Bieman-Copland was qualified as an expert in the field of neuropsychology and rehabilitation psychology. Dr. Bieman-Copland became involved in Wesley's treatment providing neuropsychological support in early 2013. In the beginning stages of her involvement, Wesley demonstrated a significant lack of awareness of the extent of his disability arising out of his brain injury. As a result, Wesley was reluctant to become involved in psychological treatment.

[171] Dr. Bieman-Copland explained that the purpose of a neuropsychological assessment is to determine which brain processes are working and which are impaired. Based on the neuropsychological assessment which was done while Wesley was an inpatient at the Acquired Brain Injury Program she was aware that he had suffered a massive injury to the right hemisphere of the brain. From this neuropsychological assessment it was clear that Wesley was able to perform only very basic tests. His performance was so poor that it was impossible to

assess a pattern of his strengths and weaknesses. There was potential for rehabilitation but there was a lot of work to be done. Wesley required 24 hour supervision because of his cognitive impairments.

[172] Dr. Bieman-Copland had access to and reviewed the report of the neuropsychological assessment of Wesley which was done in December 2013. She testified that the findings of that assessment were consistent with her own. She said she was part of an interdisciplinary team that assisted in Wesley's rehabilitation. Other members of the team were a physiotherapist, an occupational therapist, a speech and language therapist, at least two rehabilitation therapists and a case manager.

[173] Dr. Bieman-Copland continued counselling with Wesley until October 2017. At that time she was of the view that Wesley would benefit from ongoing psychological counselling. She advised that she would be available to assist in the future. She said that Wesley would continue to require rehabilitation therapy once or twice a week for 2 to 3 hours. She also recommended 12 hours annually of ongoing psychological counselling, crisis counselling of between 40 and 50 hours over Wesley's lifetime and a repeat neuropsychological assessment at some point in the future.

[174] Dr. Bieman-Copland was cross examined about certain comments recorded in the Personal History section of the neuropsychological assessment report dated February 12, 2014. The report indicated that Wesley's Apgar score at birth was 1/10. Dr. Bieman-Copland said this could have neurological significance later in life. The report also indicated that Wesley had been diagnosed with Attention Deficit Hyperactive Disorder ("ADHD") while in junior kindergarten. The diagnosis of ADHD is relevant history for a neuropsychologist.

[175] Dr. Bieman-Copland testified that she agreed with the conclusion in the February 2014 assessment report that before the accident Wesley's functioning and abilities were in the low average range.

[176] Margo Kindree will was qualified as an expert in the field of occupational therapy. She became involved with Wesley in September 2012 prior to his discharge from hospital. She visited the home where Wesley would be living and recommended some modifications to accommodate his needs. Her recommendations were implemented.

[177] As of November 2012, Wesley exhibited lack of insight into his limitations. By March, 2013, because of the onset of seizures, Wesley required 24 hour direct supervision. She arranged for woodworking therapy with Ted Newbigging. As of November 2013, Wesley could not travel by bus or arrange for a taxi. He was doing routine tasks like taking a shower and getting dressed but he still required 24 hour attendant care. By October 2015 there were no significant changes and Wesley still required 24 hour direct supervision. When she completed her involvement in May 2016, Wesley did not have insight into his disability. There were ongoing issues with problem-solving and reasoning. He continued to require 24 hour attendant care.

[178] Jennifer Horton was qualified as an expert in speech language pathology. She became involved with Wesley in approximately November 2012. At that time he was experiencing difficulty with oral communication. He was communicating in single words and short phrases and using words incorrectly. He was also having problems swallowing. The swallowing issues were resolved by August 2013. Until February 2017, she met with Wesley on a weekly basis. Currently she sees Wesley once or twice a month.

[179] Jennifer Horton testified that Wesley is at risk of social isolation. He requires support to participate in social activities. He requires one-on-one support in absorbing information, understanding it and repeating it. His difficulties will be more pronounced as he ages. She expressed the opinion that Wesley's impairment will remain unchanged but with adequate support he will be able to function. She said Wesley will require ongoing speech therapy of approximately 3 sessions annually of 2 hours each for the rest of his life.

[180] Cheryl Kirkness began providing physiotherapy services to Wesley in October 2012. She was qualified as an expert in the field of physiotherapy. When she began working with Wesley he was able to walk and move his arms but he was using more of his right side muscles. This resulted in an asymmetrical balance pattern. This made Wesley prone to falling. Through physiotherapy she attempted to improve postural control and balance as well as increasing his strength. A program at the YMCA was instituted. Initially she provided two sessions weekly. Over time she became more of a consultant and Wesley's direct care was provided by her assistant. Sessions were increased to three times weekly.

[181] Cheryl Kirkness testified that physiotherapy was discontinued for a period of time in the fall of 2014. However, upon re-evaluation it was determined that he had regressed. A decision was made to return to regular physiotherapy treatments with twice weekly sessions at the YMCA. She has noted that whenever Wesley takes a break from the physiotherapy treatments he regresses. Accordingly, she recommends that Wesley continue with the biweekly physiotherapy sessions at the YMCA. The sessions are delivered by her assistant. Her role as a consultant will likely require 2 to 3 hours per year indefinitely.

[182] Maria Ross was qualified as an expert in the field of occupational therapy and in particular vocational assessment and rehabilitation. In May and July, 2015 she performed a Situational Assessment to evaluate Wesley's suitability for employment. Wesley spent a day in a simulated work environment during the course of which he was administered standardized work sample tests designed to assess a person's competitive employability. She concluded that Wesley is not competitively employable. His performance on the standardized tests was far below what would be required for competitive employment on either a full-time or part-time basis. He was slow in performing tasks and there were quality issues. He would need constant supervision in the workplace which would not be realistic.

[183] Dr. Elaine MacNiven was qualified as an expert in the field of neuropsychology and rehabilitation psychology. She was retained by one of the defendants to conduct a

neuropsychological assessment of Wesley. She was asked to determine the effect of the motor vehicle accident on Wesley.

[184] Dr. MacNiven testified that at birth, there was a lack of oxygen flowing to Wesley's brain. He had an Apgar score of 1/10 which is the lowest possible level. He was treated with oxygen but did not respond as quickly as some babies do. Dr. MacNiven testified that she was told about the Apgar score and the oxygen deprivation by Detlev Hummel. She also said it was mentioned in the neuropsychological report from February 2014.

[185] Dr. MacNiven testified that during the interview on August 4, 2016 with Wesley and Detlev Hummel she did not see anything that indicated left side neglect although Wesley told her about it. She also said that, based on her interview with Wesley and his father, there were no major safety issues and there was no concern about Wesley remaining home alone, although there was always someone else present in the home.

[186] Dr. MacNiven concluded that prior to the accident, Wesley was in the low average to average range for mental functioning. She found no evidence of major behavioural issues commonly seen in patients with severe brain injuries. She did not think there were any specific safety concerns regarding Wesley. She said he appeared to have learned to compensate for his inability to see to the left.

