Indexed as:

Dryden (Litigation guardian of) v. Campbell Estate

Between
Scott Douglas Dryden, by his Litigation Guardian, Douglas Howard Dryden, Douglas Howard Dryden, Charlene Isabel Dryden, Leigh-Anne Dryden, Harold Dryden, Helen Parks, and Holly Elizabeth Dryden, by her Litigation Guardian, Douglas Howard Dryden, plaintiffs
Estate of David Campbell, deceased, James Campbell, Stars Inc. Bill Parchem, Carey Balzer, Royal Insurance Company of Canada and the Citadel Assurance Company of Canada, defendants

[**2001**] O.J. No. 829

Court File No. C16365/96

Ontario Superior Court of Justice

Cavarzan J.

Heard: October 30-31, November 1, 6, 8-10, 13-17, 20-24, 27-30, December 1, 4, 6-8, 2000.
Judgment: February 28, **2001.**

(249 paras.)

Torts — Negligence — Motor vehicle, standard of care of driver — Driving when ability to drive impaired — Standard of care, particular persons and relationships — Nightclub operator — Damages — General damages — General damages for personal injury — Prospective loss of wages or earnings (incl. formula) — Future care and treatment.

This was an action by **Dryden** for damages for personal injury. **Dryden** was injured when the vehicle in which he was travelling as a passenger was struck by a speeding pick-up truck that had gone through a red light. The truck was driven by **Campbell** who was extremely intoxicated. **Campbell,** who was 18, had a reputation of drinking to excess as well as a tendency to drive while inebriated. During the afternoon prior to the collision, Campbell's friend, Parchem, who was 24 years old, had purchased alcohol for **Campbell** and had participated in the consumption of alcohol with **Campbell** in the truck while **Campbell** was at the wheel. Parchem had knowledge of Campbell's drinking habits and of his propensity to drive while impaired. After leaving Parchem and prior to the collision, **Campbell** visited a nightclub. **Campbell** arrived at the club by truck and parked in the club parking lot. He was visibly intoxicated upon entering the club and he was served alcohol while at the club. **Campbell** left the club in his truck. **Dryden** suffered brain injuries that left him mentally retarded. He required 24-hour care and supervision and his life expectancy was reduced by five to ten years. There was evidence that Dryden's progress since the accident was due in large part to his family's involvement. **Dryden** expressed a desire to be with his family. **Dryden** sought the maximum award for general damages. **Dryden** was 13 years old at the time of the accident. He had an average pre-accident I.Q. and was an average student. **Campbell** argued that institutional care was the appropriate standard of care for **Dryden** while **Dryden** argued that home care was the appropriate standard. Dryden's injuries resulted in a catastrophic disruption in the lives of his parents and siblings, who made claims under the Family Law Act.

HELD: Action allowed. **Campbell** breached his duty of care to **Dryden** by driving while his ability to do so was impaired. He failed to observe the rules of the road. His negligence was a cause of Dryden's injuries. Parchem owed a duty of care to **Dryden** as it was reasonably foreseeable that providing **Campbell** with alcohol would create a risk of harm to **Campbell** as well as other users of the roads. Parchem breached the standard of care by purchasing alcohol for an 18 year old with a drinking problem and a known propensity to drink and drive. Parchem's breach of duty was a cause of the injury and losses suffered by **Dryden.** The nightclub owed a duty of care to **Dryden** as a user of the highways. By admitting **Campbell** who was under-age and intoxicated, by serving him alcohol and by failing to arrange safe transportation for him, the nightclub failed to meet the requisite standard of care. Campbell's reckless driving was directly related to the quantity of alcohol consumed. There was therefore a causal connection between the nightclub's negligence and Dryden's injuries. Campbell's father, as owner of the motor vehicle, was vicariously liable to the extent that **Campbell** was liable. Liability was apportioned 80 per cent to **Campbell,** 15 per cent to Parchem and five per cent to the nightclub. This was not a case to award the maximum amount for general damages as **Dryden** had not been deprived of all meaningful life activity. General damages were assessed at $250,000. Given his pre-accident intellectual potential, it was probable that **Dryden** would have attended community college. Given that **Dryden** would not have completed college until age 22, there could be no claim for past income loss. **Dryden** was entitled to judgment for future loss of income based on an average productivity factor. Home care was the preferable option for **Dryden,** and his future care costs were to be calculated on the assumption that he would reside with his parents for a further 10 years and then in a group home setting for the balance of his years. Dryden's parents were awarded $50,000 each for their Family Law Act claims while his sisters were awarded $15,000 each.

Statutes, Regulations and Rules Cited:

Courts of Justice Act.

Family Law Act, R.S.O. 1990, c. F.3, s. 61.

Highway Traffic Act, R.S.O. 1990, c. H.8, s. 192.

Insurance Act, ss. 268(1), 276.1(1).

Negligence Act, s. 1.

Ontario Liquor Licence Act, R.S.O. 1990, c. L.19, ss. 29, 30(1), 30(8), 32(1), 39.
Ontario Rules of Civil Procedure, Rule 19.02(1)(a), 19.05, 19.06.

Substitute Decisions Act, S.O. 1992, c. 30.

Substitute Decision Act Regulations, O. Reg. 159/2000.

[Quicklaw note: Interim supplementary reasons for judgment were released June 6, **2001.** See [**2001**] O.J. No. 4095.]

Counsel:

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G. Swaye, S. Fay and F. Leach, for the defendant, Bill Parchem.
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H. Arrell, for the defendant, Citadel Assurance.
D. Smith, for the Ministry of Health/O.H.I.P.

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SUMMARY

CAVARZAN J.:--

THE ISSUES

1 Scott Douglas **Dryden** and members of his family sue to recover for losses arising from a motor vehicle collision in which he was seriously and permanently injured. Scott was a rear seat passenger in an automobile which was struck broadside by a speeding pick-up truck which had proceeded through a red light. The grossly-inebriated driver of the truck and a front seat passenger in the car were fatally injured and died at the scene of the collision.

2 In addition to the driver and the owner of the truck, the named parties defendant include a commercial establishment and various individuals, all of whom are alleged to have negligently provided alcoholic beverages to the driver of the truck.

3 The issues of liability, apportionment of liability, past and future wage losses, and the appropriate nature and cost of future care for Scott were all vigorously contested at trial. An issue has arisen as to whether or not the statutory accident benefits received are deductible from the amount of any award of damages. Finally, the Family Law Act claims of the family members must be assessed.

BACKGROUND

4 On Saturday, April 9, 1994, Scott **Dryden,** a 13-year-old grade eight student, had spent the evening in London, Ontario at a Christian rock concert. He had travelled there from his home in Burlington with three other members of his church group. On the way home at about 12:15 a.m. on April 10, 1994, they were proceeding south on Burloak Drive near its intersection with New Street, a major east-west artery. That intersection is controlled by traffic signals. As they proceeded through the intersection on a green light, the late David **Campbell** was eastbound on New Street approaching Burloak Drive.

5 David **Campbell** was an 18-year-old high school student. He had a part-time job delivering bundles of newspapers to retail outlets on behalf of his employer, the Burlington Post. He spent part of Saturday, April 9, making deliveries. He was accompanied initially by Carey Balzer, a female friend, and later by Bill Parchem a 24-year-old acquaintance.

6 **Campbell,** Balzer, and Parchem were part of a group of friends who met regularly on weekends to socialize. **Campbell** had met Parchem some eight months earlier when he had dated Parchem's step-sister, Brenda Bauer, then about 15 years of age. This socializing occurred at family homes, usually that of Mark Hepworth, and involved the consumption of alcohol.

7 David **Campbell** became known as one who often drank to excess, and who had a demonstrated tendency to drive while inebriated. On those occasions, friends would try to prevent him from leaving by persuading him to stay overnight or by taking his ignition keys. On some occasions he complied, on others he could not be persuaded. He had extra sets of ignition keys so that, even if he was wrestled to the ground, as he was from time to time, and his keys taken from him, he was still able to drive away later.

8 **Campbell** began drinking on Saturday afternoon while in the truck with Bill Parchem. At Campbell's request, Parchem had purchased a bottle of Malibu Rum which he and **Campbell** consumed as they drove from place to place in Burlington. It is alleged that **Campbell** had consumed other alcohol at the Balzer residence in Burlington and the Livesy residence in Oakville. Later that evening he consumed further alcohol at the NRG Nightclub in Burlington.

9 Just prior to the collision he was observed by an independent witness as he drove the truck south on Appleby Line. He turned left onto New Street without stopping for a red light, made a wide left turn and then drove erratically east on New Street at high speed. The speed limit on New Street is 60 KPH. The estimated speed of Campbell's truck at the moment of impact was 101 KPH.

10 The front seat passenger in front of **Dryden** was killed. Dryden's rear seat companion was ejected from the car and found later some distance west of the intersection. The driver of the car was able to exit the car without assistance. **Dryden** was severely injured and, when first observed, was thought to have been killed because all vital signs were absent.

11 **Dryden** was taken unconscious to the Joseph Brant Hospital in Burlington, and then to the Hamilton General Hospital. He was found to have suffered a depressed fracture of the skull in the left frontal region, a subdural haematoma, broken facial bones and an injured left eye, all described as a left orbital injury, a fracture of the left femur with displacement and, later, damage to the pituitary gland leading to the onset of diabetis insipidus.

12 An emergency craniotomy was performed in order to relieve the increasing pressure inside the skull. This involved the removal of a portion of the skull and further surgery at a later date to replace the bone flap. During the course of the craniotomy the subdural haematoma or clot was removed and necrotic brain tissue was suctioned from the left side of the frontal lobe. An orthopaedic surgeon repaired and stabilized the broken femur by inserting a metal rod. This rod was later removed when further leg surgery was performed in June, 1996.

13 Plastic and reconstructive surgery was performed nine days after the collision. Metal plates and screws were installed to stabilize the left cheek fractures. This surgeon described the cheek fractures, the nasal fractures, and the damage to front upper teeth. He described as well a left arm artery thrombosis which led to the autoamputation of the tip of the left thumb.

14 On April 28, Scott was transferred to the McMaster University Medical Centre (MUMC) to continue his rehabilitation care, for management of his radial artery thrombosis, and for neurosurgical management. While there, it was discovered that spinal fluid was leaking from his nose as a result of a tear in the dura and a fracture involving the frontal sinuses. Further surgery was performed to repair the dura and to pack the sinuses. At this time the bone flap was re-inserted in the skull.

15 He was discharged from MUMC on August 12 as a temporary step pending his admission to the Hugh MacMillan Rehabilitation Centre. His discharge diagnoses were:

1. Motor vehicle accident victim with multiple facial injury and head trauma.
2. Post head trauma diabetes insipidus.
3. Seizures.
4. Left radial artery thrombosis.
5. Psychological problem.

The follow-up plans on discharge were:

1. By Dr. Newbury and Head Injury Team and they will co-ordinate Occupational Therapy, Physiotherapy, Speech Therapy, Psychology, Ophthalmologist and Dentist follow-up.
2. Dr. Bain for his thumb injury.
3. Dr. Malcolmson for diabetis insipidus.

16 I will address later in these reasons the prognoses given by the various medical professionals. Suffice it to say for the moment that Scott has made a remarkable physical recovery. The brain injury suffered was severe, however, and its effects irreversible. He was described by witnesses as a 10-year-old boy in the body of a 20-year-old man.

17 Between September 12 and December 16, 1994, Scott was treated at the Hugh MacMillan Rehabilitation Centre. It was at that facility and from the very outset of his stay there that Bartimaeus Inc. became involved in Scott's care and management.

18 Commencing in January, 1995 Scott was enrolled in the brain injury programme at the General Wolfe High School in Oakville. In the Spring of 1995 he transferred to the General Brock High School in Burlington and has been a student there in a special programme. Because Scott reaches age 21 this year, he will not be eligible to return to Brock in September.

LIABILITY

Generally

19 In order to succeed against any of the defendants, the injured plaintiff must establish that he was owed a duty of care by the defendant, the standard of care associated with that duty, and that that standard of care was not met. Finally, the plaintiff must establish that there was a causal connection between the defendant's negligent conduct and the damage suffered by him.

20 The Supreme Court of Canada considered the state of the law respecting these requirements in Stewart v. Pettie, [1995] 1 S.C.R. 131, [1995] S.C.J. No. 3 File No. 23739. Major J., speaking for the Court stated at paragraphs 24 and 25 that:

> 24. The "modern" approach to determining the existence of a duty of care is that established by the House of Lords in Anns v. Merton London Borough Council [1978] A.C. 728, and adopted by this Court in City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2, at pp. 10-11. The test, as established by Wilson J. in Kamloops, paraphrasing Anns is:
>
> (1) is there a sufficiently close relationship between the parties ... so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
>
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?
>
> 25. This approach has been approved in Just v. British Columbia [1989] 2 S.C.R. 1228, and Hall v. Hebert, [1993] 2 S.C.R. 159. The basis of the test is the historic case of Donoghue v. Stevenson, [1932] A.C. 562, which established the "neighbour principle": that actors owe a duty of care to those whom they ought reasonably have in contemplation as being at risk when they act.

