IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Johnson v. Eyre,*
2009 BCSC 1711

Date: 20091214
Docket: M053227
Registry: Vancouver

Between:

Justin Johnson, an Infant, by his Litigation Guardian, Gary Carriere and Ardith Kale

Plaintiffs

And

Leonard Marcel Eyre and The District of Kitimat

Defendants

And

Ardith Kale and The District of Kitimat

Third Parties

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Plaintiffs:	C. McTavish
Counsel for the Defendant, Leonard Eyre:	L.A.J. Dunn
Counsel for the Defendant and Third Party, The District of Kitimat:	D.J. Smith
Place and Date of Hearing:	Vancouver, B.C. July 9, 2009
Place and Date of Judgment:	Vancouver, B.C. December 14, 2009

[1] On April 27, 2005, the infant plaintiff, Justin Johnson ("Justin"), while riding his bicycle, was struck and injured by a motor vehicle operated by the defendant, Leonard Eyre ("Eyre"). The plaintiff, by his litigation guardian, seeks orders pursuant to Rule 18A that the defendant Eyre and the District of Kitimat ("Kitimat") are each negligent and caused or contributed to his injuries. The plaintiff also seeks an order apportioning liability between the defendants.

[2] The defendants argue this matter is not appropriate for determination under Rule 18A. Alternatively, if the matter is appropriate to proceed under Rule 18A, both defendants seek to have the plaintiff's case dismissed on the basis that the plaintiff is solely responsible for the accident and his injuries. Further in the alternative, if Justin was only partially responsible for the accident, each defendant denies liability and says the other should bear a portion of the fault.

[3] Following submissions by counsel, I gave oral reasons directing that this case proceed under Rule 18A with liberty to any party to apply to cross-examine any affiant to assist in resolving a conflict in the evidence. There were no applications to do so and this case proceeded on the affidavit materials filed in support of the respective motions.

[4] For the reasons that follow I have concluded neither defendant has breached its duty of care to the plaintiff.

THE ACCIDENT

[5] Kitimat is a planned community which has, as described by its Director of Engineering Services, a "garden-city layout". That layout, which dates from the mid-1950s, includes an extensive network of paved walkways throughout the community used by pedestrians, cyclists and others. The walkways are identified by numbers. Many school-age children use the walkways to get to and from school and for recreational purposes such as cycling, skateboarding, and rollerblading. Kitimat permits cyclists to use the walkways because such use is perceived to be safer than

travelling on the roadways. The walkways interconnect throughout the community and in doing so cross many of Kitimat's streets.

[6] On the day of the accident Justin, who was 7 years old, was riding his bicycle with his brother, Malcolm (aged 10), on walkway #44. The accident occurred on Gyrfalcon Avenue where that street intersects with walkway #44. The infant plaintiff was struck by Eyre's vehicle when he and his brother suddenly emerged from the walkway onto Gyrfalcon.

[7] Gyrfalcon runs in a predominantly east-west direction. It is a regularly travelled two-directional paved road running through a residential neighbourhood. The posted speed limit is 50 km/h.

[8] Walkway #44 provides access to Nechako Elementary School and to a skateboard park, both of which are located some 300 yards from the intersection with Gyrfalcon via other connecting walkways. A number of families with young children live in the vicinity of the intersection and there are often young children playing on or near the roadway.

[9] The walkway crosses Gyrfalcon at right angles. There is a marked crosswalk where the walkway intersects with Gyrfalcon with signs on the street warning drivers to be alert for pedestrians who may be crossing the street.

[10] The walkway slopes downhill at about a 2% grade before it intersects with Gyrfalcon. It continues in a northerly direction on the other side of Gyrfalcon. It is approximately 2.5 metres wide and is constructed of asphalt.

[11] There is a stepped wood picket fence along one side of the walkway which, under certain circumstances, might obstruct the view of a person using the walkway to traffic approaching on the road from the west. The fence would also, under certain circumstances, restrict the view of a driver approaching from the west to those using the walkway. The fence ends 5 metres from the south road edge and is 1.25 metres high for a length of 2.30 metres and 1.86 metres high for the rest of its length.