[187] Dr. MacNiven was asked if she agreed with Dr. Rathbone's opinion that, because of the brain injury, Wesley is more likely than the general population to develop dementia. She responded by saying that there is some research to suggest that individuals with brain injuries can be at greater risk of developing dementia but the consensus, based on other studies, is that only persons with a brain injury and a genetic predisposition are at risk of early dementia.

[188] In cross-examination, Dr. MacNiven was confronted with the study which she relied on to conclude that there was no higher prevalence of severely brain injured individuals having a

increased likelihood of developing dementia than the general population. That study involved persons over the age of 55 who had developed dementia within six years of sustaining a traumatic brain injury. According to the study, of 51,799 persons who had suffered a traumatic brain injury, 10,971 or 21.17% had developed dementia within six years.

[189] Dr. MacNiven was also cross examined about a report published by the Alzheimer's Association in 2015, which she had also relied upon. From the report of the Alzheimer's Association, she cited the statistic that 11% of the population over 65 years of age will develop dementia. She did not refer to that section of the report which concluded that persons who have suffered a severe traumatic brain injury are 4.5 times more likely to develop dementia than non-brain injured persons. By way of explanation for her testimony she said she was not trying to contradict Dr. Rathbone's opinion about the risk of Wesley developing premature dementia.

[190] In re-examination Dr. MacNiven testified that she has never suggested that Wesley did not suffer a severe brain injury or that he did not suffer severe cognitive deficits as a result of the injuries sustained in a motor vehicle accident.

[191] Elizabeth Hummel ("Elizabeth") is Wesley's wife. They were dating at the time of the accident. Prior to the accident, Wesley owned his own carpentry business. He played sports and was active in the church. When Wesley was released from the hospital he lived with his parents. She visited him daily. They married in September, 2013 and she began living with Wesley at his parent's home and she became his primary caregiver. They have three children.

[192] Elizabeth testified that Wesley began having seizures in January 2013. As a result, he cannot be left alone. He is easily distracted and will forget what he is doing. Wesley can dress himself but he wears the same clothes every day. He needs to be reminded to take a shower. He cannot make a meal. He has reminders on his cell phone in order to take his medication.

[193] Patricia is Wesley's mother. She was his home school teacher. She said that a kindergarten teacher suggested that Wesley might have Attention Deficit Hyperactivity Disorder but no formal diagnosis was ever made. She said that Wesley was an average student. He enjoyed working with his hands. Prior to the accident, she described Wesley as enjoying his work and sporting activities. He was a supportive member of the family.

[194] Detlev is Wesley's father. He testified that before the accident, Wesley worked with Dave Henderson. Wesley incorporated his own company in 2010. They did renovations at Cave Springs Cellars and the Jordan House hotel. Before the accident, Wesley played a number of sports and participated in church activities.

[195] On the morning of the accident he travelled to the Hamilton General Hospital where he spoke to Dr. Wells. There was discussion about removing Wesley from life support. Dr. Wells told him that Dr. Murty would be doing further surgery. When Wesley was an inpatient at the Acquired Brain Injury program, he visited Wesley every day after work. Upon being released from the hospital on October 20, 2012, Wesley came to live with he and Patricia. Detlev testified that he was not asked by anyone at the hospital about Wesley's consumption of alcohol. He said he never described Wesley as a binge drinker. He was not asked any questions about the interview he attended with Dr. MacNiven. He was not asked if he told Dr. MacNiven about Wesley having an Apgar score of 1/10 at birth.

Discussion – Non-pecuniary Damages

[196] Wesley suffered a severe traumatic brain injury as a result of the motor vehicle accident. He was hospitalized for approximately four months. He has received extensive rehabilitation therapy from a number of experts in the field. He has achieved a significant recovery but he will never fully recover. He is disabled from engaging in competitive employment. He suffers from seizures which will continue. He will never be able to operate a motor vehicle. He cannot be left alone.

[197] I find that prior to the accident, Wesley was a healthy, productive and well socialized young man. He operated a business in association with Dave Henderson. That business, although fledgling, was becoming successful. Wesley participated in various sporting activities and was active in his church.

[198] There is reference in a neuropsychological assessment report dated February 2014 about Wesley having an Apgar score of 1/10 at birth and being diagnosed with ADHD. Although this assessment report was made an exhibit, the authors did not give evidence at the trial. Patricia testified that he had never been formally diagnosed with ADHD. She produced a record from St. Catharines General Hospital indicating that Wesley's Apgar score was 9/10. Dr. MacNiven testified that Wesley's father told her that Wesley was a blue baby and had an Apgar score of 1/10. Detlev was not asked about this.

[199] I conclude that Wesley's birth was normal and his Apgar score was not 1/10. I do not accept Dr. MacNiven's evidence that Detlev told her about Wesley's very low Apgar score. I also find that Wesley was not diagnosed with ADHD.

[200] I accept the evidence of Dr. Rathbone that Wesley has a greater likelihood of developing early dementia than the general population. I reject Dr. MacNiven's evidence to the extent that it is contradicted by that of Dr. Rathbone. I also do not accept Dr. MacNiven's evidence that Wesley has learned to accommodate his inability to see to his left. She was the only witness who suggested that Wesley's left-sided homonymous hemianopsia is not a serious disability.

[201] Counsel are in agreement that the upper level of non-pecuniary damages of $100,000 established by the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 and its companion cases, as of the date of the trial, is now $382,000, adjusted for inflation. It is the position of the plaintiffs that the award for Wesley's non-pecuniary damages ought to be assessed at the maximum. It is the position of the defence that non-pecuniary general damages should be assessed at between $275,000 and $300,000.

[202] In *Sandhu (Litigation guardian of) v. Wellington Place Apartments*, [2008] O.J. No. 1148, the Ontario Court of Appeal directed that the upper limit for non-pecuniary damages in catastrophic injury cases is not to be used as a scale against which non-pecuniary damage claims are to be assessed.

[203] I am satisfied that Wesley suffered a severe traumatic brain injury which can be categorized as catastrophic. He will never work again. He requires constant supervision. He will never be able to obtain a driver's license. He will require ongoing treatment for the rest of his life. He is at risk of unexpected seizures. On the other hand, he has a loving wife and devoted parents with whom he enjoys spending time. He has three children. While at the present time, Wesley is not experiencing significant ongoing pain, his loss of enjoyment of life is significant as a result of the brain injury. In the final analysis, as was stated in *Andrews*, awards for non-pecuniary general damage remain largely arbitrary and conventional (p. 262).

[204] I have come to the conclusion that a reasonable award of damages for Wesley's pain and suffering and loss of amenities of life is $300,000.

Loss of Income

[205] Wesley testified that prior to the accident he was a finish carpenter. He worked for Lawrence Farrell at Dove Woodworking for approximately two years. He met Dave Henderson while working at Dove. Dave Henderson was also a finish carpenter. When Lawrence Farrell began teaching full time, Wesley and Dave Henderson continued the business of Dove under the name Claymore Design and Construction. He said that although there was no formal agreement, he and Dave Henderson operated as partners.