21 Major J. then considered the distinction between the duty of care and the standard of care. At paragraph 32 he stated that:

> The question of whether a duty of care exists is a question of the relationship between the parties, not a question of conduct. The question of what conduct is required to satisfy the duty is a question of the appropriate standard of care. The point is made by Fleming in his book The Law of Torts (8th ed. 1992), a pp. 105-6:

> The general standard of conduct required by law is a necessary complement of the legal concept of "duty". There is not only the question "Did the defendant owe a duty to be careful?" but also "What precisely was required of him to discharge it?" Indeed, it is not uncommon to encounter formulation of the standard of care in terms of "duty", as when it is asserted that a motorist is under a duty to keep a proper lookout or give a turn signal. But this method of expression is best avoided. In the first place, the duty issue is already sufficiently complex without fragmenting it further to cover an endless series of details of conduct. "Duty" is more appropriately reserved for the problem of whether the relation between the parties (like manufacturer and consumer or occupier and trespasser) warrants the imposition upon one of an obligation of care for the benefit of the other, and it is more convenient to deal with individual conduct in terms of the legal standard of what is required to meet that obligation. Secondly, it is apt to obscure the division of functions between judge and jury. It is for the court to determine the existence of a duty relationship and to lay down in general terms the standard of care by which to measure the defendant's conduct; it is for the jury to translate the general into a particular standard suitable for the case in hand and to decide whether that standard has been attained.

22 Finally, Major J. observed at paragraph 60 that: "The plaintiff in a tort action has the burden of proving each element of the claim on the balance of probabilities. This includes proving that the defendant's impugned conduct actually caused the loss complained of."

The Liability of the Estate of David **Campbell,** Deceased

23 There is no question that David **Campbell** owed a general duty of care to persons who can be expected to use the highways. He breached that duty by driving a motor vehicle while his ability to do so was impaired by alcohol. He failed to observe rules of the road such as speed limits and traffic control signals, critical to the safety of the users of the roads. His negligence was a cause of the injuries to the plaintiffs in this action. Whether or not the negligence of David **Campbell** was the sole cause of the loss and injuries in this case depends upon the findings concerning the remaining defendants.

The Liability of the Remaining Defendants

24 I will consider, initially, the claims against **Stars** Inc., the owner and operator of the NRG Nightclub (hereinafter referred to as NRG) and Parchem. This is necessary because each of these defendants denied being the supplier of the alcohol to David **Campbell** which was the effective cause of his state of inebriation at the time of the collision.

25 Each of these defendants took the position that there was no causal connection between its or his conduct and the damages suffered by the plaintiffs. In addition, NRG took the position that its mode of operation as a commercial establishment and the conduct of its staff on the evening in question met the requisite standard of care.

Bill Parchem

26 Parchem had known **Campbell** since about August, 1993. They socialized occasionally on weekends in 1993 as part of the same group. Between January and April, 1994 they socialized almost every weekend at parties where alcohol was consumed. These parties were usually held at the residence of Scott Hepworth and Carey Balzer.

27 Parchem knew that **Campbell** liked to drink, and that his preferences were beer and rye whiskey. He knew that **Campbell** was only 18 years of age and that others at these parties, including his step-sister Brenda, who was 15, were underage yet consumed alcohol. He knew that

about 50% of the time when **Campbell** drank, he would reach the "falling-down" drunk stage. He knew that **Campbell** would drive his truck when inebriated. He knew that the group had succeeded on occasion to prevent **Campbell** from driving when inebriated. He knew as well that **Campbell** had an extra set of keys for the truck. He was aware that **Campbell** was a problem drinker who had attended at least two meetings of Alcoholics Anonymous.

28 Parchem testified concerning the events of April 9, 1994. **Campbell** came by at about 5:00 p.m. to pick him up to go and deliver papers with him. Carey Balzer was in the truck. **Campbell** asked him to purchase something from the liquor store for Carey Balzer and Kelly Retz to drink. He purchased a 750 ml. (26 oz.) bottle of Malibu Rum (21% alcohol by volume). Parchem knew that both girls were less than 19 years of age.

29 After several stops, including one to purchase orange juice, they dropped Carey Balzer at her house at about 6:00 p.m. and proceeded to Waterdown to pick up Kelly Retz. On the way they stopped at a cemetery to visit the grave of John Wilson, a friend of **Campbell,** who had died in a motor vehicle accident in November, 1993. It was at the cemetery that they decided to have a drink in the truck.

30 Between about 6:00 p.m. and 7:30 p.m. the entire bottle of Malibu Rum was consumed. Parchem testified that he had mixed four drinks in a large cup over that period of time. He shared them with **Campbell,** even though he stated that **Campbell** found the taste too sweet. Parchem drank most of the rum, about 2/3 to 3/4 of the bottle according to his own estimate.

31 After leaving the cemetery, some was consumed as they drove to Dale Powell's house and some on the way from there to Kelly Retz's house. Parchem mixed a second drink before entering Retz's house and took the cup in with him. **Campbell** and Kelly also drank from the cup. When the three returned to the truck, Parchem mixed a third drink. All three drank from the cup as they proceeded to the residence of Kelly's father where she was to retrieve a change of clothes. A fourth drink was mixed and consumed while Parchem and **Campbell** waited outside and while proceeding later to Balzer's house.

32 Parchem and **Campbell** went to a liquor store where Parchem purchased a second bottle of Malibu Rum. Together with Kelly Retz the three stopped at a pizza shop. Kelly was sent to another store to purchase more orange juice.

33 By his own admission, Parchem's condition of sobriety when they finally arrived at Balzer's was not very good. As he stated in his testimony, his condition was very blurry. He recalls that others were present at Balzer's, but he cannot recall who they were. He drank at Balzer's and he claims to have opened the second bottle of Malibu Rum there. Balzer testified, however, that she and Kelly unsealed that bottle later at the Livesy residence in Oakville. I prefer her evidence to that of Parchem's blurry recollection of events and times after he arrived drunk at Balzer's. He claims to have been at Balzer's for only 10 to 15 minutes, that **Campbell** did not drink from that bottle, and most improbably that **Campbell** had declared that he was not drinking anymore because he was driving.

34 It appears that all four, i.e., **Campbell,** Balzer, Retz and Parchem then travelled to Parchem's house to drop him off. The three in the truck then proceeded to the Livesy residence in Oakville. Parchem showered, then he and a friend, Paul, proceeded to the Livesy residence arriving at about 8:30 or 9:00 p.m. They stayed for about one-half hour and then proceeded to Emma's Back Porch in Burlington where they stayed for about two hours. Parchem had more to drink there and claims to have arrived at NRG at about 11:30 p.m. By that time he was, in his own words, "blitzed". He did not see **Campbell** there.

35 The defence in this case relies upon this time estimate by Parchem, and on the fact that the contradictory time estimates by other witnesses in the case were admittedly approximations and guesses, as establishing that **Campbell** had left NRG by 11:30 p.m. As stated above I accord no weight to Parchem's time estimates given that he was grossly inebriated at the time by his own

admission. His friend, Paul, who might have been able to corroborate this testimony was not called as a witness.

36 Upon his arrival earlier at the Livesy house, he saw **Campbell** there. **Campbell** appeared to be cheerful. Later, he noticed **Campbell** becoming withdrawn, a change he attributed to **Campbell** overhearing a conversation about a collage of photographs of his deceased friend John Wilson.

37 In his testimony at trial he stated that he thought he had a drink of Malibu Rum at the Livesy house from the bottle purchased for Carey Balzer and Kelly Retz. In an earlier statement given to Officer Freeman he claimed to have had two or three drinks from that bottle. I reject both of those statements as unreliable. I accept the contradictory evidence of Carey Balzer that only she and Retz drank from that bottle at the Livesy house.

38 It is necessary now to trace Campbell's movements as related by other witnesses. Sandra Corbett was then 17 years of age. She and her friend Natalie Woods, also 17 at the time, socialized with the **Campbell** group almost every weekend at Scott Hepworth's residence. She knew **Campbell** to be a drinker. She saw him under the influence. She had seen him drive while intoxicated.

39 On the evening of Saturday, April 9, 1994, Woods picked her up and they drove to Balzer's house arriving at about 8:00 p.m. **Campbell** was on the couch with Parchem drinking. She thought **Campbell** was drinking rye and Coke. She saw obvious signs of impairment in **Campbell** such as glassy eyes and stumbling. She concluded that he was in no condition to drive.

40 Natalie Woods' estimate of their arrival at Balzer's was 6:00 p.m. She too saw **Campbell** and Parchem there. **Campbell** was drinking Southern Comfort and Coke. She claimed to have been in the living room with **Campbell** for about one hour. **Campbell** did not appear to be impaired.

41 Corbett and Woods then went to the Livesy house in Oakville arriving at about 8:00 p.m. According to Woods, **Campbell** arrived later with Balzer and Retz - sometime between 8:00 p.m. and 9:00 p.m. Balzer testified that they arrived at about 9:00 p.m. There was alcohol on the kitchen counter. Balzer testified that **Campbell** brought the bottle of Malibu Rum into the kitchen. She and Kelly unsealed it and opened it. Balzer had two - one ounce drinks from it and Retz had one. She saw no one else take a drink from that bottle. There was another bottle of Malibu Rum on the kitchen counter already. Balzer saw **Campbell** drinking a beer. Exhibit 8 is a polaroid photograph taken at the Livesy residence that evening. Several witnesses identified **Campbell** as the person in the white jersey and red baseball cap seated near the left edge of the photograph. It is difficult to discern whether or not he is holding anything in his hand. It appears that the person on the right side of the photograph is holding a bottle of beer.

42 At some point **Campbell** left the Livesy house and drove his truck a short distance to the lakeshore where Balzer and Retz had gone for a walk. He, together with Balzer and Retz then drove to the Universe Club, an unlicensed dance club in Burlington.

43 According to Retz, **Campbell** was speeding and proceeded through a yellow or red light. She asked him to slow down and he complied. By her estimate they arrived at the Universe Club at about 9:00 p.m. They were there for one-half hour during which time **Campbell** was out of sight while the girls danced. Balzer testified that they returned to the Livesy residence before midnight. Balzer had previously stated to the police that they left the Universe Club at 10:30 p.m. On the 10-minute drive back to the Livesy house **Campbell** drove at speeds up to 140 KPH and recklessly ran through two red lights. He was angry because the girls had asked to leave the Universe Club. He had wanted them to stay there. He dimmed the dashboard lights in order to prevent the girls from reading the speedometer, and he turned up the radio in order to drown out their protests.

44 Balzer testified that she had never seen **Campbell** behave like that previously. She went into the Livesy residence to ask Scott Hepworth to help get **Campbell** out of the truck. **Campbell** told Retz that he was going to NRG. According to Balzer, **Campbell** "spun out" and headed back to Burlington. Neither Balzer nor Retz went to NRG that evening and neither saw him again.

45 When the police searched the wreckage of Campbell's truck at the scene of the collision, they found a part bottle of Malibu Rum that was less than one-half full. According to Balzer, **Campbell** had retrieved their bottle of Malibu Rum from the Livesy kitchen before heading to the Universe Club, because he didn't want anyone else to drink from it.

46 Neither Balzer nor Retz saw **Campbell** drink anything while at the Universe Club. They both testified, however, that he had been out of their sight for a period of from 15 minutes to one-half hour. On cross-examination of Balzer by Mr. Arrell, the following was said:

> Q. You just told this jury David would get falling down drunk every weekend?
>
> A. Yeah.
>
> Q. He got in his truck and drank?
>
> A. He'd be in the truck. He wasn't living with anybody; he had no place else to go.
>
> Q. Is there any reason why David wasn't drinking during this fifteen minutes that you didn't see him at the Universe Club?
>
> A. I don't know what he was doing. I asked him where he went and he wouldn't say anything.
>
> Q. He could have been drinking?
>
> A. He could have been, yes.
>
> Q. Because the next time you saw him ...
>
> A. That's the first thing I thought of, that he had gone somewhere and something had happened. I didn't know if he was taking drugs. Believe me I thought of that too, because I'd never seen him like that before, that crazy.

47 Rachel Bauer, age 16 at the time, arrived at NRG at about 10:30 p.m. or 10:45 p.m. She saw **Campbell** there. According to her **Campbell** was at NRG for the next 60 to 90 minutes. She witnessed an altercation between **Campbell** and an NRG bouncer at about midnight. Shortly after that **Campbell** left the premises. Rachel Bauer stayed at NRG until closing time at 1:00 a.m. She recalls that her brother, Bill Parchem, arrived at NRG after **Campbell** had left.

48 Sandra Corbett arrived at NRG at about 10:45 p.m. She spoke to **Campbell** at about 11:00 p.m., then was on the dance floor with him and others for the next hour. She testified that **Campbell** left the club at about midnight. She and Natalie Woods left at about 12:15 p.m.

49 Natalie Woods' time estimates are somewhat different. Arrival at NRG is shortly after 11:00 p.m. She spoke to **Campbell** on entering. The altercation between **Campbell** and the bouncer was about one hour after she and Sandra Corbett had arrived. By her estimate, therefore, **Campbell** left shortly after midnight. She and Sandra Corbett left NRG at about 12:45 a.m.

50 Sanga MacDonald, who saw **Campbell** at NRG that evening, danced with him, and saw him drinking beer, was able to recall only that she arrived there later in the evening. She was there about two hours and did not see **Campbell** leave.

51 Officer Freeman testified that it takes about 20 minutes to drive from the Livesy residence in Oakville to the NRG Nightclub. Officer Doherty testified that it takes about 10 minutes to drive from NRG to the scene of the collision.