[12] The accident occurred at approximately 6:30 p.m. on April 27, 2005. It was a clear, sunny afternoon. The infant plaintiff and his brother emerged from the walkway on the south side of Gyrfalcon and turned in the direction of Eyre's vehicle which was proceeding in an easterly direction along the street. That is, they did not cross Gyrfalcon using the crosswalk but, rather, veered to their left as they emerged from the walkway into the travelled portion of the roadway upon which Eyre's vehicle was approaching. Justin was struck by the right front of the vehicle. He was thrown from his bicycle some 7 to 9 metres by the force of the impact, landing on the east side of the crosswalk. His bicycle remained on the west side of the crosswalk. The force of impact broke the right front headlight of the vehicle.

[13] The evidence suggests the boys were racing or chasing one another and that the infant plaintiff was looking back over his shoulder at his brother at the time of the accident.

DISCUSSION OF LIABILITY AGAINST THE DEFENDANT EYRE

[14] The plaintiff argues Eyre was negligent because he was familiar with the residential nature of the area in which the accident occurred; he knew of the network of walkways which cross Gyrfalcon in the area of the accident scene; and he knew young children (who he acknowledged to behave at times unpredictably) used the walkways and may be in the vicinity. Given these circumstances, the plaintiff argues, Eyre ought to have taken special precautions by travelling at a lower speed than he was. The plaintiff argues that had Eyre been driving more cautiously through this residential neighbourhood the accident would not have occurred.

[15] The plaintiff relies on the following passage in *Bourne v. Anderson,* 27 M.V.R. (3d) 63 where Hood J. said at para 55:

> 55 In my opinion, once the presence of a child or children on a road is known, or should have been known, to the driver of a vehicle proceeding through a residential area where children live, that driver must take special precautions for the safety of the child or children seen, and any other child or children yet unseen whose possible appearance or entrance onto the road is reasonably foreseeable. The precautions include keeping a sharp look out,

> perhaps sounding the horn, but more importantly, immediately reducing the speed of the vehicle so as to be able to take evasive actions if required.

This passage was cited with approval by the Court of Appeal in *Hixon v. Roberts*, 2004 BCCA 335.

[16] In *Bourne*, the infant plaintiff, aged 7 years and 4 months, and a friend, aged 9, were hiding from and sneaking up on the plaintiff's sister who was cycling. The two boys had hidden behind a vehicle on one side of the street. The 9-year-old ran diagonally across the street to take up a position behind another vehicle. The infant plaintiff then began his run to follow his friend when he was struck by the defendant driver. The trial judge concluded the driver had seen at least the 9-year-old cross the street. He stated at para. 56:

> 56 In the case at bar, the defendant saw the two boys on the south sidewalk, east of the Latta intersection, and probably in the area of the red vehicle, as her vehicle approached the intersection. Shortly thereafter she saw Brandon run from in front of that parked red vehicle, and across the avenue. In my opinion in the circumstances, she should have been warned of the possibility of at least one other child following the first, that is running out from in front of the red vehicle and across the avenue. In my view the possibility of that occurring was reasonably foreseeable. The defendant should have kept a sharp look out, particularly in relation to the front area of the red vehicle. This was the only obstruction of her view on the south side of the street. Brandon had appeared from the front of that vehicle, and she had observed the two boys a bit to the west of it earlier. She should have sounded her horn to warn any child there of the approach of her vehicle, and she should have immediately reduced the speed of her vehicle so as to avoid what actually occurred viz striking another child running out from in front of the parked red vehicle. The defendant did not take the special precautions required, and was guilty of negligence which caused or contributed to the cause of the accident.

[17] In my view, the facts of the present case are quite distinguishable from those in *Bourne*. In that case the facts were sufficient to reasonably put the defendant driver on notice of the presence of the plaintiff. Eyre was driving a 1997 GMC 4x4 pickup truck and was returning from work in Kitimat to his home in Terrace. He was travelling east on Gyrfalcon. He had two passengers with him in his vehicle who also lived in Terrace and were co-workers. They regularly travelled together, sharing the driving.

[18] Eyre had grown up in Kitimat, was familiar with Gyrfalcon and was aware there were several crosswalks with adjacent walkways throughout the community. He knew it was a residential area in which "many times" you would see children playing in their driveways which were "really quite close" to the road (as stated in his examination for discovery).

[19] Eyre deposed that immediately prior to seeing Justin on the roadway he thought he was travelling less than 50 km/h. He said he had his foot off the accelerator in anticipation of stopping at an approaching stop sign to the east of the crosswalk.

