

DRUNK DRIVER AND HOST ESTABLISHMENT FOUND LIABLE FOR PLAINTIFF'S CATASTROPHIC INJURIES INCLUDING SEVERE TRAUMATIC BRAIN INJURY

H V. J
2019 ONSC 3571

The Reasons for Judgment of The Mr. Honourable Justice G. E. Taylor were given June 13, 2019 at Hamilton, Ontario.

On June 7, 2012 at approximately 1:30 a.m., PJ was operating a motor vehicle owned by DJ, approaching a T intersection in the community of Fonthill, in the Town of Pelham. The plaintiff, WH was the front seat passenger in the vehicle and was not wearing a seatbelt. P was driving at 80 kilometers an hour when the posted speed limit was 50 kilometers an hour. P failed to observe the stop sign at the intersection. The vehicle left the roadway, hit a tree, rotated 180 degrees and came to rest facing west on the front lawn of a residence. W suffered serious injuries including comminuted, depressed skull fracture, subarachnoid hemorrhage, subdural hemorrhage, intraparenchymal hemorrhage and diffuse axonal injury.

On the evening of June 6th, 2012, W, P and four other friends or acquaintances had been at the All Star Tap and Grill House in Fonthill, where they consumed some draft beer. P's blood alcohol reading at 3:10 a.m. on June 7th, 2012 was 192mg of alcohol in 100ml of blood. P was charged with, and pleaded guilty to, operating a motor vehicle while impaired by alcohol and causing bodily harm to W.

The plaintiffs, other than W, are his parents and siblings. The plaintiffs are seeking damages from P and the owner of the vehicle for negligent operation of a motor vehicle and from the All Star for serving alcohol to P to the point that his ability to operate a motor vehicle became impaired and failing to take steps to assure that P would not then operate a motor vehicle. DJ, as the owner of the vehicle being operated by P is also liable for damages sustained by the plaintiffs pursuant to the Highway Traffic Act.



Liability of the All Start Tap and Grill House.

In June 2012, W lived in a house in Fonthill (“the Fonthill residence”) with his younger brother BH. W and P were friends with GK. On the evening of June 6, 2012 a Stanley Cup finals hockey game was scheduled to take place in Los Angeles, California. W, P, G and B made plans earlier in the day to go to the All Star to watch the hockey game. B invited his friends K and B to join the group going to the All Star. One of the reasons for the group going to the All Star was because of a draft beer special known as the “12 for 12 special”. That was 12 cups of draft beer for \$12.00. In accordance with the plans made earlier in the day, the four males met at the Fonthill residence. While waiting for K and B to arrive P, W and G each had one or two bottles of beer. Between 9:00 and 9:30 the group left for the All Star.

The testimony of each of the members of the group concerning the events of that evening have several discrepancies. However, with the support of relevant exhibits, it was apparent that everyone in the group drank beer. They purchased four trays of beer. No food was consumed. They stayed at the All Star until approximately 1:00 a.m. B, B and K did not drink as much as W, P and G. B testified that he was drunk when they left the All Star, as were the other three males. B testified that she had four or five glasses of beer. She described herself as intoxicated, but not falling down drunk. K said she drank two cups of beer throughout the entire evening. While at the All Star, K, in the presence of B, asked B how the group would be getting home. B said that P would be driving because he was a “pro drunk driver”.

Members of the group recalled that were two female employees working at the bar. No one recalls either of them speaking to anyone at the table or asking any questions. No employee of the All Star spoke to any member of the group as they were leaving. After leaving the All Star they purchased some pizza at Sobey’s and returned to the Fonthill residence. W, P and G each poured themselves a glass of wine and then went outside. While outside W asked P to drive him to buy some cigarettes at a nearby 24 hour gas bar. P testified that G sat in the backseat and W sat in the front passenger seat and that neither of the two passengers put on their seatbelts. On the trip back to the Fonthill residence after buying cigarettes, W and G encouraged P to drive faster, which he did. P said that W also reached over and grabbed the steering wheel. This was shortly before he came to the stop sign at the T-intersection. As he reached over to punch W 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.”