52 It is probable, based upon all of the evidence heard, that **Campbell** arrived at NRG at about 10:30 p.m. or 10:45 p.m. and that he left the club at about midnight, and I so find. Officer Doherty, who witnessed the collision from a point on Burloak Drive about one kilometer north of the scene fixed the time of the collision at 12:16 a.m.

NRG

53 The defendant **Stars** Inc. carried on business as the NRG Nightclub on Plains Road in Burlington. Prior to 1991 when it had received a licence to sell liquor, it had operated as the **Stars** Dance Club which was open to all ages. After being licenced and renovated, it contained six bars, two on the 3,000 square feet mezzanine level, and four on the 15,000 square feet main level. On nights when all six bars were open, admission was restricted to those 19 years of age and older.

54 All-ages dance nights were held on Sundays during the summer school vacation period and throughout the year on long weekends when students had no classes on Monday. At all-ages dances only the two bars on the mezzanine level were open and access to that level was restricted to those 19 years of age or older.

55 Saturday was the busiest night of the week. The club's capacity was 1,000 patrons, although with turnover during the course of some evenings as many as 2,000 patrons may have visited the club. The club was one of several businesses located in a strip mall. It shared a large parking lot with other businesses. In addition, it had a satellite parking lot some distance away. A dedicated shuttle service transported patrons to and from the satellite parking lot.

56 Dean Collett, one of four owners of the business, described the staffing. There were seven or eight parking lot attendants supervised by one parked in a van outside the club's front entrance. Some 15 to 20 security staff (bouncers) were positioned inside the club. Two or three security staff controlled entry outside the front entrance by checking identification (I.D.) and ensuring that the club's capacity of 1,000 was not exceeded. Usually by 10:30 p.m. on Saturdays the club had reached capacity and a line-up formed outside. New patrons were admitted only as others left the club. Ten to 12 bartenders operated the six bars. There were few tables or places to sit. There was no table service. Patrons had to go to one of the bars to purchase drinks. Other staff were five to six busboys, a disc jockey, a lighting technician, some "Go-Go" dancers, and the four owners who handled management duties.

57 The club hired three or four off-duty local police officers to patrol outside between 10:30 p.m. and 2:30 a.m. They were in full uniform and were referred to as pay duty police officers. This practice was terminated by the local authorities some time prior to April 10, 1994. The evidence heard suggests that there were no pay duty officers present on April 9, 1994 and I so find.

58 NRG purported to have a strict policy that no one under 19 years of age would be admitted. Also, no intoxicated person would be admitted. Security staff were trained to deal with intoxicated persons. They would determine whether or not that person was accompanied by others in whose care he or she could be placed to ensure that the person reached home safely. Taxi cabs were always available at the club. If the person was unaccompanied, he or she would be placed in a cab. The club's strict policy, according to the witnesses who testified, was that if the person could not pay for the taxi ride home the club would absorb the expense. None of NRG's witnesses was able to produce any club financial records showing this as a business expense.

59 Robert Simpson described in detail the Server Intervention Programme (S.I.P.) developed by the Addiction Research Foundation. It was a four and one-half hour training session which included instruction on alcohol and the law, facts about alcohol, skills development and prevention strategies, and how to manage patrons who become intoxicated nevertheless. It taught how to identify the ten signs of intoxication and strategies to deal with a patron exhibiting

one or more of these signs.

60 Managers of licenced facilities were offered the same course but with an added component. Management was encouraged to have written policies, to price away from intoxication, e.g. beer by the jug should not be cheaper than beer by the glass, and non-alcoholic drinks should be less expensive than alcoholic drinks. Management was encouraged to give staff discretionary authority to offer free non-alcoholic drinks, food, and taxi rides home. S.I.P. encouraged management to launch designated driver programmes. S.I.P. recommended against multiple bars and no waiter staff. Waiters can monitor the amount of alcohol being consumed by patrons, bartenders cannot. S.I.P. recommended that staff screen departing patrons as well.

61 Dean Collett testified that all NRG staff were required to take the S.I.P. programme. Ken Collett, also one of the owners of NRG, testified that the S.I.P. programme was mandatory for NRG's bartenders but not for its doormen, although some doormen did take the course.

62 None of the four witnesses called on behalf of NRG was able to recall the incident involving **Campbell** and an NRG bouncer. Richard Gooden, NRG's former head of security, was not at the club that night - he was on an extended leave of absence. Hayden Davidson, who was Gooden's replacement as head of security testified about an incident regarding a patron who insisted on wearing a baseball cap, contrary to NRG's strict no-caps policy, but he described a different patron and one who had left the club at 1:00 a.m.

63 All four witnesses called by NRG maintained that NRG's policy that the I.D. of every patron be checked before entering, was strictly enforced.

64 Several witnesses who had attended NRG on April 9, 1994, testified that they had not been asked to show I.D. Sandra Corbett (18) was not asked, nor was Natalie Woods (17). Natalie Woods testified that she saw at least ten others at NRG that evening whom she knew to be underage. Rachel Bauer (16) had been to NRG on about ten occasions prior to April 9, 1994, and had been asked to show I.D. on about one-half of those attendances. Once inside she purchased alcohol without being challenged. Both she and Sandra Corbett admitted in their testimony that they had possessed false I.D.

65 Dean Collett suggested that they had been untruthful and, in the case of Sandra Corbett, he suggested that her motivation for lying at trial was that she did not want to admit to possessing false I.D. In fact, she did admit both drinking under age and having possessed false I.D. The significance of her testimony is that she was not asked to produce any I.D. - she was admitted to NRG unchallenged.

66 Corbett and Bauer testified that NRG had a reputation among their age group as an easy place to gain entry. This was the view as well of Cary Balzer (18) and of Bill Parchem.

67 Another strict policy of NRG was to refuse admission to intoxicated persons. It was established in evidence that Bill Parchem was seriously intoxicated by the time he arrived at NRG. Natalie Woods observed what she described as a gross deterioration in his condition when she saw him at NRG. Not only was he admitted to NRG but he was served more alcohol there. He testified that his I.D. had been checked on entering. He stayed until closing time at 1:00 a.m. He purchased two rye and Coke drinks while there.

68 There is ample credible evidence that David **Campbell** was visibly intoxicated while at NRG, that he purchased alcohol there, and that he consumed it there. NRG purported to guard against this by placing its security staff strategically throughout the premises so that every square foot of the facility was under observation. There is uncontradicted evidence that **Campbell** showed obvious signs of impairment such as stumbling, slurring his speech, spilling his drink on another dancer, and groping Natalie Woods. None of this attracted the attention of any NRG staff. Neither did the fact that he was seen on the dance floor with a drink in each hand.

69 What did attract the attention of an NRG bouncer was the breach of NRG's no-caps policy by **Campbell.** He was told to remove it. He did so. After the bouncer turned away, **Campbell** again placed the baseball cap on his head. The same bouncer returned, confronted **Campbell,** and took the cap from him. Shortly thereafter **Campbell** retrieved his cap and left the club. He walked past security staff in the building and at the front entrance near the parking lot where his truck was parked. He was drunk and angry.

70 About 15 minutes later he was fatally injured in the collision with the vehicle in which Scott **Dryden** was a passenger. Testing done by the Centre for Forensic Science showed that Campbell's blood alcohol content was 214 milligrams of alcohol in 100 millilitres of blood (214 mg./100 ml.). His urine alcohol content was 276 mg./100 ml.

71 It is established in the evidence, that **Campbell** consumed at least three bottles of beer and one mixed rye drink while at NRG, and I so find.

The Toxicology Evidence

72 The court heard from two experienced toxicologists, Paul Cooper and Rita Charlebois. They both testified as to the effects of alcohol on the human body and its ability to function. For example, Paul Cooper testified that alcohol is absorbed at varying rates into the blood. As he put it, alcohol in the blood is alcohol in the brain.

73 At low blood alcohol concentrations (B.A.C.), not much physical impairment is evident. As the B.A.C. increases one begins to see "add-ons", e.g. difficulty with concentration and impaired judgment, then loss of visual acuity, and then physical effects such as slurred speech and loss of balance and co-ordination, become apparent.

74 Cooper agreed on cross-examination that the B.A.C. reading alone as an indicator of impairment is not reliable. One must look at all the surrounding circumstances. Similarly, Charlebois testified that an individual "may display few, and even no signs of intoxication, despite having a substantial B.A.C.". A seasoned drinker who regularly drinks to the point where his B.A.C. reaches 214 mg./100 ml. may show no signs of intoxication.

75 NRG, in particular, relies on these observations by the toxicologists and on the evidence about Campbell's drinking habits to support the suggestion that he probably exhibited no visible signs of impairment while at NRG. Although **Campbell** was recognized to be a problem drinker by his friends, it has not been established in evidence that he had reached the status of the seasoned drinker who could "hold his liquor" and show no signs of impairment. He was described by witnesses who testified as becoming "falling-down-drunk" on occasion. On other occasions, they readily detected signs such as glassy eyes, slurred speech, loss of muscle control and balance, and other visible symptoms. They would take steps to prevent him from driving.

76 **Campbell** began to drink more, and more often, in the few months since the death of his friend, John Wilson, in November, 1993. There is evidence, however, that the effects of drinking were still obvious to those who observed him. I find as a fact that he exhibited obvious signs of physical impairment while he was at NRG.

77 Both toxicologists were asked two hypothetical questions based on assumed facts. They were asked to assume that **Campbell** had consumed three bottles of beer between 10:45 p.m. and midnight and that his B.A.C. at 12:15 a.m. was 214 mg./100 ml. Based on those assumptions they were asked to calculate his B.A.C. upon arriving at NRG at 10:45 p.m. They answered 150 mg./100 ml. (Cooper) and 149 mg./100 ml. (Charlebois).

78 The second hypothetical assumed that **Campbell** had consumed two mixed drinks, one with rye and one with Southern Comfort, between 6:15 p.m. and 10:45 p.m. and an unknown quantity of Malibu Rum, and that his B.A.C. at 10:45 p.m. was 150 mg./100 ml. The toxicologists

were asked to calculate how much Malibu Rum he had consumed. Cooper's opinion was 16 ounces to 18 ounces assuming the other two mixed drinks were one to one and a half ounces each. Charlebois' opinion was 15.9 ounces.

79 Cooper prepared Exhibit 9 which shows that one ounce of Malibu Rum, which is 21% alcohol by volume, translates into a B.A.C. of 9.83 mg./100 ml. in a person of Campbell's size and weight. Sixteen ounces yields a reading of about 157 mg./100 ml. Even allowing for an elimination rate of 15 mg./100 ml. per hour, which is midway between the lowest and highest rates for the population other than severe alcoholics, Malibu Rum would be largely responsible for Campbell's state of intoxication at 10:45 p.m.

80 In cross-examining Mr. Cooper, Mr. Faye asked him to assume that **Campbell** had consumed six ounces of Malibu Rum between 6:00 p.m. and 8:00p.m., and to calculate his B.A.C. at 12:15 a.m. based upon that assumption. Cooper answered that the B.A.C. reading would be zero. He opined that the reading would be zero if **Campbell** had consumed eight ounces in the hypothetical, and a very low reading if the amount consumed was ten ounces.

81 That hypothetical is of no assistance to Parchem's defence. I find as fact that **Campbell** consumed the quantity of Malibu Rum missing from the second 750 ml. (26 oz.) bottle purchased by Parchem, except for the three drinks consumed by Balzer and Retz at the Livesy residence. When found in the truck by police the bottle was less than half full. Even assuming that 14 or 15 ounces had been consumed, **Campbell** would account for 11 or 12 ounces of the missing rum. In my view he consumed that quantity of Malibu Rum at some point between leaving the Livesy residence to go to the Universe Club and the time of the motor vehicle collision. The probability is that he consumed it while he was out of sight at the Universe Club, and I so find.

Parchem's Duty of Care

82 Given the detailed personal knowledge which Parchem possessed of Campbell's drinking habits and of his propensity to drive while impaired, it was reasonably foreseeable that providing him with alcohol would create a risk of harm to **Campbell** as well as to other users of the roads. Parchem owed a duty of care to Scott **Dryden.**

The Standard of Care

83 The conduct required of Parchem to satisfy that duty is, as the case law indicates, a question of the appropriate standard of care. There ought to be no need to resort to statutory proscriptions in order to discern the requisite standard of care here.

84 A 24-year-old adult ought not to be purchasing liquor for an 18-year-old high school student with a drinking problem and, worse still, a known propensity to drink and drive. To make matters worse Parchem participated in the consumption of alcohol with **Campbell** in the truck and while **Campbell** was at the wheel. Having consumed one bottle, Parchem compounded the error and the wrong by purchasing a second bottle and leaving it in Campbell's possession.

85 I agree, nevertheless, with plaintiffs' submission that the most obvious guidelines society has for this standard of care are the provisions of the Ontario Liquor Licence Act R.S.O. 1990, c. L.19 as amended. The "Responsible Use" provisions of that Act include the following:

> 29. No person shall sell or supply liquor or permit liquor to be sold or supplied to any person who is or appears to be intoxicated.
>
> 30.(1) No person shall knowingly sell or supply liquor to a person under nineteen years of age.
>
> 30.(8) No person under nineteen years of age shall have, consume, attempt to purchase or otherwise obtain liquor.

> 32.(1) No person shall drive or have the care or control of a motor vehicle as defined in the Highway Traffic Act ... while there is contained in the vehicle any liquor, except under the authority of a licence or permit.