[20] Eyre deposed that as he was driving in an easterly direction along Gyrfalcon and approaching the crosswalk he "saw a glimpse of movement to my right side". He said he "immediately realized the movement was someone on a bicycle approaching Gyrfalcon, so I stepped on the brakes and swerved to the left away from them". He deposed the infant plaintiff and his bicycle struck the right front corner of his vehicle. He stated:

> 10. I observed the following in the short period of time leading up to the Accident between when I first observed Justin Johnson and when he came into contact with the Truck:
>
> a. Two children were riding on their bicycles on the path leading to the crosswalk.
>
> b. Justin Johnson was in the front.
>
> c. The two children came out of the pathway from behind the fence, onto Gyrfalcon in the Eastbound lane and the Plaintiff collided with the Truck.
>
> d. The two children were riding fast on their bicycles and I had very little time to react.
>
> e. The Plaintiff was not in the crosswalk when he collided with the Truck.
>
> f. I was able to reduce the speed of the Truck by brake before the Plaintiff collided with it.
>
> 11. I stopped as quickly as I could once I saw the movement to my right, but there was a fence blocking my view of any traffic on the pathway leading up to the crosswalk, until the traffic is 15 or 20 feet from Gyrfalcon. This fence prevented me from seeing Justin Johnson in time to stop the Truck before Justin Johnson collided with it.

[21] Eyre brought his vehicle to a stop prior to entering the crosswalk. He immediately left his vehicle to give first aid assistance to the plaintiff.

[22] There were two passengers in Eyre's vehicle, Mr. Roger Fehr and Mr. Regan Kardas, both co-workers with the defendant and returning from work to Terrace.

[23] Mr. Kardas, who was sitting in the right front passenger seat, deposed:

> 7. Just before the Accident, as we proceeded east on Gyrfalcon;
>
> …
>
> c. Leonard Eyre and I were both looking forward and talking;
>
> d. it was a nice day and we were not in a hurry; and
>
> e. I estimate that we were travelling between 40 and 50 kilometres per hour, but it was probably closer to 40 kilometres per hour because we were approaching a stop sign and I could feel the vehicle slowing down.
>
> 8. The Accident occurred when two kids on junior sized mountain bikes came out of the pathway to our right.
>
> 9. Leonard Eyre and I both saw the two kids at about the same time.
>
> 10. The area where the two kids came from is a pathway that leads up to the crosswalk across Gyrfalcon Avenue.
>
> 11. There is a fence, which is about three feet tall, that runs parallel with the pathway and the fence blocks traffic's view of anything travelling on the pathway until it is approximately ten feet back from the edge of Gyrfalcon Avenue.
>
> 12. From when I first glimpsed the two kids riding bicycles on the pathway to when the Truck stopped, I observed that:
>
> a. the Plaintiff was not wearing a helmet;
>
> b. the two kids were travelling very quickly because they were travelling down a bit of a hill on the pathway;
>
> c. the two kids cut the corner to their left in order to go down the hill on Gyrfalcon Avenue in the lane we were travelling up;
>
> d. the two kids appeared to be chasing each other;
>
> e. the Plaintiff was the kid in front and he was looking back at the kid behind him as he turned onto Gyrfalcon Avenue into the lane we were travelling up;
>
> f. the Plaintiff appeared to realize we were there because he saw the reaction on the face of the kid behind him;
>
> g. the kid in the rear swerved away once he saw the Truck and the Plaintiff, looked forward just as he collided with the right front bumper of the Truck in the headlight area;

…

k. the Truck stopped at least five feet from the crosswalk;

l. because of the angle at which the two kids cut the corner as they came out of the pathway and turned onto Gyrfalcon, they never touched the crosswalk;

m. Leonard Eyre reacted quickly, said "Oh my God," braked and swerved to his left as soon as we saw the two kids coming out of the pathway to our right;

n. from the time we first glimpsed the two kids to the time the Truck completely stopped, the Truck would have travelled a maximum of 40 to 50 feet; and

o. the Truck was nearly stopped when it collided with the Plaintiff.

[24] Mr. Fehr was looking down at the time and did not see the events unfold. He did hear Eyre yell "oh my God" and felt him apply the brakes and swerve the vehicle to the left.