[206] Dave Henderson testified that he began working with Wesley at Dove, a business operated by his brother-in-law, Lawrence Farrell. Wesley began working at Dove in 2003, at 19 years of age. Dave Henderson and Lawrence Farrell trained Wesley. By 2007 Wesley was an

accomplished finish carpenter. He also had the ability to motivate subcontractors. When Lawrence Farrell began teaching on a full-time basis he incorporated a company called Claymore Design and Construction to continue the business which had been operated by Dove. Wesley was the first employee of Claymore. Claymore operated from 2007 to 2009. Wesley was primarily a finish carpenter but he also acted as a project manager from time to time. Wesley's skills as a finish carpenter continued to improve after 2007.

[207] Dave Henderson testified that in 2009, the company which he had incorporated to carry on business as Claymore went bankrupt and he declared personal bankruptcy as a result of a large customer who did not pay for work done by Claymore. Wesley wanted to continue the business. They decided to continue to work together. In 2010, Wesley incorporated a company to continue the business which they had operated under the name Claymore. This company was also operated under the name Claymore Design and Construction. He dealt with customers and did some carpentry work. Wesley was responsible for administration and acted as site supervisor on Claymore's projects. Claymore's oldest client was Cave Springs Winery.

[208] By June 2012 Claymore was a fledgling business. It was not making a lot of money but he felt their business plan was moving forward. The business began to improve during the first six months of 2012. At the time of the accident, Claymore had just obtained a $300,000 contract which Dave Henderson completed through a new corporation owned by his wife. By the time of the trial he was anticipating annual sales for Claymore for the current fiscal year in the amount of $4 million.

[209] Leonard Pennachetti, the founder and president of Cave Springs Wines, the owner of the Inn on the Twenty and the former owner of the Jordan House Hotel testified about his business dealings with Wesley.

[210] Leonard Pennachetti first met Wesley when Wesley was in his early 20s and was working for Dove Woodworking, a business run by Lawrence Farrell. Lawrence Farrell was the project

manager for numerous projects in which Leonard Pennachetti and his businesses were involved. Wesley was a finish carpenter working under Lawrence Farrell's supervision. Wesley was involved in many high quality millwork projects for Cave Springs. Wesley understood that high standards were expected and he executed accordingly. When Lawrence Farrell went into teaching on a full-time basis, Wesley and Dave Henderson, through a company called Claymore Design and Construction, assumed the role previously performed by Lawrence Farrell.

[211] Leonard Pennachetti testified that he considered Dave Henderson and Wesley to be a team. Although he dealt more extensively with Dave Henderson, the two were interchangeable in his mind. He wanted at least one of them present at all times on every job site for the purpose of supervising and coordinating tradesmen. He described Wesley as an exceptional communicator. He said he worked closely with Wesley and that he could rely on Wesley to listen to instructions and deliver what was expected.

[212] Leonard Pennachetti testified that at the time of the accident, it was his intention to continue to provide business to Claymore. He has continued to work with Claymore and has referred substantial projects to Dave Henderson through Claymore.

[213] Wesley's income tax returns for the years 2007, 2008, 2009 and 2011 were made exhibits. His T4 for 2010 was also introduced as an exhibit. Wesley's reported income for those years was:

2007	$13,064
2008	$16,724
2009	$9,689
2010 `	$19,000
2011	$22,402

[214] Financial statements for the years 2010, 2011 and 2012 for 1815821 Ontario Inc., which was the company incorporated by Wesley to carry on the business of Claymore, were made exhibits. Claymore's revenue and net income (loss) for those years was:

	Revenue	Net income (loss)
2010	$256,572	($9,565)
2011	$189,900	$11,797
2012 (to June 30)	$114,295	$12,227

[215] Maria Ross was qualified as an expert in the field of occupational therapy and in particular vocational assessment and rehabilitation. In July, 2015 she conducted a Situational Assessment in order to evaluate Wesley's ability to engage in competitive employment. During the course of the Situational Assessment, Wesley performed a number of tasks designed to simulate the work environment. He performed poorly on virtually all of the tasks. Maria Ross concluded that Wesley is not competitively employable. His performance during the Situational Assessment was far below what would be required for competitive employment.

[216] James Forbes was qualified without contest as an expert in the field of accounting and quantification of economic losses.

[217] Mr. Forbes calculated Wesley's loss of income from the date of the accident to the date of the commencement of the trial and his future loss of income from the date of trial to the date of retirement. For the purpose of his calculations he assumed that Wesley's residual earning capacity was nil. In order to do these calculations he reviewed a number of documents including income tax information from Canada Revenue Agency and financial information including Financial Statements from 1815821 Ontario Inc. carrying on business as Claymore Design and Construction. For the purpose of his calculations he understood that Wesley was the sole shareholder of Claymore but there was an understanding between Wesley and Dave Henderson

that profits of Claymore would be shared equally between them. He was aware that, following the accident, Dave Henderson had continued to operate the business and it had achieved a level of success.

[218] Based on his review of the financial statements, Mr. Forbes determined the adjusted net income of Claymore for the years 2010, 2011 and 2012 to be:

2010	$9,435
2011	$34,199
2012 (to June 30)	$33,053

He also projected Claymore's adjusted net income to the end of 2012 to be approximately $75,000.

[219] From this analysis, Mr. Forbes concluded that the business was improving financially. However, because of the limited financial information available for Claymore, Mr. Forbes elected to use statistical information from the Statistics Canada National Household Income Survey of earnings for contractors and supervisors in carpentry trades in order to determine a loss of income for Wesley. Based on the statistical information he estimated that on annual basis from 2012 to 2018 Wesley would have earned between approximately $54,000 and $59,000. He therefore calculated Wesley's loss of income to the date of the trial in the gross amount of $356,627.

[220] Mr. Forbes also calculated Wesley's loss of future income from the date of the trial to his anticipated date of retirement at age 65. He used the same methodology as for calculating the loss of income to the date of the trial. The starting point was the annual income for 2018 of approximately $59,000 which was then adjusted for each 10 year period to age 65. The estimated annual income for the 10 year period from 2019 to 2029 was approximately $69,000, for the

period from 2029 to 2039 was approximately $93,500 and for the 10 year period from 2039 to 2049 was approximately $73,500.

[221] When calculating an amount for future loss of income, it was assumed that Wesley would be subject to the average probability of death of the general male population based on the Statistics Canada Life Expectancy Tables. The estimated loss of income for each year of future income loss was adjusted downward for the likelihood that Wesley would not survive to the end of any given year. In addition, for the purpose of calculating loss of future income, a statistical participation rate adjustment was applied in order to take into consideration the possibility that someone would be unable to work due to involuntary layoff or illness. This would adjust downward the estimated loss of income for each year. In an alternative calculation, the participation rate adjustment was reduced to take into consideration the assumption that Wesley would remain self-employed and therefore unlikely to be subject to involuntary layoff.