86 Parchem, by his conduct, either breached or was a party to the breach of the above provisions. Parchem did not comply with the standard of care required of him by the law and by ordinary common sense.

Causation

87 In my view Parchem's breach of duty was a cause of the injury and losses suffered by Scott **Dryden** and his family.

> "Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury."
>
> See Athey v. Leonati, [1996] 3 S.C.R. 458, [1996] S.C.J. No. 102 at paragraphs 13ff.; Snell v. Farrell, [1990] 2 S.C.R. 311.

NRG's Duty of Care

88 The Supreme Court of Canada has reconfirmed as recently as in 1995 in Stewart v. Pettie, supra, at paragraph 33 that:

> 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. ... it clearly ought to be in the reasonable contemplation of such people that carelessness on their part might cause injury to such third parties.

89 NRG owed a duty of care to Scott **Dryden** as a user of the highways.

The Standard of Care

90 The basic principle is articulated by Major J. at paragraphs 50 of his reasons in Stewart v. Pettie, supra:

> One of the primary purposes of negligence law is to enforce reasonable standards of conduct so as to prevent the creation of reasonably foreseeable risks. In this way, tort law serves as a disincentive to risk-creating behaviour. To impose liability even where the risk which materialized was not reasonably foreseeable is to lay a portion of the loss at the feet of a party who has, in the circumstances acted reasonably. Tort law does not require the wisdom of Solomon. All it requires is that people act reasonably in the circumstances. The "reasonable person" of negligence law was described by Laidlaw J. in this way in Arland v. Taylor, [1955] O.R. 131 (C.A.) at p. 142:
>
> > He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct. He does nothing that a prudent man would not do and does not omit to do anything a prudent man would do. He acts in accord with general and approved practice. His conduct is guided by considerations which ordinarily regulate the conduct of human affairs. His conduct is the standard

"adopted in the community by persons of ordinary intelligence and prudence".

91 In Jordan House Ltd. v. Menow, [1974] S.C.R. 239 Laskin J., speaking for a plurality in the Court, stated at p. 247 that:

> ... in considering whether the risk of injury to which a person may be exposed is one that he should not reasonably have to run it is relevant to relate the probability and the gravity of injury to the burden that would be imposed upon the prospective defendant in taking avoiding measures. Bolton v. Stone [1951] A.C. 850, in the House of Lords and Lambert v. Lastaplex Chemicals Co. Ltd. [1972] S.C.R. 569, in this Court illustrate the relationship between the remoteness or likelihood of injury and the fixing of an obligation to take preventive measures according to the gravity thereof.

92 I agree with the proposition advanced by the plaintiffs that given that catastrophic injuries can result from the operation of a motor vehicle by an inebriated person, a high standard of care is imposed on commercial establishments which supply alcohol, in order to ensure that they do not create a danger to users of the highways.

93 The owners of NRG testified that they were aware of the risks involved in the serving of alcohol to their patrons. They enrolled in the S.I.P. course of instruction and endeavoured to have the members of their staff take the programme.

94 The conduct required of NRG to meet that high standard of care is reflected in the guidelines contained in the S.I.P. course of instruction. Robert Simpson was the leader of a team of specialists which developed that programme of instruction. He testified that S.I.P. is the acronym for Server Intervention Programme, and that the initials also represent the following essential actions required of institutions which serve alcohol: S represents "Stop trouble at the door"; I represents "Interview and assess"; P represents "Provide low risk options".

95 The following prudent and reasonable steps to be taken by institutions serving alcohol to the public are specified in the course materials:

* Stop trouble at the door
* Check for underage patrons
* Interview and assess for prior drinking
* Provide low-risk options, serve and monitor service
* Check for driving
* Arrange for safe transportation

96 I have no difficulty in concluding that NRG failed to meet the requisite standard of care in the circumstances. It admitted to its premises David **Campbell,** an under-age, intoxicated person.

97 NRG's position is that David **Campbell** gained admission by the use of false I.D. That position is based in part on the evidence that **Campbell** drank regularly and that it is a reasonable inference that he must have used false I.D. to obtain alcohol. There is no direct evidence that **Campbell** possessed false I.D. It is significant, on this issue, that when the Malibu Rum was purchased at two different L.C.B.O. outlets, **Campbell** asked Parchem to make the purchases. The more reasonable inference from the available evidence is that he did not possess false I.D. Moreover, I have already concluded that whether or not young people carried false I.D., NRG was not as thorough and uncompromising in checking I.D. at the door that evening as its witnesses maintained.

98 Once inside, he purchased alcoholic beverages even though outward signs of intoxication were apparent.

99 NRG's position is that even though it did not have waiters to serve patrons, it had sufficient security staff in the building who were S.I.P.-trained and able to monitor every square foot of the premises. I am not persuaded that all of NRG's security staff took the S.I.P. programme. Ken Collett testified that NRG made the programme mandatory for bartenders but not for doormen, although, in his words, "the odd doorman did take it". He testified as well that the ratio of security staff to patrons inside was one staff for every 100 patrons, plus two or three additional for a total of 12 or 13. Dean Collett testified that there were usually 17 or 18 security people inside.

100 Michael Larson, a Halton Regional Police officer served as a pay duty officer at NRG. He was also retained by NRG as an unpaid consultant on security matters. His view, which he expressed to NRG management, was that the number of security staff employed was insufficient. His advice was that 30 security staff were needed to monitor the premises effectively.

101 NRG failed to deal with **Campbell** appropriately on entry, while on the premises, and as he left the premises. NRG knew that at least 50% of its patrons arrived by car. It knew or ought to have known that **Campbell** had arrived in his truck which was parked on the lot near the front entrance. No one checked to confirm that he was driving. No effort was made to arrange safe transportation for him.

Causation

102 NRG takes the position that there is no evidence that alcohol was the cause of the collision. No issue is taken, of course, with the finding that Campbell's B.A.C. was 214 mg./100 ml. at the time of the collision. Rather, the cause is attributed, as I understand it, to the fact that **Campbell** habitually drove at high speed whether intoxicated or not. Mr. Borlack noted that even before attending at NRG that day, he drove at speeds up to 140 km./hr. on a city street and ignored two red lights. He submitted that Campbell's anger and aggressive driving, and going through a red light, were the cause of the collision which injured Scott **Dryden.** The anger, on this occasion, was triggered, he said, by the visit to the cemetery that day, by seeing the collage of photographs of his late friend, and by his girlfriend's rejection of his amorous interest in her.

103 The suggestion that Campbell's drinking was not the cause of the collision is not borne out by the evidence. It denies the toxicologist's evidence given by Mr. Cooper that among the first manifestations of alcohol intoxication is difficulty with concentration and impairment of judgment. I find that Campbell's action in not braking before entering the intersection was more consistent with recklessness fuelled by alcohol than with any death wish he may have harboured.

104 There is no evidence that he ignored red lights when not intoxicated. Balzer and Retz testified that he ignored two red lights on the return trip from the Universe Club. He next drove through red lights shortly before and at the time of the collision. In my view his abilities were impaired by alcohol on both occasions and I so find.

105 Bill Parchem testified that he had never witnessed **Campbell** drive erratically as a result of being angry. He testified that **Campbell** habitually drove about 10 to 15 KPH over the speed limit.

106 When cross-examined, Kelly Retz described how **Campbell** had a "crush" on her. When she told him that he drank too much, he stopped drinking for a couple of weeks. When she later told him that she simply wanted to be friends, he resumed drinking. She described how, a few days before April 9, they had discussed their relationship following which **Campbell** drove fast on a winding road. When they dropped Parchem at his house on the way to Oakville, Retz described **Campbell** as being a little "standoffish".

107 Carey Balzer agreed with the suggestion put to her on cross-examination that **Campbell** was angry because he cared for her cousin, Retz, and she was not interested in him. She agreed that this led **Campbell** to drive angrily. No explanation was elicited by counsel as to what she meant by "driving angrily". She did say that **Campbell** habitually drove fast.

108 Carey Balzer's observation of the effect on **Campbell** of the photo collage at the Livesy house was that he became quiet and withdrawn.

109 Mark Hepworth described **Campbell** as a very skilled driver who drove fast but was always in control. **Campbell** had ignored stop signs when he was with Hepworth, but not red lights. Hepworth considered it to be out of character for **Campbell** to have driven "like an idiot" as related to him by Balzer when she sought his help at the Livesy residence.

110 **Campbell** may have been angered when Balzer and Retz insisted on leaving the Universe Club; however, in my view that does not account for the bizarre driving which occurred on the return trip to Oakville.

111 Sonja MacDonald testified that **Campbell** was feeling happy while at NRG. She said that he was angered by the hat incident with the bouncer. His anger at that point occurred shortly before he took the wheel to leave the NRG lot. It does not, in my view, account for the erratic high speed trip along New Street described by the independent witness Michelle Forsyth. The excessive quantity of alcohol consumed accounts for that behaviour, and I so find.

112 The alcohol provided to **Campbell** at NRG in an hour or so of drinking before he left NRG served to increase his level of intoxication. I have found a causal connection between Scott Dryden's injuries and losses and the negligence of both Parchem and NRG. In the case of NRG, the Liquor Licence Act imposes liability as a result of the findings of fact. Section 39 of that Act deals with civil liability and states in its relevant parts that:

> 39. 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:
>
> ....
>
> 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 of compensation for the injury or damage from the person who or whose employee or agent sold the liquor.

113 NRG is liable both at common law and by operation of the above statutory provision.

James **Campbell**

114 James **Campbell** was David Campbell's father and the owner of the pick-up truck. There was no policy of insurance in effect to cover the operation of that motor vehicle.

115 This action was not defended by James **Campbell.** He is liable vicariously, as owner of the motor vehicle, to the extent that David **Campbell** is found to be liable. This is the statutory liability imposed by section 192 of the Highway Traffic Act R.S.O. 1990 c. H.8 as amended.

116 It was submitted, however, that he should be found liable in accordance with the

allegations of negligence made against him in the statement of claim. Subrule 19.02(1)(a) of the Rules of Civil Procedure provides that a defendant who has been noted in default is deemed to admit the truth of all allegations of fact made in the statement of claim. The plaintiffs did not, prior to trial, move for default judgment under subrule 19.05.

117 Subrule 19.06 declares that the facts as found at trial must entitle the plaintiff to judgment:

> A plaintiff is not entitled to judgment on motion for judgment or at trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment.

118 The only evidence at trial implicating James **Campbell** related to his ownership of the pick-up truck, and to the fact that he had been called on one occasion to come to pick up his inebriated son to prevent him from driving. That evidence alone is not sufficient to establish on a balance of probabilities the allegation in paragraph 17(c) that:

> He permitted the Defendant motor vehicle to be operated by the Defendant David **Campbell,** when he knew or ought to have known that his ability to drive a motor vehicle was impaired by the influence of alcohol or other intoxicating drugs.

119 The facts do not entitle the plaintiffs to judgment against James **Campbell** on the basis of any of the allegations of negligence made against him in paragraph 17 of the statement of claim. There will be judgment against him making him jointly and severally liable to the extent that liability is found against the defendant David **Campbell.**

Carey Balzer

120 Carey Balzer did not defend this action. The plaintiffs did not move for default judgment against her prior to trial.

121 The same reasoning and analysis applied to the circumstances surrounding the claims against James **Campbell** apply to the claims against Carey Balzer. The allegations of negligence in paragraph 19 against various individual defendants, including Carey Balzer, are that:

(a) They permitted the Defendant, David **Campbell** to drink alcohol, despite knowing that he was under age;

(b) They provided alcohol to the Defendant, David **Campbell** or in the alternative, they permitted the defendant David **Campbell** to bring alcohol onto the premises, which they later allowed the minor to consume;

(c) They permitted the Defendant, David **Campbell,** to consume alcohol to the state of intoxication;

(d) They failed to take any steps to try and [sic] prevent the Defendant from consuming alcohol;

(e) They failed to prevent intoxicated persons from leaving their premises, despite knowing he [sic] would operate a motor vehicle;

(f) They failed to take any steps to prevent David **Campbell** from operating his motor vehicle;

(g) They failed to alert police that David **Campbell** was about to drive;

(h) They failed to take any steps to prevent the intoxicated defendant, David **Campbell** from leaving their premises;

(i) They failed to take any steps to control persons legally on their property;

(j) Such further and other ground as counsel shall advise.

122 The evidence as to the length of time that David **Campbell** was at Balzer's residence, his state of sobriety while there, and whether or not he had any alcohol to drink there is contradictory. In my view, there is no sufficient evidentiary support for the allegations in subparagraphs (a) to (e) and (g) to (i) inclusive. Carey Balzer attempted to enlist the assistance of Mark Hepworth at the Livesy residence to remove **Campbell** from the truck. This was after she had experienced the ride from the Universe Club to Oakville when Campbell's driving behaviour had been bizarre and dangerous. Contrary to the allegations in subparagraph 19(g), she appears to have been the only one to have taken any steps to prevent **Campbell** from driving that evening.

123 The plaintiffs have failed to prove the allegations of negligence in paragraph 19 as against the defendant Carey Balzer. The action as against her will be dismissed.