[25] Several witnesses provided affidavit evidence describing the accident scene. Mr. Gary Carriere, Justin's stepfather had lived on Gyrfalcon Avenue for many years and deposed that it was a busy street with a bus route and had through traffic on it day and night. He said the pathways were not used during the winter months but when they were clear of snow they were used by children and many other members of the community for walking, cycling, skateboarding and generally getting around to various locations in the community, including by children travelling to and from the elementary school. He deposed the fence "obstructs the view of drivers headed eastbound. Similarly the fence obstructs the view of the people using the pathway of traffic to their left."

[26] Cst. McCoombs, one of the police officers who attended the accident scene described the accident location as a "high traffic, high pedestrian area".

[27] Several residents who live in the vicinity of the accident provided evidence of the nature of the accident scene. Ms. Sandra Allaway, who had lived on Gyrfalcon Avenue for some 16 years, deposed that children of all ages travelled the pathways on foot, by bicycle, as well as on skateboards and rollerblades. She said that she had seen children ride onto the roadway very quickly, not paying attention. She also

deposed that as a result of these experiences and due to her observations that visibility is obstructed due to the fence, she approaches the intersections where there are pathways at about 10 miles per hour "to avoid striking inattentive pedestrians that could emerge suddenly"".

[28] Another long-term resident on Gyrfalcon, Ms. Carol Perry deposed that because the street "has many children on it" she typically drives along it at 40 km/h. She further deposed that there had been a previous accident at the same location in 1991 or 1992 in which two young girls had been struck by a vehicle. She said she called emergency services at the time.

[29] Mr. Hugh Storey, a long-term resident on Gyrfalcon also deposed to the previous accident at the intersection and said that all emergency services, including the fire department, ambulance and RCMP attended the scene. He testified that after the accident he spoke to various representatives from Kitimat about it, including the Mayor, Ms. Monaghan. He deposed that Gyrfalcon had many children on it and as a result, he typically drove at 40 km/h.

[30] Ms. Monaghan deposed she had no awareness or recollection of any other motor vehicle accident at the intersection of walkway #44 and Gyrfalcon, nor did she recall any conversation with Mr. Storey as referred to above.

[31] Mr. Tim Gleig, Director of Engineering Services for Kitimat, deposed he had searched Kitimat's records and had found no record of any other accident in the area where the infant plaintiff was struck. He further deposed he had contacted the Kitimat RCMP and had been advised the RCMP had no record indicating there had been any other motor vehicle accidents on Gyrfalcon involving pedestrians or cyclists being struck by vehicles.

[32] The infant plaintiff's brother, Malcolm, was interviewed by Cst. Schmidt of the Kitimat RCMP detachment on June 10, 2005. Portions of the transcript of the interview read:

SCHMID: OK, so what kind, what hit him?

JOHNSON: A truck. A white truck.

SCHMID: So did you see him ride out onto the road and get hit?

JOHNSON: Yup.

SCHMID: How fast was he going? Was was your brother..

JOHNSON: Really fast, because because he couldn't use his brakes because his brakes couldn't make him stop.

SCHMID: So your brother was riding really fast?

JOHNSON: Yup.

SCHMID: So he didn't stop at the crosswalk, he..

JOHNSON: Nope.

...

SCHMID: OK. And then you were at the circle and then what happened?

JOHNSON: And then I caught up to him, but um he got went really fast and then um, he he got hit. ("The circle referred to is a spot in the walkway system well preceding the accident scene where the walkway diverges in three separate directions.")

...

SCHMID: So when you say Justin was, when you say Justin is going fast, was he really peddling hard and then did he slow down or stop before he went on the road.

JOHNSON: Nope.

SCHMID: Nope, just went right out.

…

SCHMID: And as soon as you caught up to him at the circle that's when he went really fast?

JOHNSON: Yup.

SCHMID: OK. And then he rode really fast onto the road or into the crosswalk.

JOHNSON: Yup.

SCHMID: And then you saw the white truck come and hit him?

JOHNSON: Yup.

SCHMID: OK. Could you tell Malcolm where your brother hit the truck? Was it at the front of the truck, or was it at the side? Could you tell?

JOHNSON: It was ah in the front front of the truck.

SCHMID: In the front of the truck, OK. And the truck, did it stop right away?

JOHNSON: It tried to and then, um, it he stopped when he hit him.

SCHMID: OK.

JOHNSON: And then somebody went to go ask for a phone to go call for 911.

SCHMID: OK, what did you hear before the truck hit your brother? Did you hear anything?