[222] Assuming standard mortality and participation rates, Mr. Forbes calculated Wesley's future loss of income to age 65 to be $1,741,863. Adjusting the participation rate to eliminate or reduce the likelihood of an involuntary layoff, the amount calculated for Wesley's future loss of income to age 65 is $2,019,468.

[223] In cross-examination, Mr. Forbes testified that when the net income of Claymore for 2012 was added to Wesley's T4 income the total remuneration for Wesley and Dave Henderson was approximately equal.

Discussion - Loss of income

[224] A plaintiff who seeks to recover for loss of future income need not prove on a balance of probabilities that his future earning capacity will be lost or diminished. If the plaintiff establishes a real and substantial risk of future pecuniary loss, he is entitled to compensation: *Schrump v. Koot (1977)*, 18 O.R. (2d) 337; *Graham v. Rourke (1990)*, 75 O.R. (2d) 622.

[225] In *Graham v. Rourke*, the Court of Appeal also addressed the issue of contingencies stating:

> These cases, and those which have applied them, tell me that contingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.

[226] I accept the uncontroverted evidence of Maria Ross that Wesley is not competitively employable. I therefore find that Wesley's residual earning capacity is nil.

[227] Based on the evidence of Wesley, Dave Henderson and in particular Leonard Pennachetti, I find that by June 2012 Wesley was a highly skilled finish carpenter as well as a young but promising project manager. The suggestion that he was nothing more than a mediocre carpenter is not supported by the evidence. Dave Henderson described Wesley as a skilled finish carpenter with an ability to motivate sub-trades. Leonard Pennachetti described Wesley as a skilled communicator. He said he viewed Dave Henderson and Wesley as a team and that the two were interchangeable in his mind. He saw them both as capable project managers.

[228] By the date of the accident, the business of Claymore was operated by a corporation of which Wesley was the sole shareholder. This arrangement was necessitated by Dave Henderson's bankruptcy. I find it to be understandable and reasonable that they were in fact a

partnership. Wesley was an important member of the partnership due to Dave Henderson's financial difficulties.

[229] However, the potential success of Claymore was not the basis used by Mr. Forbes to calculate Wesley's loss of income. Because of the lack of historical financial records he chose to use data obtained from Statistics Canada. I find his approach to be reasonable. By using the statistical approach he began his loss of income calculation based on the assumption that Wesley's income for 2012 would have been approximately $54,000 when his estimated income with the profit of the Claymore added back in would have been approximately $75,000.

[230] I accept Mr. Forbes' calculation for Wesley's loss of income to the date of the trial in the gross amount of $356,627 which is subject to adjustment.

[231] In my view it is appropriate to use the statistical participation rate adjustment when calculating Wesley's future loss of income. While I appreciate the position that a business owner is unlikely to be involuntarily laid off, there is also a risk of business fluctuations. For that reason I accept the calculation for future loss of income in the total amount of $1,741,863. It seems to me that this amount factors in both negative and positive contingencies. Negative contingencies include the participation rate adjustment and business risk. The positive contingencies being the potential that Wesley would earn more than the statistical average income of a project manager/carpenter would offset any other potential negative contingencies. The effect of the participation rate adjustment is to reduce the claim for loss of income by slightly in excess of 10%. In my view this is an appropriate contingency in the circumstances of this case.

[232] There are credits and deductions to be taken into consideration when determining the final amounts for loss of past and future income. The parties are in agreement that based on my findings they will attempt to resolve these issues but if that is not successful further submissions can be made.

Cost of Future Care

[233] Wesley will require ongoing care and treatment for the remainder of his life. Both sides called expert evidence about the need for and cost of such ongoing care and treatment. There was considerable agreement between the experts. Terry Pearce was called by the plaintiffs. He was qualified as an expert in the field of future care costs and the need for future care based on the recommendation of medical experts. Keith Glynn was a witness for the defence. He was qualified as an expert in the field of life care planning and vocational rehabilitation in the context of life care planning.

[234] I propose to deal first with the future care and treatment items about which there was agreement or substantial agreement as between the experts. I will then move to the areas of dispute which will require consideration of the legal principles to be applied to damages for the cost of future care and treatment.

The Law – Cost of Future Care

[235] In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at page 241, the Supreme Court stated the following with respect to the cost of future care:

> In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in 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.

[236] And further at pages 246 and 247, the Court in *Andrews* stated:

> It is not for the Court to conjecture upon how a plaintiff will spend the amount awarded to him. There is always the possibility that the victim will not invest his award wisely but will dissipate it. That is not something which ought to be allowed to affect a consideration of the proper basis of compensation within a fault-based system. The plaintiff is free to do with that sum of money as he likes. Financial advice is readily available. He has the flexibility to plan his life and to plan for contingencies.

[237] Finally, at page 243 in *Andrews*, the Court articulated the proposition that dedicated family members who choose to devote their lives to looking after infirm members of their family are not expected to do so on a gratuitous basis.

[238] In *Krangle (Guardian ad litem of) v. Brisco*, [2002] 1 S.C.R. 205 the Court stated at paragraph 21:

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

[239] In *Moore v. Wienecke (2008)*, 90 O.R. (3d) 463 the Ontario Court of Appeal, after referring to the passage from *Andrews* at page 243, concluded that the fact that the injured person's family has helped with the tasks of daily living in the past, and may well continue to do so, is irrelevant.

[240] In *Pelletier v. Ontario*, [2013] O.J. No. 5271 at paragraph 416, Boswell J. held that, it is the proper and reasonable cost of providing the attendant care required by the injured person which determines the amount of damages. The source from which the injured person's attendant

care needs have been met, or will be met, or who has provided, or will provide the attendant care, is immaterial.

[241] In my view, the proper approach to assessing Wesley's damages under the heading of the cost of future care is to determine a reasonable amount that is required to provide the care recommended by the various healthcare professionals. Based on the evidence, the damage amount awarded for future care should then be adjusted for contingencies to take into consideration factors such as whether the care will be provided by a professional service provider or a family member or not at all.

Non-contentious Items – Cost of Future Care

[242] Mr. Pearce and Mr. Glynn agreed that the annual cost of prescription medications required by Wesley is $5659 and that the annual cost of nonprescription medications is between $100 and $150 plus HST. I fix this amount at $125 per year plus HST.

[243] Mr. Pearce and Mr. Glynn agreed that bathroom safety aids will require replacement every five years at a cost of $350 and that the annual cost of Wesley's YMCA membership and membership in the Ontario Brain Injury Association of $30 each is appropriate.

[244] It was agreed that an allowance of $1250 per year to provide case management services to Wesley and his treatment providers is appropriate. It was also agreed that a one time cost for psychological crisis support in the amount of $10,125 and a one time cost for a neuropsychological assessment in the amount of $4500 are appropriate.