124 As I understand it, the remaining individual defendants named in paragraph 19 have been let out of the action.

GENERAL DAMAGES

125 Scott Dryden's injuries are described in paragraphs 11 to 16 above.

126 Dr. Reddy, the neurosurgeon who treated Scott's head injuries considered that Scott had made a remarkable physical recovery. In his view, however, Scott had a long way to go and is unlikely to reach his pre-accident potential. Dr. Reddy last saw Scott in 1994.

127 Dr. Garner, a physiatrist, assessed Scott in June of 1996. He testified that the severity of the brain injury to Scott was indicated by a Glasgow Coma Scale reading consistently less than eight, and by the onset of diabetes insipidus as a result of the injury to the pituitary gland at the base of the skull. He concluded that Scott would need 24 hours per day supervision and that he will have on-going life-long needs in that regard. He saw no major reduction in Scott's life expectancy as a result of his injuries. Based upon recent studies, it was his view that the only factors which affect life expectancy are difficulties with feeding and mobility. Scott is mobile and he doesn't need a feeding tube to take nourishment. He considered, however, that risk factors such as diabetes, epilepsy, and seizures may reduce his life expectancy by five to ten years at most.

128 Three psychologists who had done intellectual and other testing on Scott testified for the plaintiffs. Michael Finlayson, a neuropsychologist, assessed Scott in 1996. He found Scott's post-accident I.Q. to be 64 as opposed to his pre-accident average I.Q. of 90 to 110. This dramatic level of loss placed Scott in the very seriously impaired category. There had been some recovery in reading ability, but he continues to have problems in other areas. The damage to the frontal lobe of the brain places Scott at risk for a whole range of personal problems, one of which is a rigid thinking style which makes it difficult for others to get along with him.

129 Lawrence Tuff is a child neuropsychologist. He assessed Scott in May/June, 1994 and then about one year later in late March, 1995, more than one year after the collision. Based on test results he placed Scott in the 0.1 percentile, which categorizes him as mentally retarded. He stated that the bulk (90%) of the recovery from brain injury occurs within the first year. Some subtle improvement occurs in the second year. The probability is that there will be no discernible improvement thereafter. In his view, Scott will have long-term problems. His executive/cognitive deficits will lead to problems in relationships with people including making and keeping friends and problems with intimacy. Scott's status at one year post-accident is likely to continue.

130 Kenneth Dunn performs neuropsychological testing for the purpose of rehabilitation. He

assessed Scott in December, 1997, some three and one-half years post-accident. He found "that the pattern of results shown in the current assessment remained very highly consistent with those obtained in both 1995 and 1996." He found only a slight overall improvement in test scores over previous testing. Scott's verbal abilities are better than his non-verbal abilities. In his view, the prognosis for any future significant gains is not good. He did not foresee a day when Scott will function on his own. Scott's frontal lobe injuries have compromised his executive functioning which is in the second percentile, the mentally deficient range. His cognitive difficulties are permanent. There will be changes, but none significant enough to affect Scott's inability to live independently. It is very unlikely that he will ever become competitively employable. He described Scott's brain injury as an injury to Scott and to his family.

131 None of this evidence was seriously challenged by the defendants. They called no medical evidence. The defendants assess the general damages for Scott at $225,000.00. The plaintiff Scott **Dryden** seeks an award for general damages at the current value for the upper limit set by the Supreme Court of Canada in Andrews et al. v. Grand & Toy Alberta Ltd. et al., (1978) 83 D.L.R. (3d) 452 at 478. The economists called by both sides agreed, within about $200, that the maximum is now slightly in excess of $274,000.

132 In the Andrews case at page 476, the Court accepted the approach to assessing general damages that:

> ... attempts to assess the compensation required to provide the injured person "with reasonable solace for his misfortune". "Solace" in this sense is taken to mean physical arrangements which can make his life more endurable rather than "solace' in the sense of sympathy. To my mind, this last approach has much to commend it, as it provides a rationale as to why money is considered compensation for non-pecuniary losses such as loss of amenities, pain and suffering, and loss of expectancy of life.

Dickson J., as he then was, explained at page 477, the purpose for this award of damages and why it should be limited:

> If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries.

133 The defendants cited Ligate et al. v. Abick et al. (1996) 28 O.R. (3d) 1 (Ont. C.A.) and Roberts et al. v. Morana et al. (1997) 34 O.R. (3d) 647 (Ont. Ct. Gen. Div.) as precedents for the proposition that the maximum should be awarded only in cases where there remains for the injured plaintiff no meaningful life activity. In Ligate, the Court of Appeal did not interfere with the trial judge's award of $200,000 for general damages for a plaintiff who was 19 years old when he suffered brain injuries with consequences remarkably similar to those suffered by Scott **Dryden.** In the Roberts case, O'Brien J. assessed general damages at $225,000 in the case of a 16 year old plaintiff who suffered severe brain injury, with cognitive deficits similar to those suffered by Scott **Dryden,** and with significantly more severe physical injuries to other parts of the body including loss of one leg above the knee and partial paralysis of the left side of the body.

134 Although similar cases have been cited where the maximum or upper limit was awarded, there is merit in the view reflected by the awards in Ligate and Roberts.

135 I assess the general damages for Scott **Dryden** in this case at $250,000. That award is close to the current upper limit and it satisfies the criteria outlined by Dickson J. in the Andrews

case.

PAST INCOME LOSS OF SCOTT **DRYDEN**

136 Scott was a grade eight student when he was injured. His grade eight teacher, Barbara Baxter, described Scott as a good average student with strong interests in drama and music, but with less aptitude for mathematics and science. Finlayson, the neuropsychologist, reported that Scott's pre-accident I.Q. was average--in the 90 to 110 range. I am not sure of the source of that information, but it was not challenged. Similarly in the case of Dr. Pesando, the defendants' economist, who relied on information that Scott was in the lower half of the average group of students. That evidence was not challenged either.

137 A determination of wage loss entails a certain amount of speculation because no one can say for certain now, to what level Scott may have risen in his academic endeavours. Two predictors or indicators of the likely level are the individual's I.Q. and the educational level attained by his parents.

138 In this case, neither of Scott's parents progressed beyond Grade 10. Dr. Pesando proceeded on the assumption that Scott would have completed his high school education and no more. Dr. Welland was the economist who testified for the plaintiffs. One of his assumptions was that Scott would complete a post-secondary non-university education, i.e., that he would have graduated from a community college. He observes in his report that 80% of high school graduates go on to post-secondary education.

139 I find it difficult to credit the suggestion in this case that Scott **Dryden** would not have proceeded beyond high school. The educational level achieved by the parents as the yardstick for predicting the educational level to be achieved by their children, seems to me to be an unduly crude and arbitrary indicator. This is especially so where we have no evidence concerning the parents' I.Q. scores, nor the life circumstances which may have limited their opportunities to pursue higher education. An additional consideration in this case is that Scott's older sister Leigh-Anne attended Wilfred Laurier University for two years. She abandoned her studies there for financial and personal reasons unrelated to academic performance. It would have been wrong, therefore, to predict her level of academic achievement based upon the record of her parents.

140 Finally, Scott **Dryden** testified at length at trial and he was cross-examined. Despite his mental deficits, about which there is no dispute, he exhibited wit and insight which bespoke an intellectual potential which might well have taken him beyond the high school level in his formal education. In my view, therefore, it is probable as posited by the plaintiffs that he would have, but for these injuries, completed a community college education.

141 Given that Scott would not have completed community college until he reached age 22, there can be no claim for past income loss. Scott will be 21 on June 24, **2001.** No evidence was led as to lost income from part-time employment.

FUTURE LOSS OF INCOME

142 After a careful review of the assumptions upon which Professor Welland for the plaintiffs and Professor Pesando for the defendants, based their calculations of Scott's future loss of income, I find Professor Welland's approach to be preferable in this case. The critical difference between them on this aspect of the claim is that Professor Welland's assumption that Scott would have been a "post-secondary, non-university graduate", coincides with the finding of fact made in this case.

143 After outlining the principles applied in his calculation of future loss of income, Professor Welland considered "work-life contingencies" at page 16 of his report (Exhibit 84A):

> Allowance must be made in the calculations for the possibility that Scott **Dryden**

> might not have worked continuously until age 65, on account of spells of unemployment, long-term injury or stress (unrelated to the cause of this action), or early retirement.
>
> ....
>
> In the blended income calculation, income already contains an implicit adjustment for unemployment, and only the labour force participation adjustment is applied to the blended incomes.

Professor Welland's "blended" income calculations which allow for the possibility of part-time employment in addition to full-time employment, appear to me to be the most reasonable basis upon which to establish a figure for future lost income. The present value of future earnings streams as at October 30, 2000, applying an average productivity factor is, according to Professor Welland, $841,054.

144 The above present value figure is remarkably close to that reached by Professor Pesando. He proceeded on the assumption that Scott **Dryden** would enter the labour force on his eighteenth birthday, i.e., on June 24, 1998. On that basis he estimated the income loss as at October 30, 2000 as follows: $35,957 for past loss of income and $778,655 as the present value of the future loss of income for a total of $814,612.

145 Counsel have advised that they, together with Professors Welland and Pesando, will calculate the amounts owing under this and others heads of damages once the Court's findings of fact have been published.

146 Scott **Dryden** is entitle to judgment for future loss of income based upon my finding that that loss as of October 30, 2000 has a present value of $841,054.

FUTURE CARE COSTS

147 As with the issue of liability, the issue of future care costs was also vigorously contested. Is home care the appropriate standard of care for Scott **Dryden** as argued by the plaintiffs, or is institutional care the appropriate standard as argued by the defendants NRG and Parchem?

148 The choice of the type of care has significant cost implications, as does the level or quality of care to be rendered. Issue was joined, therefore, on whether or not higher paid workers with cognitive expertise were required on a 24 hours per day basis or only during some waking hours.

149 I agree, with respect, with the observation made by Jewers J., in Lusignon (Litigation Guardian of) v. Concordia Hospital [1997] M.J. No. 197 (Man. Q.B.) that "there is no legal requirement that in these cases home care is mandated and each case must turn on its own evidence and facts."

150 The limitation on what can be claimed and on what ought to be awarded is discussed in the Supreme Court of Canada judgment in Andrews et al. v. Grand & Toy Alberta Ltd. et al. (1978) 83 D.L.R. (3d) 452 at p. 462:

> 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.
>
> .....
>
> There is a duty to be reasonable. There cannot be "complete" or "perfect" compensation. An award must be moderate, and fair to both parties. Clearly, compensation must not be determined on the basis of sympathy, or compassion for the plight of the injured person. What is being sought is compensation, not retribution.
>
> [underlining added]

151 The matter must not be viewed, however, solely from the point of view of the defendants and of the expense to them. This point is made at page 463 in Andrews:

> An award must be fair to both parties but the ability of the defendant to pay has never been regarded as a relevant consideration in the assessment of damages at common law. The focus should be on the injuries of the innocent party. Fairness to the other party is achieved by assuring that the claims raised against him are legitimate and justifiable.

152 While focussing on Scott's injuries, it should be borne in mind that his entire family was quite seriously traumatized. Since his discharge from the Hugh MacMillan Rehabilitation Centre on December 16, 1994, Scott has been in the care and custody of his parents and family. In assessing whether or not the defendants' proposal that Scott receive institutional care is reasonable, a closer examination of the care Scott has received in the past six years is required.

153 Rosemary Whyte was Scott's primary care nurse when he was admitted to Hugh MacMillan on September 12, 1994. She described him as the most functionally impaired ambulatory brain injury patient she had admitted in 11 years. She recommended that Scott needed care from Bartimaeus Inc. immediately. Hugh MacMillan provides programmes for children with acquired brain injury. Bartimaeus provides experienced child and youth workers (C.Y.W.'s) for rehabilitation support.

154 Rosemary Whyte described Scott's cognitive deficits as follows:

* cognition (thinking process) - oriented to himself only
* delayed processing - it took him a while to respond
* extremely short attention span
* verbally and physically aggressive
* very reactive to external stimuli
* perseverative in speech
* hypersensitive to sound
* altered taste sensation made it difficult to persuade him to eat
* impaired executive function - unable to organize, carry out, and complete tasks
* unable to carry out activities of daily living such as showering
* behaviourally defiant with staff and family

* lacked boundary awareness
* engaged in inappropriate language and touching
* lacked social judgment

The programme at Hugh MacMillan began a long course of rehabilitation for Scott. First, his medications were regulated. Then cognitive remedial work was begun on activities of daily living. School instruction was commenced. Behavioral work, including toilet training was begun. Scott became continent again.

155 A detailed care plan (Exhibit 24) was prepared in conjunction with Bartimaeus just prior to Scott's discharge from Hugh MacMillan. It included daily routine schedules with the details required for him to have a successful day.

156 On discharge home, Scott was still incontinent of urine at night. He had problems with short-term memory and difficulty with word retrieval. He was geographically disoriented which raised a safety issue concerning his ability to navigate in the community. Behavioral issues such as acting out and lack of appreciation of social boundaries were still outstanding.

157 Hugh MacMillan and Bartimaeus worked to prepare Scott's parents. Ms. Whyte recalled that although Scott's mother was keen to help with his care, his deficits were so pronounced that she could do so only with expert assistance. The parents had to be taught rehabilitation behaviour techniques.