JOHNSON: I heard a squeak sound from the truck.

SCHMID: A squeak sound from the truck? Was it a really loud squeak or?

JOHNSON: Yup.

SCHMID: Yeah, and then it hit your brother.

JOHNSON: Yup.

[33] Justin attended an examination for discovery. The defendants read portions of his examination into the record. He said he had started riding a bike when he was four years old and he acknowledged he had been told by his mother it was important to stop and look both ways before crossing the street. He said he had been told by both his mother and his father to dismount and walk his bike across the crosswalk. He said he was well familiar with the crosswalk at the intersection of the walkway and Gyrfalcon Avenue. He was asked:

Q And before the accident, you knew that you had to stop at Gyrfalcon?

A Yes.

Q Look both ways?

A Yes.

[34] He said he simply forgot to stop and walk his bike across the crosswalk on the day of the accident.

[35] The plaintiff produced an accident reconstruction report from Mr. Mike Ellis, a professional engineer, which offered an opinion of the speed of Eyre's vehicle at the time Eyre saw the plaintiff emerge from walkway #44.

[36] Mr. Ellis drew the following conclusions:

1. The distance which Justin travelled from the time he would have been visible to Eyre when he emerged from behind the fence to the point of impact was between 7 and 9 meters;

2. Utilizing three different methodologies, Eyre was likely travelling between 23 and 33 km/hr at the moment of impact. The three methods used by Mr. Ellis each put the estimated speed within approximate agreement;

3. Utilizing data contained in a study referenced in his report (Thompson et al.) Justin was likely travelling at about 4.8 meters per second as he traveled in the direction of Eyre's vehicle;

4. Given these findings, it was his opinion Justin was visible for 1.5 to 1.9 seconds from the time he emerged from behind the fence and came into Eyre's view and the time he was struck;

5. He concluded that based on the assumption (using a DRIVE3 computer program, a compilation of various studies of driver response times in real life and research situations) Eyre had a perception-response time of 1.5 seconds which he concluded "is equal to or near the length of time that Justin would have been visible to Eyre and suggests that Justin afforded Eyre little to no time to avoid the collision";

6. While concluding there was "insufficient evidence" to determine the pre-braking velocity of the Eyre vehicle, he did opine that "it is likely Mr. Eyre was travelling no faster that 44 km/h" at the moment Justin emerged from behind the fence.

[37] I have found Mr. Ellis's opinion as to time, distance and speed helpful in establishing the speed at which Eyre's vehicle was travelling immediately prior to

Eyre seeing Justin. I have viewed his opinion with caution as it is based on at least one assumption which may be debatable – the study relating to the speed at which young children can travel while cycling. I accept the assumption he has made as to where Justin was when Eyre first saw him.

[38] Mr. Ellis's opinion as to the speed of Eyre's vehicle is consistent with the evidence of Mr. Kardas who thought Eyre was travelling between 40 and 50 km/h but probably closer to 40. Although Eyre was not clear what speed he was travelling he did acknowledge at his examination for discovery it was possible he was going 50 km/h. Accordingly, Eyre was travelling at, or more likely below, the posted speed limit at the time he first observed Justin.

[39] On a review of all the evidence I am not satisfied the plaintiff has met the onus of proof upon him of demonstrating on the balance of probabilities that Eyre's conduct caused or contributed to Justin's injuries. In my view, Eyre simply could not have avoided striking Justin. Although he was driving through a residential neighbourhood, there was no evidence there were children actually on the road or in the vicinity which would have put Eyre on the alert that he should proceed at a slower speed or take other precautionary action. This is not a case where the defendant driver should have seen Justin earlier than he did but was not paying attention or where the defendant saw Justin but assumed he would act in a safe manner, ignoring the fact that young children can act in an unpredictable manner.

[40] Even so, had the boys proceeded in a straight path across the crosswalk Eyre would have had sufficient time to react and avoid hitting them. He was able to bring his vehicle to a stop about five feet to the west of the crosswalk. The collision occurred because the youths turned to their left after emerging from the walkway and into the path of the Eyre vehicle. Justin was looking back at Malcolm and was not able to manoeuvre out of the way.

[41] On the evidence, Justin was likely visible to Eyre for somewhere between 1.5 to 1.9 seconds before impact. Eyre took appropriate evasive action in the little time he had to react. Taking all the evidence into consideration it cannot be said that

Eyre, once having observed Justin, could have, in the exercise of due care, avoided the accident.