[245] There was agreement that Wesley will require the services of a physiotherapy monitor at a cost of $300 per year, the services of an occupational therapist at an annual cost of $1119, the services of a speech language therapist to 2020 at an annual cost of $2426 and thereafter at a cost

of $840 per year. Finally Mr. Pearce and Mr. Glynn agreed that Wesley will require the services of a rehabilitation therapist at an annual cost of $4800 per year plus $990 per year for mileage.

[246] Mr. Pearce testified that an allowance of $200 to $300 per year should be allowed for maintenance of the home workshop which has been provided for Wesley at his parent's home. The evidence about what equipment would require maintenance was sparse at best. Taking into consideration the allowance for Wesley to attend at the Heartland workshop in Niagara Falls or some other similar facility and the allowance for a rehabilitation therapist (Ted Newbigging) to have some ongoing involvement with the home workshop, I think it appropriate to disallow any amount for maintenance of the equipment at the home workshop.

[247] Both Mr. Pearce and Mr. Glynn felt that it would be reasonable for Wesley to attend a supervised workshop facility such as at Heartland. They also agreed that an annual cost of approximately $14,500 per year would be reasonable. They differed only about whether the amount allowed for supervision of Wesley while engaged in woodworking activities should be based on the assumption that he will attend at Heartland or on the assumption that supervision will be provided by his father.

[248] Mr. Pearce and Mr. Glynn agreed that Wesley should be able to access the services of a physiotherapy assistant to monitor him at the YMCA. They also agreed that it would be appropriate for Wesley to attend at the YMCA with the physiotherapy treatment for two hours per week at a cost of $56 per hour. Mr. Pearce was of the view that this expense should be for 52 weeks whereas Mr. Glynn felt that 48 weeks per year would be appropriate. I agree with Mr. Glynn. There will be times during the year, for a number of possible reasons, when Wesley will not attend the YMCA, or if he does, he will not require the services of the physiotherapy assistant. I therefore fix the allowance for the cost of a physiotherapy assistant to be $5376 per year.

<u>Contentious Items – Cost of Future Care</u>

[249] Jennifer Horton, the speech language pathologist, testified that Wesley has benefitted from the use of electronic devices to assist with things like spelling, reading and writing. She said it would not be practical to teach Wesley to spell again or to teach him to type. She therefore recommended that he have access to applications to assist with spelling and organizing text. She said he tires easily while reading so access to applications to allow him to have material, in effect, read to him would be beneficial. Mr. Pearce testified that the electronic aids which he has found to be most useful to persons with cognitive deficits are Apple products. These can be very expensive. He therefore recommended an allowance of $2250 every five years for replacement of electronic devices. This is an amount which is over and above what a non-brain injured person would spend on electronic devices such as computers, tablets and cell phones. Mr. Glynn testified that no allowance should be made for electronic devices because everyone owns and uses these items.

[250] In my view, it is appropriate to compensate Wesley for the cost of replacement of electronic devices and applications specifically required to assist him in communication. I find that he is likely to incur expenses in excess of what would be incurred by the general population. I therefore conclude that an appropriate allowance to upgrade electronic devices is $1500 every five years.

[251] Wesley has not participated in any yoga or tai chi classes. He has no interest in those activities. I therefore decline to allow an amount to fund these activities.

[252] Mr. Pearce suggests that Wesley should be awarded an annual amount for transportation costs of $5200. This is based on the evidence that Wesley will not be able to obtain a driver's license. Included in the cost of transportation is taxis and a mileage allowance to compensate people who are required to drive Wesley the places he wants or needs to go. Mr. Pearce testified that the allowance for transportation expense is intended to cover extraordinary expenses such as travelling to medical appointments or therapy sessions which are directly related to the accident. There was no evidence about the expenses actually being incurred by Wesley in travelling to and

from medical and therapy appointments. Mr. Glynn's analysis was that there should be no damage award for transportation costs because Wesley will not incur normal expenses in relation to owning and maintaining a motor vehicle. In my view, a modest allowance for extraordinary transportation costs is appropriate. I fix that amount at $2500 per year.

[253] Dr. Bieman-Copland recommended that Wesley have access to psychological counselling. She suggested he participate in psychological counselling for 12 hours per year at a cost of $225 per hour. Dr. Muniz testified that there are concerns about Wesley's emotional health going forward. She said there can be a high incidence of emotional difficulties experienced by persons with severe traumatic brain injuries. Wesley testified that he is not currently seeing Dr. Bieman-Copland. He is not sure if he will see her in the future. At the present time he feels his involvement with his church is satisfactory counselling. Mr. Glynn was of the view that an allowance for future psychological counselling would be inappropriate because Wesley is not currently participating in such counselling. In my view, it is appropriate to include an amount for future psychological counselling but at something less than the 12 hours per year suggested by Dr. Bieman-Copland.

[254] As with other future care costs, I am of the opinion that while Wesley may currently feel he does not require ongoing psychological counselling, there is a realistic possibility that he will need such counselling in the future. The evidence is that he is at risk of early onset of dementia. There is evidence that he may experience emotional difficulties. I therefore think it appropriate to reduce the recommended annual cost of providing Wesley with psychological counselling by 50%. Therefore I will allow the cost of future psychological counselling at $1350 per year.

[255] Dr. Bieman-Copland testified that part of Wesley's treatment included working with a rehabilitation therapist in the community. She said it is important for Wesley to participate in community activities but because of his disability, he requires the assistance of someone who is aware and capable of addressing Wesley's cognitive deficits. This would include activities such

as taking Wesley to pay soccer, ice skate and play the guitar. She said Wesley should participate in rehabilitation therapy once or twice a week for 2 to 3 hours at a time.

[256] Mr. Pearce utilized a figure of $80 per hour for the services of a rehabilitation support worker. Mr. Glynn's position regarding a rehabilitation support worker was that there was not enough time considering all of Wesley's other treatment and activities for him to also utilize the services of a rehabilitation support worker. He also said there would be issues about fatigue and Wesley could become overwhelmed. Mr. Glynn is not a healthcare professional. It is not open to him to decide which treatment and rehabilitation recommendations of the medical professionals should be followed. Mr. Glynn did not challenge the hourly rate proposed by Mr. Pearce.

[257] I therefore find it reasonable for there to be an allowance for the services of a rehabilitation support worker for three hours a week which is consistent with the recommendation of Dr. Bieman-Copland. This amounts to $11,500 annually assuming there will be four weeks a year when Wesley will be otherwise engaged and will not require the services of a rehabilitation support worker. I would then reduce this amount by 20% for contingencies such as Wesley deciding not to avail himself of this service. This results in a damage award for a rehabilitation support worker of $9200 annually.

[258] By far the largest single component making up the damages for the cost of future care is attendant care.