158 A Bartimaeus report of September, 1995, (Vol. 2 Tab E 11 Trial Brief) gave an overview of that organization's involvement to date, of the progress in Scott's rehabilitation, and of its work with the family. An example from the report on progress in activities of daily living is found at page 2:

> Is now able to complete morning routine with minimal direction, including:
>
> - Wake up routine, greeting, orientation to time, place and self.
> - Bathroom routine, toileting.
> - Shower routine, is now able to complete personal hygiene activity by himself. Self-monitoring of water temperature. Needs occasional reminders.
> - Dressing routine, dress according to weather, age appropriate attire, self-monitor with feedback. Needs occasional reminders to ensure he is dressed appropriately.

In the area of social skills, the following examples are from page 3 of the report:

- Is more aware of social boundaries (i.e., personal space, strangers, acquaintances, peers). Continues to need development in this area.
- With feedback is able to monitor and regulate behaviour while in public.
- Partakes, with direction, of social opportunities during organized activities; sea cadets, YMCA, church.

A couple of examples from page 3 on the matter of community skills illustrate Scott's continuing deficits in that area:

- Scott is aware of road safety (i.e. looking both ways). Scott continues to be impulsive and tends to be overly focussed which at times causes him to ignore traffic rules. He continues to need supervision at this time.

.....

- When in a vehicle he no longer interferes with the driver when driving, does not undo seatbelt and attempt to leave moving car. However, does have occasional periods of impulsiveness that require addressing.

Bartimaeus' work with the family is outlined at pages 5 and 6:

> Bartimaeus has recommended that family receive joint counselling and educational support from an individual separate from our associates. The family work that we do is limited to:
>
> - Supporting Scott's initial reintegration home.
> - Providing instrumental respite support.
> - Modelling intervention technique.
> - Acting as a resource regarding brain injury.
> - Providing emotional crises support.
> - Empowering parents to feel comfortable with Scott (i.e., correcting his behaviour, placing expectations). The parents are now at a point where Bartimaeus Associates can step back and allow parents to intervene regarding managing behaviour and expectations. The family will continue to need support to ensure that they are consistent in their approach. Technique to support Scott will need to be modified as he changes clinically. This can be done by the family in consultation with the Bartimaeus associate.
> - Parents now feel more competent and comfortable in supporting Scott's behaviour. Scott does have a tendency to become unmotivated. They need to focus on ensuring that his free time remains structured and productive. Bartimaeus associates will assist the family in planning for such free time. A key will be on enhancing Scott's repertoire of activities that he can do at home independently (i.e., computer, creative writing, homework).

159 Those extracts from the Bartimaeus report reflect the reality which the **Dryden** family has lived with since 1994. The evidence at trial supports the view that Scott will always require care 24 hours per day. He has continued to make incremental progress but he has "plateaued" in the sense that he still remains a ten-year-old in a twenty-year-old's body.

160 The psychologist Dr. Kenneth Dunn, testified that Scott's cognitive difficulties are permanent, and that although there will be changes in his condition, they will not be significant enough to affect his ability to live independently. It is unlikely that he will ever become competitively employable. It was his view that the best setting for Scott was with his family. He acknowledged, however, that as his parents age, they will no longer be able to care for him. Scott will then become increasingly dependent on others to care for him in a supported living arrangement.

161 Mr. Borlack's cross-examination of Dr. Dunn was typical of his cross-examination of the plaintiffs' witnesses who supported the view that Scott should live at home rather than in an institution. Dr. Dunn agreed that institutions like Home for Independent Living and Learning (H.I.L.L.) and Brain Injury Services of Hamilton (B.I.S.H.) could provide the necessary rehabilitation milieu for Scott including a degree of independence and interaction with non-family members on a daily basis. Scott's parents could visit him regularly. Dr. Dunn stated, however, that he was not sure what advantage there was for Scott in a programme like B.I.S.H. when he

has a family which is interested in caring for him. He saw an organization like B.I.S.H. as a last resort for Scott only if the family is not able to cope.

162 Dr. Dunn's view, "speaking generically", was that the choice of clinical care is driven by economics and not by the needs of the person needing care.

163 Dr. Dunn did not accede to the suggestion that some of the time spend by Bartimaeus workers with Scott was attendant care rather than rehabilitation care. He stated that rehabilitation care is a 24-hours per day seven days per week effort; rehabilitation care cannot be stopped to provide attendant care - one must work continuously to provide a rehabilitation milieu.

164 Finally Dr. Dunn saw continuity in the relationship between Scott and individual rehabilitation workers as crucial to Scott's wellbeing.

165 The longest association between Scott and a rehabilitation worker has been that with James Gillam who first met Scott at the Hugh MacMillan Centre in October of 1994. Gillam described in detail his involvement since Scott's return home in December, 1994. He described the small 1100 square foot townhouse occupied by the family. He found the family ill-equipped to handle the situation. The father's authoritarian parenting style made things particularly difficult. Much effort was expended by Gillam in counselling both parents. Their skills and abilities have improved considerably as a result.

166 Scott now manages better because his parents' manage him better. The father is less authoritarian - Scott is less aggressive.

167 James Gillam is still involved in Scott's care. In his view, Scott's progress plateaued two years ago. If changes are made in his environment, he regresses. Based on his intimate knowledge of Scott's condition and progress, Gillam has concluded that he will never be capable of earning a living, and that independent living is out of the question for Scott.

168 He acknowledged that independence is a major issue for Scott who knows that he can never be independent. Gillam's view is that for the foreseeable future, the best place for him is with his family. Scott's family, as confirmed in his own testimony at trial, is important to him. Gillam noted that institutions would not provide the stability and continuity needed by Scott because of staff and inmate turnover. In his view, an ideal compromise for Scott would be a house with an "in-law suite" so that he could live in close proximity to his family.

169 A recurring theme in the cross-examination of plaintiff's witnesses was the suggestion that Scott enjoys being around other people. Gillam agreed that that was the case "if things are going well". Grace Jacoba-Hunter, Scott's instructional assistance for three years at General Brock High School, testified that Scott does not get along with other students, primarily because they tease him.

170 Gillam agreed that institutional care may be an option "down the road"; he was adamant, however, that it is not an option today.

171 Scott's father is 52 years of age and in good health. He intends to continue his full-time employment at Dofasco. He testified that he and his wife are able and willing to care for Scott for as long as their health holds out. He declared that his son is a joy who has taught him much about music.]

172 Scott's mother testified that she would like to continue her involvement in Scott's care as long as her health holds out, but certainly for the next five to ten years. She rejects institutional care as inappropriate for Scott - "it's not a consideration at this point - his place is at home with his family".

173 Scott was asked if he ever thought of living in a group home. His colourful answer was:

"No way! If you want to p--- me off, put me in a group home." He stated that he loves his parents, and that they are teaching him things.

174 The defendants called Carol Kelly, an expert in rehabilitation care and needs and Audrey Miller, an expert in rehabilitation counselling and future care costs. Ms. Kelly had not been permitted to interview Scott **Dryden.** She prepared her recommendation in favour of institutional care based on the documents such as medical records, Bartimaeus reports, and school reports.

175 Ms. Kelly found Scott to be a suitable candidate for institutional care because of his age. He has an opportunity to adjust to adult life and to make choices. In her view institutional care allows the family to be a family rather than caregivers. This is an astonishing rationale inasmuch as the institution of the family is the very epitome of caregiving. In her view, it would provide more contact with peers. Finally, she saw institutional care as providing independence for Scott. Since she acknowledged that Scott needs 24 hours per day of one to one supervision, independence can mean only separation from his family. When asked for her reaction to Scott's declared wish not to be separated from his parents, she replied that the separation could be achieved in stages beginning with one-night stays. I took this to signify that Scott's wishes don't count.

176 I have concluded, on balance, that institutional care would not be appropriate or reasonable for Scott. The defendants' recommendation to the contrary is based in part on Scott's declared wish to be more independent. This recommendation ignores the fact that Scott requires 24 hours per day supervision, and his own understanding that he cannot be more independent. It ignores, as well, his wish to continue living with his parents.

177 Most telling of all, in my view, is that Scott's progress to date is due in no small measure to his family's sacrifices and involvement. That is objective evidence that home care has been beneficial. To suggest that institutional care would have been or will be equally beneficial or more beneficial is mere speculation.

178 I agree with the submission by plaintiffs' counsel that the preferable option for Scott's future care is that he reside with his family. It is reasonably foreseeable that his parents will find it difficult to provide the needed care ten years hence. Scott's future care costs should be calculated, therefore, on the assumption that he will reside with his parents for a further ten years, occupying an in-law suite annexed to the family house, and then reside in a group home setting for the balance of his years.

179 Various expense items in the future care costs identified by Ms. Paquette and incorporated in Mr. Welland's calculations are called into question:

Rent Differential

180 It was conceded by Mr. Welland that the higher rent for a larger residence with an in-law suite should not be part of the future care costs calculation. The cost of accommodation is a normal living expense payable by the plaintiff out of his award for future loss of income.

Room and Board

181 To the extent that the costs of future care in this case includes an institutional residential long-term living programme, the cost of room and board should be "backed out" of the calculation. These amounts for normal expenses of living will be included in the loss of income claim. The best evidence on this issue comes from the testimony of Ms. Miller the defendants' expert on future care costs. She proffered an average figure of $400 per month. Professor Pesando considered $400 per month for room and board to be "on the low side". He would have calculated that expense by calculating a percentage of income, presumably net income. He would use Statistics Canada figures of 12.8% of income for food and 24.4% of income for shelter. In my view, the figure of $400 per month for this item is appropriate. It is the figure supplied by the

programme co-ordinator for the not-for-profit community-based rehabilitation service known as Brain Injury Services of Hamilton (see Exhibit 103 at pp. 11 and 12). Although on the low side, Professor Pesando did not reject it as inappropriate.

Heavy Cleaning, etc.

182 The defence has challenged the propriety of the claims for heavy cleaning, handyperson services, lawn and garden care, and snow removal, on the basis that these are ordinary expenses. In the circumstances here, they are extraordinary expenses. Because of his injuries the plaintiff Scott **Dryden** is not capable of performing these tasks independently. They are tasks which one might reasonably infer would be undertaken personally by anyone with a modest income because of the inordinate expense of hiring someone to perform them. In my view, those items are properly claimed as items of future care costs in this case.

Eyeglasses

183 Dr. Kesava Reddy, the neurosurgeon who performed the emergency cranial surgery on Scott **Dryden** described his injuries as including a left orbital injury. There was air in the left eye. Ever since the collision, Scott **Dryden** has complained of double vision which has significantly reduced his ability to read and his tolerance for reading. Exhibit 44, the Chedoke-McMaster Hospitals Discharge Summary prescribed ophthalmologist and dentist follow-up in its follow-up plan for Scott. In my view, the claim for eyeglasses (lenses only) is a reasonable one and is based on sufficient proof given at trial.

Dental Work

184 Exhibit 43, the Joseph Brant Hospital Emergency Record of April 10, 1994 lists "chipped teeth" among Scott Dryden's injuries. Two teeth have been capped as a result. The claims for crowns and root canals for two teeth are reasonable. The plaintiff has established that there is a reasonable chance of loss or damage occurring in the future. Schrump et al. v. Koot et al. (1997), 18 O.R. (2d) 337 (Ont. C.A.). In my view, it was not necessary to call medical specialists to testify specifically about the need for eyeglasses and dental work. The medical records in evidence at this trial contain sufficient references to eye and teeth injuries to satisfy the court as to the legitimacy of those claims.

Computer System

185 In my view this is an extraordinary item necessitated in this case by the nature of the injuries suffered. I agree, however, that the amount claimed is excessive. I would allow as the Unit/Base Cost for this item in the calculation, the amount of $1,400 in lieu of the amount claimed of $2,700.

Estate/Financial Management/Guardianship Services

186 Scott **Dryden** claims an amount pursuant to the provisions of O. Reg. 159/2000 under the Substitute Decisions Act, S.O. 1992, c. 30 to fund certain necessary care and management fees. Awarding of this amount is resisted on the ground that management services will not be needed if a structure is put in place.

187 The evidence about Scott Dryden's inability to manage his money properly is unchallenged. He has no appreciation of the value of money. He has been subjected to frequent exploitation by his classmates and acquaintances. He gives money away and he regularly loses or misplaces his wallet.

188 In my view there will be a need for financial management services for him whether any award is paid as a lump sum or over a period of time under a structure. As noted at p. 17 of Susan Paquette's report of July 6, 1999 (Vol. 1, Tab C5):

> As Mr. **Dryden** is incapable of attending to financial transactions independently, it is advisable [that] estate/financial management/guardianship services be provided in order to ensure that financial investments and day to day bills are addressed appropriately. Mr. Dryden's parents could complete this service if they wish, however, allowances should be made for the occasion where they are no longer willing or able to provide this assistance.