The manager on duty at the All Star that night was J, and she was working with J. Both were experienced employees. The owner, JS, testified that every employee working at the All Star was required to have a Smart Serve certificate. J said that customers were not to be over-served to the point of intoxication. 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. 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 would be offended. J testified that it was not a busy night that night so both she and J had time to chat with the members of the group. The members of the group were well behaved and left when the hockey game was over. She said the group was “perfectly fine” when they all left the All Star. In her statement to the police, she said that she did not see the group leave but that there were two guys on the door helping out that night. J testified that it did not appear that anyone in the group was drinking more than anyone else. She was constantly at the table talking to the people in the group. The person who paid the bill [P] 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. Further, she told the police that she was working with one other person that evening and that was J. She said she thought the two females in the group left before the males.

Video surveillance from the Target Gas Bar, where the cigarettes were purchased, showed P and W 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. A sample of blood was obtained from P at 3:10 a.m. That sample was analyzed by a toxicologist and was found to have a concentration of 192mg of alcohol in 100ml of blood. (Using the terminology adopted at trial, this was referred to as a BAC of 192.

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, including that P was 6 feet tall and weighed 155 pounds, as well as various other facts concerning the timeline and consumption of alcohol on the night of June 6th and the morning of June 7th, 2012.

[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, P would have had a BAC of 53 when he arrived at the All Star.

[63] Dr. Rosenbloom calculated P'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 P'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 P 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 P 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 P 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.

Dr. Michael Corbet qualified as an expert in the field of forensic toxicology. Dr. Corbet was given a set of assumptions to base his calculations on. He rejected P's testimony at his examination for discovery that he weighed 155 pounds at the time of the accident. Assuming a weight of 189 pounds and the consumption of 6 cups of beer beginning at 10:30 p.m., Dr. Corbett calculated a BAC of between 8 and 66 at 12:30 a.m. Assuming a weight of 176 pounds and consumption of 8 cups of draft beer beginning at 9:30 p.m., Dr. Corbett calculated a BAC of between 73 and 163 at 12:30 a.m. On cross-examination Dr. Corbett was asked to employ a different set of assumptions, including that P weighed 155 pounds. Based on the BAC as determined by the Centre of Forensic Sciences at 3:10 a.m., P's BAC would have been 240 at the time he left the All Star. Dr. Corbett said that at this level he would expect significant impairment of one's ability to operate a motor vehicle and observable signs of intoxication.

Testimony was given concerning the policies and procedures outlined in the Smart Serve workbooks. Of particular note are: Servers should actively promote food sales; Count the number of drinks served to each person; Do not offer liquor at discounted prices; Engage in "chat and check" to possibly determine whether the guest had been drinking before they arrived, is the guest driving, or is there a designated driver.



Under the 2011 revisions of the Smart Serve workbook, the establishments and servers are held to a much higher standard. 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, as well as being responsible for that guest until he or she is sober again.

Mr. Justice Taylor found that at the time he left the All Star, P’s BAC was between 220 and 240 and that he was exhibiting obvious signs of impairment. This conclusion is based on the evidence of Dr. Rosenbloom and Dr. Corbett. He discounted most of Dr. Corbett’s evidence due to his assumptions concerning P’s weight. 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. Further, B testified that P was drunk when they left the All Star and B and K were sufficiently concerned about P’s sobriety that they questioned whether he was capable of driving the group back to the Fonthill residence. He found that the All Star did not have a sufficient complement of staff working on the evening of June 6th, 2012. There were only two servers. There was no one on the door. He did not accept J’s evidence that she spent time speaking to the members of the group during the evening nor her claim that there was someone at the door who would have observed the group leaving. No food was offered to the group. There was no effort made to count the number of drinks being consumed by any member of the group. No inquiries were made by J or J about who in the group was driving.