DISCUSSION OF LIABILITY ON KITIMAT

[42] The plaintiff also seeks an order that the defendant Kitimat's negligence or its breach of statutory duty caused or contributed to the accident.

[43] The claim against Kitimat arises from the fact that in 1991 Kitimat passed Bylaw No. 1471 permitting bicycles to be used on its sidewalks (walkways). The *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, prohibits the riding of bicycles on sidewalks unless provided for in a municipal bylaw.

[44] The plaintiff argues Kitimat knew or ought to have known that the layout of walkway #44 constituted a hazard to users – particularly young children – and it should have taken reasonable and necessary steps to protect those using its walkways. The plaintiff says Kitimat's responsibility in the circumstances of this case was heightened because of the hazard created by the declining grade of the walkway as it approaches Gyrfalcon and the fence adjacent to one side of the walkway which had the potential to impair the vision of both drivers and users of the walkway. The plaintiff places emphasis on the fact the walkway connects a residential neighbourhood, where many young children live, to an elementary school and other community facilities.

[45] The plaintiff says the erection of a bike dismount barrier would have been easy and inexpensive and could have accommodated access by Kitimat employees for the purpose of snow removal in the winter.

[46] Kitimat does use barriers to slow cyclists and other users on some 16 of its walkways. According to its municipal engineer, the decision where to install the barriers is made on a case by case basis depending on a number of factors including traffic volume, traffic speed, the proximity of schools and playgrounds, downgrades on the paths, pedestrian volume, and for the purpose of denying vehicular use. One walkway with a barrier has a 7% downgrade and is 100 meters

from an elementary school. Six barriers are used where the walkways cross major roads, five are for the purpose of keeping out vehicular traffic and the balance are at site specific locations – that is, near schools or playgrounds.

[47] Of some 100 painted crosswalks which are within the walkway system, 28 are located mid-block similar to the crosswalk where the accident occurred. Of the 28, only six have barriers for the purposes described above.

[48] The barriers which are in place are no post longitudinal concrete blocks. The blocks were evidently at one time spaced fairly close together but have more recently been placed apart to allow wheelchairs and scooters access to the walkways; the result being that cyclists can ride through without dismounting.

[49] The barriers are taken out over the winter to enable municipal equipment to access the walkways for snow clearing purposes. Mr. Gleig deposed they are not reinstalled until May due to Kitimat's extended winter season and the need to sweep the walkways when the snow has gone in the spring.

[50] The plaintiff argues that a bicycle dismount barrier such as those in place in many areas of the Lower Mainland should have been in place on walkway #44 where it intersects with Gyrfalcon. Such barriers are generally posted metal gates which require cyclists to dismount in order to negotiate several right angle turns to pass through.

[51] The plaintiff also argues Kitimat was negligent for failing to install signs on the walkway warning users they were approaching a busy road. The plaintiff says such signs would have warned the infant plaintiff to slow down and stop before entering onto the roadway in the manner he did, thus avoiding the accident.

[52] The onus rests with the plaintiff to prove on the balance of probabilities that Kitimat has breached a duty of care to him and that such breach caused or contributed to his injuries. The law on the duty of care imposed on a municipality such as Kitimat was discussed in *Friedrich v. Shea*, 2008 BCSC 1243, where Barrow J. stated at paras. 63-65:

> [63] The duty on a municipality does not render it an insurer of those that use its roads. The duty was expressed in *Fafard v. Quebec (City)* (1918), 39 D.L.R. 717 at p. 718 as follows:
>
> > A municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety.
> >
> > [Emphasis in original]
>
> [64] This proposition was recently adopted by Bastarache J. (albeit in dissent but not in relation to this issue) in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 115 (see also *Ryan v. Victoria (City)* (1994), 21 M.P.L.R. (2d) 148 (B.C.S.C.) at paras. 153 and 154). The majority in *Housen* adopted a similar test where at para. 38 they quoted with approval the following statement of the law from *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (Sask.C.A.) where at pp. 558-559, Martin J.A. wrote:
>
> > The extent of the statutory obligation placed upon municipal corporations to keep in repair the highways under their jurisdiction, has been variously stated in numerous reported cases. There is, however, a general rule which may be gathered from the decisions, and that is, that the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety.
> >
> > [Emphasis in original]
>
> [65] Although expressed in terms of the statutory framework that governed the municipality in that case, the proposition applies generally as a matter of common law.