Rehabilitation/Cognitive Care v. Attendant Care

189 The defence has challenged the need for the amount of the more expensive rehabilitation/cognitive care to be provided under the proposed option, as well as the rates used to calculate the cost. The rationale for the option approved by this court is set forth at pages 20 and 21 of Ms. Paquette's report of July 6, 1999:

> Mr. **Dryden** is currently living with his parents and occasionally his younger sister with the part-time assistance of Bartimaeus. Both Mr. **Dryden** Sr. and Mrs. **Dryden** have indicated a strong desire to have Mr. **Dryden** continue to live with them. However, they have also identified that due to a small living space and Mr. Dryden's ongoing behavioral needs, it results in increased stress and dysfunction for the whole family.
>
> Increased independence has been identified as a goal by Mr. **Dryden** and his parents. Mr. **Dryden** Sr. and Mrs. **Dryden** have identified that a living arrangement where Mr. **Dryden** lived in the in-law suite of their house would adequately address this issue. Ms. Greer has identified that with rules for both Mr. **Dryden** and his parents with respect to privacy and locked doors, an in-law suite is an appropriate initial step towards addressing the issue of independence and lack of physical space. She further noted that with the successful management of this level of increased independence, a gradual move towards supported living in an apartment setting or to a supported group home could possibly be appropriate. Ms. Greer stressed that for Mr. **Dryden,** "gradual" is to be identified in terms of 10 years. She also emphasized that cognitive abilities/deficits and environment must mesh in order for the transition to increased independence to be successful.
>
> The level of burden of living with a family member with a brain injury and neurocognitive issues is very high. The family member's functional limitations and needs result in them being very demanding and hard to manage. The end result is often increased stress. Therefore, to prevent caregiver burnout and to decrease the stress within the family, and to continue to promote Mr. Dryden's independence, it is recommended that Mr. **Dryden** live independent of his parents in the community following a period of time living in an in-law suite attached to their home. A 24-hour support worker trained in brain injuries will be needed in order to assist Mr. **Dryden** in the day to day management of his life and to ensure his safety.
>
> Of the 24-hour assistance noted above, 16 hours would be classified as rehabilitation due to the interactive and cognitively supportive nature of the intervention. The remaining eight hours would be attendant care in order to ensure safety at night.
>
> .....
>
> Although Mr. **Dryden** and his parents are currently pleased with the cognitive intervention provided by Bartimaeus, costing has been provided as an average in order to address the possibility that in time, Mr. **Dryden** will either need or want to access another service provider. Also, costs identified have taken into account the

time Mr. **Dryden** spends at school, at Camp Kodiak, and sleeping, in order to identify the most cost effective way to implement this service.

190 In my view the suggested split between hours of rehabilitative care and hours of attendant care is appropriate in the circumstances. Kenneth Dunn, a psychologist who testified for the plaintiffs, was cross-examined vigorously by Mr. Borlack on this issue. Dunn would not agree that a part of a rehabilitation worker's time with Scott **Dryden** should be counted as the less expensive attendant time. He saw the distinction as artificial because rehabilitation involves creating the proper milieu.

191 Ms. Paquette agreed, on cross-examination, that "a bit" of the time budgeted for a support worker with neurocognitive expertise in Exhibit 81C, for example, could be replaced by attendant care. More generally, she agreed that there could be some mixture of rehabilitation care and attendant care "as long as the attendant is properly trained". The expressions "a bit" and "properly trained" were not explored further in cross-examination. Those reluctant concessions do not detract, in my view, from the clearly demonstrated need for the assistance of workers with neurocognitive expertise throughout Scott Dryden's waking hours.

192 For the reasons stated above, the average rate for a rehabilitation worker should be charged rather than the lower preferred rate currently charged by Bartimaeus. No explanation was offered for the preferred rate currently in effect, and no guarantee was given that that will be the rate in the future.

193 I see no reason to fold into the recommended family counselling the individual counselling for Scott Dryden's parents. I agree, however, that the charges for travel time and mileage are excessive. That service should be available locally; accordingly, I would reduce those travel and mileage charges for the purpose of the overall calculation by one-half. It is reasonable to continue the individual counselling for one year post settlement.

194 Similarly, it is reasonable to provide the vocational counselling on the basis recommended in Exhibit 30. I agree with the defendants' submission, however, that there is no justification for the separate and discrete item in Exhibit 79 for rehabilitation counselling. This can be provided by Bartimaeus or a similar service as part of its daily supervision of Scott **Dryden.**

FAMILY LAW ACT CLAIMS

195 The relevant portions of section 61 of the Family Law Act, R.S.O. 1990, c. F.3, as amended are, for purposes of these claims, as follows:

> 61(1) If a person is injured ... by the fault or neglect of another under circumstances where the person is entitled to recover damages ... the parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury ... from the person from whom the person injured ... is entitled to recover ... and to maintain an action for the purpose in a court of competent jurisdiction.
>
> (2) The damages recoverable in a claim under subsection (1) may include
>
> .....
>
> (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 ... had not occurred.

196 The "conventional approach" to assessing damages under s. 61 of the Family Law Act has

been rejected by the Ontario Court of Appeal. See Neilsen v. Kaufmann (1986), 54 O.R. (2d) 188 (C.A.). Each claim must be assessed in the context of the particular family relationships in questions.

197 The injuries to Scott have resulted in a catastrophic disruption in the lives of his parents and siblings. Scott's parents previously had concerns about and responsibility for Scott's sister Holly who suffers from cystic fibrosis. They now have concerns and responsibility for the welfare of Scott who is, as noted previously, a ten-year-old boy in a 20-year-old man's body. Unfortunately his emotional and intellectual development has reached a plateau while he continues to age physically. It is clear on the evidence that Scott will be unable to provide any care or guidance to the members of his family. He is totally dependent on them and on professional workers to ensure that he completes his daily activities safely.

198 Prior to the collision, Scott had a very close relationship with his sister Leigh-Ann Davidson. That relationship has since deteriorated as a result of Scott's cognitive impairments. He has developed an entirely inappropriate interest in her which has had the effect of alienating her from her brother. This has resulted in a loss of guidance, care and companionship.

199 Holly **Dryden** as well had a close relationship with Scott prior to the collision. Holly and her mother spent countless hours with Scott at the hospital trying to assist in his recovery. Because of the changes in Scott, Holly no longer regarded him as the same brother she knew prior to the collision. Scott and Holly are close in age, but it is clear that Holly will also be affected by Scott's childlike outlook and behaviour. She too, has lost any hope of experiencing a normal brother-sister relationship with Scott as adults.

200 Harold **Dryden** is Scott's only surviving grandparent. Because of his health, he was unable to testify at trial. The evidence suggests, however, that Scott and his grandfather were close. Like any other claim, a claim for compensation under s. 61 must be proved according to the civil standard of proof. There is not sufficient proof in the case of the claim by Harold **Dryden** to justify an award of more than a nominal amount.

201 I assess the Family Law Act claims as follows:

Charlene **Dryden**	$50,000
Douglas **Dryden**	$50,000
Leigh-Anne Davidson	$15,000
Holly **Dryden**	$15,000
Harold **Dryden**	$ 1,500

EXEMPLARY DAMAGES

202 This is not a case in which an award of exemplary damages is justified. It does not involve the type of egregious conduct on the part of any of the defendants which might attract the censure of the court through an award of exemplary damages.

203 I found the defendant **Stars** Inc. to have been negligent on April 9, 1994, because the policies in place to guard against underage drinking and drinking to excess failed on that occasion. Although there were inconsistencies between the testimony of Dean Collett and Ken Collett, I am unable to say that they were other than truthful in giving their testimony.

204 Rachel Bauer testified that she was interviewed by an unidentified representative of NRG about two weeks after April 10, 1994. She claimed that she received a V.I.P. pass in exchange for her co-operation in attending for the interview about the events of April 9, 1994, even though it was known that she was only sixteen years of age at the time. There is no proof that either of the Collett brothers was involved in that interview. The invitation to attend for the interview came from a friend at school. Bauer received the V.I.P. card, not at the interview, but from an unidentified friend at school one week after the interview. She never visited NRG again.

205 The Bauer V.I.P. card was not produced at trial. The evidence surrounding this event falls short of establishing a basis for the award of exemplary damages.

206 Bill Parchem's conduct was negligent; it was not, however, of the nature which attracts an award of exemplary damages. He parted company with **Campbell** after the first bottle of Malibu Rum had been consumed. The second bottle was to replace the first bottle and was purchased by him for the girls. He was not involved thereafter in the consumption of alcohol with **Campbell.**

LIFE EXPECTANCY

207 A defence medical report of July 7, 2000, prepared by Dr. Daune L. MacGregor, a paediatric neurologist, was filed as Exhibit 94. Dr. MacGrengor's findings are in her concluding summary where Scott's injuries and his persisting deficits are listed. The report sets out the following conclusions at pages 15 and 16:

> The deficits which I have indicated as being present at the time of this evaluation are now permanent as there has been an elapsed time of greater than six years from the time of the accident.
>
> .....
>
> ... he has both significant cognitive/behavioral and physical deficits which will prevent him from participating in any type of gainful employment. His injuries are not of the nature which compromise life expectancy other than that there will be an actuarial calculation based on the likelihood that he will have persisting epileptic seizures.

208 Dr. Scott Garner, a physiatrist, assessed Scott **Dryden** in June of 1996. His findings are summarized at paragraph 127 above. He indicated on cross-examination that he had not been asked to address the question of life expectancy. Based upon his knowledge of the literature, he identified problems with feeding and mobility as factors reducing longevity in brain injury cases. He concluded that these factors are absent in Scott Dryden's case. He foresaw a "very modest reduction only" because of Scott's epilepsy and mild impairment of motor control. He went on to say that any reduction in longevity would be surprisingly minor. When pressed for his definition of "some" reduction in this case, he answered "five to ten years at most".

209 In my view, the opinion of Dr. MacGregor is the more considered opinion. She applied her mind to this issue as part of her examination of Scott in July, 2000. Her examination is also much more recent than Dr. Garner's. Dr. Garner's general comments on the effect of acquired brain injury on longevity tend to support Dr. MacGregor's conclusion. I would not, therefore, give effect to Dr. Garner's educated guess of a reduction of five to ten years.

210 Based upon available statistical tables according to Professor Welland, life expectancy for Scott **Dryden** (d.o.b. June 24, 1980) as at October 30, 2000 is 54.4 years, and I so find.

APPORTIONMENT OF LIABILITY

211 Having found that each of David **Campbell,** Bill Parchem, and **Stars** Inc. was negligent

and either caused or contributed to the losses suffered, it remains to apportion liability among these defendants.

212 The position of the plaintiffs is that liability should be apportioned as follows: David **Campbell** and his father - 50%; **Stars** Inc. - 25%; Bill Parchem - 25%. The position of the defendant **Stars** Inc. is that the driver, David **Campbell** is 80% to 85% liable. If David **Campbell** is held 80% liable, then James **Campbell** should be held 15% liable and **Stars** Inc. 5% liable. If Bill Parchem is found liable, his portion should be at least equal to that of **Stars** Inc. for two reasons - he knew Campbell's background, and **Campbell** drank more alcohol supplied by Parchem than alcohol supplied by NRG.

213 The position of the defendant Parchem is that, if found liable, his liability should not exceed 5% because of his lack of involvement with **Campbell** after about 8:00 p.m.

214 Mr. Baker, counsel for Royal Insurance submitted that the driver, David **Campbell,** was primarily responsible for the incident. In his view the combined negligence of Parchem and NRG should be fixed at 20% to 30% apportioned as follows: Parchem, 5% to 10%; NRG, 15% to 20%.

215 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.

216 In this case, as in Hague et al. v. Billings et al. (1993), 13 O.R. (3d) 298 (C.A.) an inebriated driver attended at a licensed establishment and was served more alcoholic beverages. Speaking for the court on the issue of apportionment of liability, Griffiths J.A. stated the following at p. 303:

> ... I agree with counsel for the appellant that an apportionment of 50-50 liability between Billings and the Ship and Shore Hotel was totally disproportionate to the respective degrees of culpability, both legal and moral, of these two parties.
>
> .....
>
> Without in any way diminishing the legal responsibility cast on the tavern not to serve liquor to an intoxicated person, it seems to me that the conduct of Billings in all the circumstances of this case was so reprehensible as to require that he be fixed with the largest degree of liability. In my opinion, an appropriate apportionment in the circumstances would be to find Billings 85 per cent at fault and the Ship and Shore Hotel 15 per cent at fault.

217 Billings, the intoxicated driver had resisted attempts to have one of his less-intoxicated passengers drive the automobile. In this case, **Campbell** manifested his intention to drive at high speed and through red lights when he returned to the Livesy residence in Oakville from the Universe Club. He dimmed the dash lights to obscure the speedometer, and he raised the volume on the radio to drown out the girls' protests. He was behaving according to the established pattern attested to at trial, namely that he would resist any attempt to prevent him from driving while intoxicated. He sped away from the Oakville residence before Carey Balzer could summon someone to keep him from driving away.

218 In Whitlaw v. 572008 Ontario Ltd. (c.o.b. as Cross-Eyed Bear Tavern) [1995] O.J. No. 77, E. MacDonald J. canvassed eight similar cases including Hague v. Billings. She found the range of liability assigned to licensed establishments in those cases to be between 0% and 33-1/3% which she regarded as a useful guideline. These results reflect the sentiment expressed by Griffiths J.A. in the Hague case.

219 In my view an appropriate apportionment of liability in this case is David **Campbell,** 80%; **Stars** Inc., 15%; Bill Parchem, 5%. Parchem's direct involvement with **Campbell** ended several hours before **Campbell** left NRG. The staff at NRG, on the other hand, admitted this underage patron, supplied alcoholic beverages to him even though he exhibited signs of intoxication, and permitted him to drive away from the premises without ensuring that he could do so safely.

DEDUCTIBILITY AND ASSIGNMENT OF BENEFITS

220 As elaborated below, the Bill 164 Insurance Act regime which governs in the circumstances of this case has substituted a system of compensation through payment of Statutory Accident Benefits (SABs) by private insurers, for the right to sue certain defendants (protected defendants) for pecuniary loss. Subsequent to the collision which injured him, Scott **Dryden** applied for and has been receiving SAB's.