Pursuant to section 39 of the Liquor Licence Act, and relying on *Stewart v. Petite* [1995] 1 S.C.R. 131, the Court found that the All Star owed a duty of care to W. P was served to the point of intoxication at the All Star. The All Star and its employees failed to fulfil their obligations pursuant to Smart Serve including, but not limited to: Counting drinks; engaging customers in conversation for the purpose of assessing sobriety; encouraging the ordering of food; offering alcohol at a discounted price; making inquiries about arrangements in place to assure that a group of customers would arrive home safely. Liability for the motor vehicle accident was apportioned at 80% against P and 20% against All Star.

CONTRIBUTORY NEGLIGENCE

The defendants take the position that W should be found contributorily negligent for: not wearing a seatbelt; driving with P when he knew P was drunk; encouraging P to drive faster; and, grabbing the steering wheel while P was driving. Dr. Rosenbloom testified that W’s BAC at the time of leaving the All Star would have been between 122 and 152 and that there might be observable signs of impairment.



Engineers prepared reconstructions of the accident and testified as to whether W would have suffered a comminuted depressed skull fracture if he had been wearing a seatbelt. On considering the evidence Mr. Justice Taylor concluded that W's contributory negligence includes: failing to wear a seat belt; entering a motor vehicle knowing it would be operated by an impaired driver and encouraging P to drive faster. He found that the allegation of W grabbing steering wheel had not been proven. As a result of W's contributory negligence, the Court ordered a reduction of his damages by 25%. It was submitted that W's contributory negligence should be reduced because the All Star was responsible for over serving W to the point where his judgment was impaired. In that regard, the Court found that All Star breached its duty to W and the All Star is therefore 20% responsible for overserving W.

NON-PECUNIARY DAMAGES

W was transported by ambulance from the scene of the accident to the Welland General Hospital and promptly airlifted to Hamilton General Hospital at about 3:50 a.m. on June 7, 2012. He had a Glasgow Coma Scale reading of 5, meaning a significant impairment of consciousness. His injuries were summarized as a comminuted, depressed skull fracture, subarachnoid hemorrhage, subdural hemorrhage, intraparenchymal hemorrhage and diffuse axonal injury. Surgery was performed by Dr. John Wells, neurosurgeon, 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. A further similar surgery was performed on June 8, 2012 by Dr. Murty, neurosurgeon, but in a different location. On September 26, 2012, Dr. Wells replaced the bone flaps which had been removed from W's skull on June 7 and 8. W was admitted to the Acquired Brain Injury Program on August 1, 2012 where he remained until October 23, 2012, when he was discharged to his parents' residence. As a result of the right-sided brain injury W had left-sided homonymous hemianopsia which is loss of vision on the left side of both eyes. The prognosis is that there will be no improvement to the left side loss of vision. As a result of this condition W is unable to obtain a driver's license.

Dr. Flor Muniz, physical medicine and rehabilitation expert with respect to acquired brain injuries, saw W for the purpose of a medical legal examination on October 9, 2015.

[164] One of the documents reviewed by Dr. Muniz was a report dated February 12, 2014 of a neuropsychological assessment of W by Storrie, Velikonja and Associates which was conducted on December 2, 5 and 9, 2013. The assessment identified W'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 W'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 W 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 W 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 W 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 W'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 W in maintaining his level of fitness.

Dr. Michael Rathbone, neurologist, testified on behalf of the plaintiff.

[166] Dr. Michel Rathbone was qualified as an expert in the field of neurology. He began treating W 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 W began to experience in January 2013 were late onset seizures. Dr. Rathbone continued to see W on a regular basis until November 2016. At that time, he referred W to Dr. Perumpillichura who is an epilepsy specialist. Dr. Perumpillichura has continued to monitor and treat W's seizures.