[259] The evidence from the healthcare experts, Dr. Muniz, Dr. Bieman-Copland and Margo Kindree is that Wesley requires constant supervision 24 hours a day seven days a week. During the course of final submissions, counsel for the All-Star agreed that Wesley requires 24-hour per day attendant care. Counsel for the Jantzis did not take a contrary position. The dispute is about whether some of the hours that Wesley spends with his family should be deducted from the period of supervision and the rate at which such supervision is compensated.

[260] Mr. Pearce and Mr. Glynn agreed that the attendant care hours should be reduced by the time Wesley will spend with other treatment providers. Those treatment providers will, in effect, provide the attendant care while Wesley is in their presence. Mr. Pearce determined that would amount to 632 hours annually.

[261] Mr. Pearce utilized an hourly rate for a Personal Support Worker ("PSW") charged by a service provider in the Niagara Region of $30 plus HST. Based on information obtained from a different service provider, Mr. Glynn testified that the services of a PSW in the Niagara Region could be obtained for $26.50 per hour plus HST. For the purpose of calculating the future cost of attendant care I propose to use an hourly rate of $28 plus HST.

[262] Mr. Pearce testified that he had determined that the actual amount paid to a PSW by a service provider was $19 per hour. Mr. Glynn agreed with this hourly rate. Mr. Pearce suggested that the $19 hourly rate be utilized to compensate family members who provide attendant care to Wesley.

[263] According to the testimony of Mr. Glynn, the hours required by Wesley for attendant care should be reduced by a further 12 hours per day, over and above the reduction for the time spent with other healthcare professionals, to take into consideration that Wesley will sleep for eight hours a day and spend four hours per day as normal family time.

[264] The defence supports the reduction of 12 hours per day from the required attendant care, as proposed by Mr. Glynn, on the basis of the decision of *Dube (Litigation guardian of) v. Penlon Ltd.*, [1994] O.J. No. 1720. *Dube* involved a child who as a result of an overdose of anaesthetic suffered a diffuse brain injury and was rendered a quadriplegic. At the time of the trial the child was approximately seven years of age. There was no issue that the child required 24 hour day attendant care. At paragraph 89, Zuber J. concluded that the cost of care once the child turned 21 would be based on 24 hour paid attendant care. For the three years between the child's 18th and 21st birthday, paid attendant care was reduced by three hours per day for "quiet

time" when the child did not require attendant care. From my reading of the decision, it is not entirely clear why that deduction was made for a three year period only.

[265] I do not read *Dube* as supporting the contention in this case that Wesley only requires attendant care for 12 hours a day.

[266] Further, in *Dube*, the submission was made that until the child turned 18 there should be no allowance for nighttime attendant care. This submission was addressed at paragraph 95 as follows:

> In my view there is a very substantial qualitative difference in the levels of attentiveness that would have been required but for the accident and the level that is now required. But for the accident Alan and Sylvia Dube would no doubt have slept through the night and would have still been ready to respond to any need that might emanate from a healthy boy. This is far different from attempting to sleep through the night and still be ready to respond to whatever needs may emanate from a spastic quadriplegic.

[267] Wesley is prone to seizures during the night. He is also at risk of falling if he gets out of bed. The attentiveness now required by Elizabeth Hummel is substantially different than what it would have been if Wesley had not suffered the injuries that he did.

[268] Another decision relied upon to support Mr. Glynn's suggestion that Wesley should only be allowed 12 hours of PSW care a day is that of *O'Connell v. Yung*, [2010] B.C.J. No. 2486. In that case the facts included that a severely injured plaintiff required "almost 24 hour care" and could be left alone in her home unsupervised for "at least a few hours at a time". The trial judge concluded that the evidence did not support a finding that the injured plaintiff required the services of a PSW during the nighttime hours. That is a factual distinction to the present case.

[269] I am mindful that, at the present time, Wesley's attendant care is provided partly by his wife and partly by his parents. That will not always be the case at least as far as Patricia and Detlev are concerned. I am confident that is they age they will be less likely to be able to provide the level of care they are currently providing. They are also likely to predecease Wesley. Similarly, Elizabeth may not always be able or willing to provide the level of care as at present. The needs of the growing family may mean she will have less time to care for Wesley. She might become unable for physical or emotional reasons to continue to provide care at the current level.

[270] For these reasons, I propose to determine the cost of future attendant care on the basis of a PSW being provided by an agency at the rate of $28 per hour plus HST for a total of $31.64 per hour which I round to $31.50. There are 8760 hours in a year. I accept the evidence of Mr. Pearce that there should be a reduction of 632 hours per year when Wesley will be supervised by other healthcare and rehabilitation specialists. On this basis I calculate the annual cost of future attendant care to be $256,158. I then reduce this calculated amount by a contingency of 20% to take into consideration that the medically required attendant care is not likely to be exclusively provided by professional healthcare workers. Accordingly, the total amount to be allowed for future attendant care is $204,926 which I round down to $200,000 per year.

[271] The final component of the cost of future care is for household maintenance services. Margo Kindree testified that 12.83 hours of housekeeping assistance would be required by Wesley. This included assistance in performing activities such as cleaning, vacuuming, grocery shopping, laundry and outdoor maintenance. Mr. Pearce and Mr. Glynn agreed that $25 would be an appropriate hourly rate for providing this type of service. Mr. Pearce suggested reducing the hours recommended by Ms. Kendree by 50%. Mr. Glynn suggested the hours be further reduced because light housework is typically done by the PSW during slow periods. I propose to allow four hours per week as the basis for future household maintenance services which I calculate to be $5200 per year.

[272] The following is a summary of my findings with respect to the cost of future care. I accept Mr. Forbes testimony that the annual expenses for transportation and household maintenance should terminate at age 80. To simplify the net present value calculation, I have elected to treat the expense for a speech language therapist to 2020 as a one time expense in the amount of $3000.

Prescription medication	$5,659 per year
Non-prescription medication	$125 per year
Bathroom safety aids	$350 every five years
YMCA membership	$30 per year
OBIA membership	$30 per year
Case management	$1,250 per year
Psychological crisis support	$10,125 one time
Neuropsychological assessment	$4,500 one time
Physiotherapy monitor	$300 per year
Occupational therapy services	$1,120 per year
Speech language pathologist to 2020	$3,000 one time
Speech language pathologist after 2020	$840 per year
Rehabilitation therapist including mileage	$5,790 per year
Heartland woodworking	$14,500 per year
Physiotherapy assistant	$5,376 per year
Electronic aids	$1,500 every five years
Transportation (to age 80)	$2,500 per year
Psychological counselling	$1,350 per year

Rehabilitation support worker	$9,200 per year
Attendant care	$200,000 per year
Household maintenance (to age 80)	$5,200 per year

[273] Exhibit 51 contains the Schedules prepared by Mr. Forbes which set out the present value of the cost of future care. I accept the evidence of Mr. Forbes that he has appropriately factored in a contingency for mortality on an annual basis. Schedule 10 in Exhibit 51 is a chart which sets out the present value of the cost of $1000 of future care for each year from the date of the trial onward.