221 In this action he claims compensation for general, non-pecuniary damages against both protected and unprotected defendants. Members of his family claim derivative damages under the Family Law Act. He claims against the unprotected defendants for his pecuniary losses.

222 The unprotected defendants took the position that the SAB's paid and payable to Scott **Dryden** in the future are deductible from the amount of damages awarded against them. Mr. Baker framed the issues as follows:

> Are non-protected [sic] Defendants entitled to deduct accident benefits that have been received or to which the Plaintiff is entitled?
>
> Are non-protected [sic] Defendants entitled to a Cox and Carter assignment of the future accident benefits to which the Plaintiff is entitled?

223 For the reasons stated below I would answer both questions in the negative.

224 The collision which resulted in the injuries and losses for which compensation is claimed by the plaintiffs occurred on April 10, 1994. Bill 164, the Insurance Statute Law Amendment Act, S.O. 1993, c. 10, governs recovery by injured parties for events occurring between January 1, 1994 and October 31, 1996. This legislation creates a class of protected defendants against whom there can be no recovery for economic loss such as past and future lost income and future care costs. Recovery for non-pecuniary general damages for pain and suffering and derivative damages under the Family Law Act for family members of the injured plaintiff, is possible only if the injured plaintiff has sustained serious impairment of an important physical, mental, or psychological function, or serious disfigurement (the so-called threshold). There is no question in this case that Scott Dryden's injuries meet the threshold requirements.

225 Under s. 276.1 of the Insurance Act, David **Campbell** and James **Campbell** are classed as protected defendants, being the occupant and the owner respectively of the **Campbell** pick-up truck:

> 267.1(1) Despite any other Act and subject to subsections (2) and (6), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in a proceeding in Ontario for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of the automobile in Canada, the United States of America or any other country designated in the Statutory Accident Benefits Schedule.
>
> (3) Subsection (1) does not relieve a person from liability for damages for non-pecuniary loss, including damages for non-pecuniary loss under clause 61(2)(e) of the

> Family Law Act, if as a result of the use or operation of the automobile the injured person has died or has sustained,
>
> (a) serious disfigurement; or
>
> (b) serious impairment of an important physical, mental or psychological function.
>
> .....
>
> (6) Subsection (1) does not relieve any person from liability other than the owner of the automobile, the occupants of the automobile and the persons present at the incident.

226 Included in the class of unprotected defendants in this case are Bill Parchem, and **Stars** Inc. carrying on business as NRG Nightclub.

227 Subsection 267.1(7) overrides the normal rule in s. 1 of the Negligence Act of joint and several liability where damages have been caused or contributed to by the fault or neglect of two or more persons:

> 267.1(7) If, in the absence of subsection (1), the owner of an automobile, an occupant of an automobile or a person present at the incident would have been jointly and severally liable for damages for pecuniary loss with one or more persons who are not relieved of liability by subsection (1), the other persons are liable for those damages only to the extent that they are at fault or negligent in respect of those damages.

228 Liability of the protected defendant David **Campbell** has been found in this case to the extent of 80%. The effect of s. 267.1(7) is that the plaintiff can recover against the unprotected defendants only 20% of the amount awarded for pecuniary damages. The usual rule of joint and several liability applies to the award for general damages.

The Law

229 At paragraphs 74 to 101 of his reasons in Cunningham v. Wheeler, [1994] 1 S.C.R. 359, Cory J. speaking for the majority discusses "The Private Insurance Policy - Its History of Exemption from Deduction and Its Present Status".

> 74. For over 119 years, the courts of England and Canada have held that payments received for loss of wages pursuant to a private policy of insurance should not be deducted from the lost wages claim of a plaintiff. The first question to be considered is whether the rationale for this exemption persists. In my view there are convincing reasons both for the existence of the policy and for its continuation.

230 The defendants argue that the automobile insurance policies in question do not qualify as private policies of insurance because of the mandatory nature of Ontario's Compulsory Automobile Insurance Act and because of s. 268(1) of the Insurance Act. The former requires that motor vehicles may be operated on the highways only if insured under a contract of insurance. The latter requires that every such contract of insurance must provide for statutory accident benefits. The heart of this argument is found in paragraphs 12 and 15 of the factum of the defendant Royal Insurance:

> 12. One of the exceptions which allows double recovery is when the benefit paid was

> under a private policy of insurance or a plan in the nature of private insurance. All who insure themselves for disability benefits are displaying wisdom and forethought. The purchase of the policy has social benefits for those insured, their families and the community. The purchase of the policy represents forbearance and self-denial as the purchaser may never have a claim and the premiums paid may be a total loss. Therefore it makes little sense for a wrongdoer to benefit from the private act of forethought and sacrifice of the Plaintiff.
>
> Cunningham v. Wheeler (1994), 113 D.L.R. (4th) 1, S.C.C. at 10
>
> .....
>
> 15. Therefore automobile insurance which is mandated by law, is not akin to private insurance, so that statutory accident benefit payments do not fall within the "private insurance" exception and fall within the prohibition against double recovery.
>
> John v. Flynn, [2000] O.J. No. 1122 (S.C.J.) McCutcheon v. Chrysler Canada Ltd., [1999] O.J. No. 604 (Gen.Div.) at para. 19, Brennan v. Singh, [1999] B.C.J. No. 1776, (S.C.)

231 The cases relied upon are distinguishable. John v. Flynn involved a collision between automobiles on December 10, 1992, an event governed by the law in Bill 68, the Ontario Motorist Protection Plan, S.O. 1990, c. 2. Section 267(1)(a) of the Insurance Act, then in effect but repealed when Bill 164 came into effect on January 1, 1994, provided that:

> 267(1) The damages awarded to a person in a proceeding for loss or damage arising directly or indirectly from the use or operation of an automobile shall be reduced by,
>
> (a) All payments that the person has received or that were or are available for no-fault benefits and by the present value of any no-fault benefits to which the person is entitled.

This was a statutory prohibition against double recovery. The references by Donnelly J. to the position at common law on this issue from Cunningham v. Wheeler, Brennan v. Singh, and McCutcheon v. Chrysler are obiter dicta. McCutcheon is an Ontario case which interprets the law under the Bill 164 regime.

232 The trial courts in the Brennan and McCutcheon cases focus on the view of Cory J. in the Cunningham case that the purchase of a policy of insurance is a demonstration of forethought and wisdom to protect an individual, and hold, in effect, that that is the hallmark of a "private" policy of insurance. They held that it is not a prudent act of forethought to obtain insurance which is required by law to operate a motor vehicle.

233 With respect, I disagree with that reasoning. In the first place, and as a general proposition, a private contract of insurance does not cease to be so when some of its content is mandated by statute. Nor does it cease to be so because insurance is required as a condition of the right to drive a motor vehicle on the highways, and because the law makes it an offence to operate a motor vehicle in breach of that condition.

234 It appears that the Ontario Court of appeal decision in Cugliari v. White et al. (1998), 38 O.R. (3d) 641, [1998] O.J. No. 1628, was not considered by the court in the McCutcheon case.

235 In Cugliari, it was held that Canada Pension Plan (CPP) benefits are not deductible at

common law in that they are "akin to a private policy of insurance". Charron J.A. speaking for the Court states the following at pages 6 and 7 of [1998] O.J. No. 1628:

> The common law principles on deductibility of collateral benefits were reviewed recently by the Supreme Court of Canada in Ratych v. Bloomer, [1990] 1 S.C.R. 940, 69 D.L.R. (4th) 25, and Cunningham v. Wheeler, supra. The Supreme Court reiterated the general principle against double recovery. However, it is of relevance to this appeal to note that the private insurance exception was maintained. Simply put, the tortfeasor is not allowed to benefit, in effect, from the injured party's wisdom and forethought in making provision for the continuation of some income in the case of disability. The majority in Cunningham v. Wheeler held that the private insurance exception should also apply where the disability benefits are obtained not privately but pursuant to a collective agreement, provided that there is evidence of some type of consideration given up by the employee in return for the benefit.
>
> The appellants argue that CPP disability benefits do not fall within the private insurance exception and are deductible at common law. They rely principally on the mandatory nature of the CPP scheme in support of their contention. Since contributions to the Plan are mandatory, they argue that the policy reason behind the common law exception to deductibility does not exist. It cannot be said that the tortfeasor would be benefiting from the injured party's wisdom and forethought in making provision in case of disability.

The Court of Appeal here addresses squarely the argument made in this case in favour of deductibility. Charron J.A. cited the Supreme Court of Canada in Canadian Pacific v. Gill, [1973] S.C.R. 654, 37 D.L.R. (3d) 229 in which Spence J. held at p. 670 that: "... pensions payable under the Canada Pension Plan are so much of the same nature as contracts of insurance that they should be excluded from consideration when assessing damages under the provisions of that statute." At p. 7 she noted that:

> The appellants submit that these words were not spoken in the context of the principles later considered in Ratych v. Bloomer, and Cunningham v. Wheeler, where the injured party's prudence and forethought in making provision for himself was considered.

She observed, however that Canadian Pacific v. Gill was considered by Cory J. in Cunningham. Her conclusion was that:

> ... notwithstanding the fact that contributions to the Plan are mandatory, CPP disability benefits fall within the exception to the rule against double recovery as set out in Cunningham v. Wheeler. On the authority of Canadian Pacific V. Gill, CPP disability benefits can be considered akin to a private policy of insurance. Further, by his contributions to the Plan, Cugliari has given up consideration in return for the benefits as required by the principles set out in Cunningham v. Wheeler.

236 It is not solely the wisdom and foresight of the individual, but also the fact that the benefits had been "paid for" by the insured that makes them non-deductible. Cory J. added the following to his comments about wisdom and foresight in paragraphs 82 and 83 of his reasons in Cunningham:

> The acquisition of the policy has social benefits for those insured, their dependents and indeed their community. It represents forbearance and self-denial on the part of the purchaser of the policy to provide for contingencies. The individual may never make a claim on the policy and the premiums paid may be a total loss. Yet the policy

provides security.

> Recovery in tort is dependent on the plaintiff establishing injury and loss resulting from an act of misfeasance on the part of the defendant, the tortfeasor. I can see no reason why a tortfeasor should benefit from the sacrifices made by a plaintiff in obtaining an insurance policy to provide for lost wages. Tort recovery is based on some wrongdoing. It makes little sense for a wrongdoer to benefit from the private act of forethought and sacrifice of the plaintiff.

237 In short, if the CPP is akin to a private policy of insurance, then no less can be said about the motor vehicle liability insurance in this case.

238 There is a further reason why the SABs are not deductible from the damages awarded in this case. The unprotected defendants bear the onus of demonstrating that there would indeed be double recovery if the SABs were not deducted. If there is no double recovery, there would be no justification for deducting the collateral benefits.

239 Double recovery occurs only if the injured plaintiff receives more than 100 per cent of his loss under any of the various heads of damages. Since 80 per cent liability has been assessed in this case against the protected defendants, there appears to be no potential at all for double recovery.

240 Having concluded that the unprotected defendants are not entitled to deduct the SABs that have been received or to which the injured plaintiff is entitled in the future, there is no reason to make a Cox and Carter assignment of future SABs.

SUMMARY

241 The personal injuries and losses for which compensation is claimed in this action were caused or contributed to by the negligence of the following defendants in the proportions shown:

David **Campbell**	80%
Stars Inc.	15%
Bill Parchem	5%

James **Campbell** as owner of the motor vehicle driven by David **Campbell** is vicariously liable for David Campbell's negligence.

242 General damages are assessed in the amount of $250,000. Damages for future loss of income are assessed at $841,054 being the present value of future earnings as at October 30, 2000.

243 Future care costs are assessed at the values reflected in Table 5 of Exhibit 84B for medical and non-medical items, professional services, vocational items and recreational items, and at the values reflected in Table 6D of Exhibit 84B for semi-independent community living with support for ten years, average rate, then residential long-term living (Option 3). The present value of those two elements of future care costs as at October 30, 2000 are, respectively, $423,067 and $6,833,905.

244 These present value amounts must be adjusted in accordance with the findings of fact in paragraphs 180 to 194 above.

245 Counsel advised in the course of their submissions that they, together with Professors Welland and Pesando, will calculate the sums owing as of the date of this judgment, based upon my findings of fact. I will await receipt of an agreed draft judgment reflecting those final calculations.

246 The following sums are payable to the members of Scott Dryden's family pursuant to s. 61 of the Family Law Act:

Charlene **Dryden** (mother)	$50,000.
Douglas **Dryden** (father)	$50,000.
Leigh-Anne Davidson (sister)	$15,000.
Holly **Dryden** (sister)	$15,000.
Harold **Dryden** (grandfather)	$ 1,500.

247 The plaintiffs are entitled to receive prejudgment interest in accordance with the Courts of Justice Act.

248 The parties have agreed on the quantum of O.H.I.P.'s subrogated claims in this action. The amounts at which O.H.I.P.'s claims were settled are:

$174,213,49 for the cost of past services

and

$ 28,397.00 for the cost of future services.

249 If the parties are unable to agree on the matter of costs of the action, I may be spoken to. Similarly, if I have neglected to deal with any particular required to permit completion of the calculations to be undertaken by the experts, I may be spoken to for that purpose as well.

CAVARZAN J.

cp/d/qlfwb/qldah/qlmjb