[167] Dr. Rathbone performed a neurological examination of W. On the Montreal Cognitive Assessment ("MoCA"), W'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 W'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 W'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. W will be required to take anticonvulsant medication permanently and will need to be monitored by a neurologist. Dr. Rathbone suggested that in the future W will require a neuropsychological assessment, physiotherapy, speech therapy and occupational therapy to maintain his level of functioning.

[169] According to Dr. Rathbone, W 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.

Dr. Sherri Bieman-Copland was W's treating neuropsychologist. She qualified as an expert in the field of neuropsychology and rehabilitation psychology. She became involved in his treatment in early 2013. She testified that in the beginning stages of her involvement W demonstrated a significant lack of awareness of the extent of his disability arising out of his brain injury and he was reluctant to become involved in psychological treatment. Based on the neuropsychological assessment while W was still 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. It was clear from the assessment that W was able to perform only very basic tests. His performance was so poor that it was impossible to assess a pattern of strengths and weaknesses. Dr. Bieman-Copland testified that the findings of the December 2013 neuropsychological assessment, referred to by Dr. Muniz, were consistent with her own. She continued counselling with W until October 2017. At that time, she felt that W would benefit from ongoing psychological counselling and she made recommendations regarding continued rehabilitation therapy, psychological counselling, crisis counselling and a repeat neuropsychological assessment at some future date. She agreed that W's functioning and abilities were in the low average range.

W had the support of Margo Kindree, occupational therapist. When she completed her involvement in May 2016, W did not have insight into his disability. There were ongoing issues with problem-solving and reasoning. He continued to require 24 hour attendant care. JH, is W's treating speech and language pathologist. She said W will require ongoing speech therapy of approximately 3 sessions annually for the rest of his life.



CK, physiotherapist began providing W services in October 2012. She testified that whenever W takes a break from physiotherapy treatments he regresses. She recommends biweekly physiotherapy sessions. MR, expert in vocational assessment and rehabilitation, performed a Situational Assessment. W spent a day in a simulated work environment where he was administered standardized work sample tests designed to assess a person's competitive employability. She concluded that W is not competitively employable.

EH is W's wife. They were dating at the time of the accident. Prior to the accident W owned his own carpentry business. He played sports and was active in church. When W was released from hospital to the care of his parents, she visited him daily. They married in 2013 and she began living with W at his parent's home and she became his primary caregiver. They have three children. E testified that W 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. He 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 to take his medication.

Mr. Justice Taylor found that "prior to the accident, W was a healthy, productive and well socialized young man. He operated a business in association with DH. That business, although fledgling, was becoming successful. W participated in various sporting activities and was active in his church." He accepted the evidence of Dr. Rathbone that W has a greater likelihood of developing early dementia than the general population. He goes on to say...

[203] I am satisfied that W 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, W 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 W's pain and suffering and loss of amenities of life is \$300,000.



LOSS OF INCOME

Mr. Justice Taylor accepted the uncontroverted evidence of MR that W is not competitively employable and therefore his residual earning capacity is nil. Based on the evidence, he found that W was a highly skilled finish carpenter as well as a young but promising project manager.

DAMAGES SUSTAINED BY OTHER PLAINTIFFS

The other plaintiffs in the action are W's parents and siblings. They make a claim pursuant to section 61(2) of the Family Law Act. They are a close-knit family. They each testified as to the impact and personal loss of care, guidance and companionship they suffered as a result of W's tragic accident.

SUMMARY OF CONCLUSIONS

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

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

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

[311] W's past loss of income is fixed at \$356,627. W'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.

H V. J



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

P (Mother)	\$175,000
D (Father)	\$175,000
M	\$25,000
S	\$25,000
A	\$25,000
B	\$25,000

The full Reasons for Judgment of The Honourable Mr. Justice G. E. Taylor [can be found here:](#)

WRITTEN BY STELLA GOWANS, PARALEGAL

If you would like to book an assessment with Dr. David Rosenbloom, Pharmacology, Dr. Michel Rathbone, Neurology or Dr. Flor Muniz Rodriguez, Psychiatry, please contact us at [Integra](#)