[274] By my calculation, the total cost of the future care items provided for on an annual basis is $245,570. Using Schedule 10, I calculate the net present value of the annualized cost of future care to be $8,765,000.

[275] The annual amounts allowed for transportation and household maintenance are to age 80. I have allowed a total of $7,700 annually for those expenses. Using Schedule 10, I calculate the net present value of those items to be $257,000.

[276] The amounts allowed for psychological crisis support and a neuropsychological assessment were one time expenses. They total $14,625. Mr. Forbes did not calculate a present value for these two items presumably because there was no indication as to when such expenses might be incurred. To this amount I have added $3,000 as a one time cost for speech therapy to 2020 for a total of $17,625.

[277] The evidence with respect to the future costs for bathroom safety aids and electronic aids was that those expenses would be incurred every five years. The total amount that I allowed for these future costs was $1,850 once every five years for a net present value of $15,000.

[278] Based on my calculations, I therefore find that the net present value of the cost of future care on a periodic basis and one time costs to be $9,055,000. My calculations detailing how I arrived at the future care costs are set out in Schedule "A".

[279] As discussed during the course of the trial, my findings regarding the cost of future care will be presented to Mr. Forbes who will then perform the calculations to determine the "gross-up" for taxes. There will also need to be further submissions regarding the appropriate credits and deductions to be made to the various components of the cost of future care.

Management Fee

[280] I am satisfied that, as a result of the severe traumatic brain injury, Wesley requires professional assistance in the management of the damage awards for loss of future income and attendant care. There was no evidence presented about the level of fee that would be charged by a professional manager in relation to a damage award of an amount likely to be found in Wesley's favour.

[281] In *Mandzuk v. Insurance Corp. of British Columbia*, [1988] 2 S.C.R. 650, it was held that there should be a factual basis for an award of damages based on a management fee, including evidence as to the cost of such services. Such evidence is lacking in the present case.

[282] However, in *Cadieux (Litigation guardian of) v. Cloutier*, [2016] O.J. No. 6653, Hackland J. stated at paragraph 57:

> Having reviewed the case law provided by counsel, it would appear that a management fee of 5% of the assets under management is a conventional award and I propose to follow that guideline.

The conclusion of a 5% management fee was approved of by the Court of Appeal in *Cadieux (Litigation guardian of) v. Cloutier*, [2018] O.J. No. 6345 at paragraph 141 without commenting on whether it is a conventional award.

[283] In *Dybongo-Rimando Estate v. Jackiewicz et al.*, [2001] O.J. No. 3826 and *Butler (Litigation guardian of) v. Royal Victoria Hospital*, [2017] O.J. No. 2350, judges of this court declined to award a management fee on the reasoning that professional financial advisor should be able to obtain a rate of return (net of his or her fee) that is higher than a nonprofessional would be able to learn.

[284] It therefore appears to me that there is authority for a management fee to be awarded as a conventional award as well as authority that a management fee need not be awarded in every case.

[285] As I have said, Wesley does not have the ability to invest and manage the damage award for future care and loss of income. I also take into consideration that the funds under management will be several millions of dollars once the reduction for contributory negligence is taken. It would seem to me that that would lead to a realistic possibility that a management fee of less than 5% could be negotiated.

[286] I therefore conclude that an award of a management fee of 2% of the net amount of the damages awarded for loss of future income and cost of future care is appropriate.

OHIP Subrogated Claim

[287] By agreement of all parties the subrogated claim of OHIP is fixed at $40,000 gross.

Damages sustained by the other plaintiffs

[288] Wesley is the second oldest child of a family with five children. It is and was a close knit family.

[289] Patricia is Wesley's mother. Patricia testified that Wesley is the second oldest of five siblings. She homeschooled Wesley to the end of high school. The family regularly attended church together. Prior to the accident she saw Wesley four or five times a week as well as speaking with him by telephone and exchanging text messages. She said Wesley was the "go to person" for his siblings. He and his sister Serena were very close and his sister Miranda looked to him for advice.

[290] After the accident Wesley was hospitalized until October 20. Patricia visited him every day. When he was released from hospital Wesley lived with her and Detlev. For seven months she slept beside Wesley. She and Detlev were Wesley's primary caregivers until Wesley and Elizabeth were married in September 2013.

[291] Dr. Bieman-Copland provided psychological counselling to Patricia. When she began seeing Patricia in January 2013, Patricia was suffering from an adjustment disorder with anxiety. Patricia was unable to work. Patricia was hyper vigilant about Wesley's safety. She continued with her counselling of Patricia until July 2015. By that time the adjustment disorder was no longer disabling.

[292] She and Detlev live within an eight minute drive of Wesley and Elizabeth's home. If Elizabeth needs to run an errand she and/or Detlev will go to Wesley and Elizabeth's home to care for Wesley. She will take Wesley to the gym if Detlev is not available. She takes him to medical appointments in St. Catharines. She testified that she sees Wesley four or five times a week. She estimated that she spends 15 to 20 hours weekly caring for Wesley.

[293] Detlev is Wesley's father. The family attended church on Sundays. Detlev described Wesley as the glue between the siblings.

[294] Detlev retired in February 2013. He now spends most of his days with Wesley. They engage in woodworking together. He said that Wesley is careful when using tools but he cannot be left alone in the woodworking shop. He estimates that he spends 50 to 60 hours a week with Wesley. Elizabeth pays he and Patricia $1200 per month for the care they provide for Wesley.

[295] Miranda Hummel is Wesley's older sister. She is 16 months older than Wesley. When they were young they were very close. After she married she saw Wesley twice a week and they talked on the phone every day. Every Thursday evening Miranda, Wesley and Serena went shopping. They socialized at church on Sundays.

[296] After the accident Miranda went to the hospital to visit Wesley as often as she could considering the demands of her employment and family. After he was released from hospital she visited with him whenever he could. She does not see Wesley with the frequency that she did because there was a falling out with her parents in approximately September 2014.

[297] Serena Cole is one of Wesley's younger sisters. She is 14 months younger than Wesley. They were very close as children. They had similar interests. Because of the closeness of their ages, they shared a common group of friends. Her husband was a friend of Wesley's. Prior to the accident she saw Wesley a few times a week. They also spoke by telephone.

[298] Serena said Wesley is no longer her confident. But for the accident she had expectations about the two families doing things together. She said Wesley is a different person subsequent to the accident. Now he is like a child. She cannot talk to Wesley about serious things.

[299] At the present time Serena and her family live in Alabama. They have been living there since 2017. Her husband has a three year work visa. They expect to return to the Niagara area in the summer of 2020.

[300] Autumn Okum is Wesley's youngest sister. She currently resides in Kitchener with her husband and three children. She and Bryan were adopted by the Hummel seniors when she was six years old. Her husband and Wesley were very good friends. She was a close friend with Wesley's wife. She looked up to Wesley as a role model. She sought advice from him. They participated in church activities together. Before the accident she typically saw Wesley at church once or twice a week.

[301] Autumn's interaction with Wesley is different than it was before the accident. She feels as though she has to think about every interaction with him. Although she visits with her parents approximately once a month, Wesley does not have a relationship with her children. She has not being alone with Wesley since the accident because she does not know how to care for him if he has problems.

[302] Bryan is Wesley's younger brother. They were living together at the time of the accident. Bryan was struggling with drug addiction. Wesley was aware of his drug addiction. They discussed his difficulties. He said Wesley wanted him to "kick his demons". Before the accident they played sports together and played in a church band. After Wesley's accident, Bryan enrolled in a drug treatment program. Bryan testified that he does not spend as much time with Wesley as he did before the accident. He said Wesley is not good at anything anymore. He described their roles as being reversed as a result of the accident. Now he feels the need to look after Wesley.

[303] Section 61 (2) of the *Family Law Act* permits the recovery by parents and siblings of:

> (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
>
> (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and

> (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

[304] Patricia and Detlev have devoted and will continue to devote a significant amount of their time to caring for Wesley. Their relationship with Wesley has changed significantly subsequent to the accident. In my view, an appropriate award for loss of care guidance and companionship each of them have suffered as a result of Wesley's motor vehicle accident is $75,000.

[305] There are no records of the precise amount of time which Patricia and Detlev have spent caring for Wesley. For that reason I do not think it practical to do an arithmetical calculation to determine an amount to compensate them for the value of their services to the date of trial. This was the approach followed in *Dube*. I accept that in the 6+ years since the accident they have devoted significant amounts of their time to caring for Wesley. As was stated by Zuber J. In *Dube*, assessing an appropriate amount for compensation for past services provided by a parent is "more art than science". Using that approach I find that an appropriate amount to compensate each of Patricia and Detlev for the care they have provided for Wesley up to the date of the trial is $100,000.

[306] I am satisfied that Miranda, Serena, Autumn and Bryan have suffered a loss of guidance care and companionship as a result of the injuries suffered by Wesley in the motor vehicle accident. The relationship each of them had with their brother before the accident has fundamentally changed. Rather than Wesley being a support to his siblings they now need to provide care for him. Their pre-accident companionship has also changed significantly.

[307] No suggestion was made by counsel that I should differentiate as between the loss suffered by each of the siblings. I agree with that approach. In my view, a fair and reasonable amount compensate each of the siblings for loss of care, guidance and companionship that they have suffered is $25,000.

Summary of Conclusions

[308] Liability for the motor vehicle accident is apportioned 80% to Philip and 20% to the All Star.

[309] Wesley is contributorily negligent to the extent of 25%. The All Star is also found 20% responsible for contributing to Wesley's negligence.

[310] Wesley's non-pecuniary general damages are assessed at $300,000.

[311] Wesley's past loss of income is fixed at $356,627. Wesley's future loss of income is fixed at $1,741,863.

[312] I have calculated the net present value of the cost of future care to be $9,055,000. This includes annual amounts for transportation and household maintenance which only continue to age 80. The amounts allowed for bathroom safety aids and electronic aids are on the basis of every five years. One-time expenses are for psychological crisis support, a neuropsychological assessment and speech language therapy to 2020.

[313] The OHIP subrogated claim is fixed at $40,000. A management fee of 2% is allowed.

[314] The Family Law Act claims are assessed as follows:

Patricia	$175,000
Detlev	$175,000
Miranda	$25,000
Serena	$25,000
Autumn	$25,000
Bryan	$25,000

Counsel are requested to make arrangements through the trial coordinator for a time to appear to make submissions with respect to net present values, deductions and credits from the damage assessments, gross up for taxes, prejudgment interest, costs and any other matters required to be addressed to finalize the judgment.

"G.E. Taylor"

G.E. Taylor, J.

Released: June 13, 2019

Schedule "A"

Annual Cost of Future Care

Prescription medication	$5,659.00	
Non-prescription medication	$125.00	
YMCA membership	$30.00	
OBIA membership	$30.00	
Case management	$1,250.00	
Physiotherapy monitor	$300.00	
Occupational therapy services	$1,120.00	
Speech language therapy (after 2020)	$840.00	
Rehabilitation therapist including mileage	$5,790.00	
Heartland woodworking	$14,500.00	
Physiotherapy assistant	$5,376.00	
Psychological counselling	$1,3500.00	
Rehabilitation support worker	$9,200.00	
Attendant care	$200,000.00	
Total	**$245,570.00**	

Net Present Value

$245,570 x 35.693 = $8,765,130.01
Rounded to $8,765,000

Transportation and Household Maintenance
(to age 80)

Transportation	$2,500.00	
Household maintenance	$5,200.00	
Total	$7,700.00	

Net Present Value

$7,700 X 33.483 = $257,819.10
Rounded to $257,000 $257,000

One time expenses

Psychological crisis support	$10,125.00	
Neuropsychological assessment	$4,500.00	

Speech language therapy to 2020	$3000.00	
Total	$17,625.00	$17,625.00

Bathroom and Electronic Aids
(every 5 Years)

Bathroom safety aids	$350.00
Electronic Aids	$1,500.00
Total	$1,850.00

Net Present Value

2019	1850 x .99882 x .99876 =	$1,845.53
2024	1850 x .99342 x .99382 =	$1,826.47
2029	1850 x .98562 x .98886 =	$1,803.08
2034	1850 x .97375 x .95620 =	$1,731.08
2039	1850 x .95579 x .84514 =	$1,494.39
2041	1850 x .94624 x .80441 =	$1,408.16
2044	1850 x .92855 x .74698 =	$1,283.18
2049	1850 x .88708 x .66022 =	$1,083.49
2054	1850 x .82423 x .58354 =	$889.80
2059	1850 x .73118 x .51576 =	$697.66
2064	1850 x .59888 x .45586 =	$505.06
2069	1850 x .42647 x .40291 =	$317.88
2074	1850 x .23573 x .35612 =	$155.30
2079	1850 x .08270 x .31476 =	$48.16
2084	1850 x .01457 x .27820 =	$7.50
2089	1850 x .00111 x .24589 =	$0.50
Total		$15,097.22
Rounded to		$15,000.00

Total Net Present Value $9,054,625

Rounded to **$9,055,000**

CITATION: Hummel v. Jantzi, 2019 ONSC 3571
COURT FILE NO.: 13-42743 (Hamilton)
DATE: 2019-06-13

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Wesley Hummel, Detlev Hummel, Patricia Hummel, Bryan Hummel, Miranda Oakes, Serena Cole and Autumn Okum

– and –

Philip Jantzi, David Jantzi and 1340305 Ontario Limited carrying on business as All Star Tap & Grill House

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REASONS FOR JUDGMENT

G. E. Taylor, J.

Released: June 13, 2019