[53] Accordingly, the question which this Court must answer is whether Kitimat has breached its duty of care to keep walkway #44 in a reasonably safe condition – that is, whether it has taken reasonable care to prevent injury to users of walkway #44 such as the infant plaintiff and, if it has not, whether such lack of care caused or contributed to the plaintiff's injuries.

[54] In *Resurfice Corp. v. Hanke*, 2007 SCC 7, the Supreme Court of Canada discussed the "but for" test. The Court stated at paras. 20-21:

> 20 Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.
>
> 21 First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of

> showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

[55] For the reasons that follow, I cannot conclude Kitimat failed in its duty of care to take reasonable steps to prevent the injury to the infant plaintiff.

[56] The plaintiff relies on the evidence of several residents who lived in the vicinity of the accident that there had been a prior accident at the intersection a number of years ago involving two young girls and that accident had been reported to both municipal officials and to the police. Accordingly, the plaintiff argues Kitimat ought to have been aware the intersection of walkway #44 and Gyrfalcon posed a hazard another such accident would occur, particularly given that area has many residents with small children playing on the streets and using the walkway. However, neither the Mayor nor the city engineer had any memory of such an accident, and the RCMP had no record of it. If such an accident did occur, there was no evidence how it occurred. It is not known whether the girls emerged from the walkway onto Gyrfalcon or whether they were in or out of the crosswalk. There are simply no particulars to enable the Court to draw any conclusion about the nature of the accident or whether it bears any resemblance to the circumstances of this case. Accordingly, I do not find the evidence useful in determining whether Kitimat failed in its duty of care to Justine in this case.

[57] Did Kitimat fail in its duty of care by not posting signs on the walkway warning users of the proximity of Gyrfalcon? In my view, even had such a sign or signs been posted, signage would have had no effect of the manner in which Justin and Malcolm approached the roadway. Both knew it was there. They had travelled the route many times. Justin had been warned to stop before crossing the crosswalk. The boys were too caught up in their chase to have paid attention to a warning sign.

[58] Did Kitimat fail in its duty of care to the plaintiff in failing to install a bike dismount barrier, similar to those found in Vancouver, at the intersection of walkway #44 and Gyrfalcon?

[59] It must be recalled the legal test for liability requires the municipality take reasonable care to protect users of its roads and pathways. The standard is one of reasonableness, not perfection. As stated above, a municipality is not required to act as an insurer. In my view, it would not be reasonable to import the standards which a large metropolitan region such as Vancouver has chosen to adopt in certain areas to the much smaller town of Kitimat. Further, I have no evidence as to the criteria (such as vehicular and cyclist traffic volume) on which decisions to erect such gates are made in the area where gates are installed.

[60] As stated, Kitimat does use concrete barriers across certain of its walkways. These barriers appear to have been effective for the purpose they were intended. I heard no evidence they were not. Many are near schools or park facilities and one is on a 7% down grade. While prior safe use is not determinative of the issue, it is a factor which can be considered: see *Jolly v. PNE,* [1986] B.C.J. No. 2284 (S.C.).

[61] However, even had a barrier been installed at the intersection where the accident occurred, the question is whether, but for the lack of the barrier, the accident would have occurred in the manner it did.

[62] After a full consideration of the evidence, I am of the view the motor vehicle accident and resulting injuries would likely have occurred even had a barrier been in place. The legal responsibility of the municipality to keep its roadways, and in this case, its walkways, safe for users is premised on a corresponding duty of users of those walkways to use them in a reasonable manner having regard to their own safety. In this case, it is clear the infant plaintiff and his brother were chasing one another as they emerged from the pathway onto Gyrfalcon. While a barrier may have slowed the infant plaintiff's progress, it is likely the chase would have continued and it is likely the infant plaintiff would have emerged onto Gyrfalcon in the same manner and with the same lack of attention to the potential of traffic being on the roadway. I am unable to conclude that, but for a barrier being in place, the accident would not have occurred.

Conclusion

[63] I conclude neither Eyre nor the District of Kitimat is liable in negligence for the injuries suffered by the infant plaintiff. Accordingly, the plaintiff's case is dismissed with costs.

[64] I have not found it necessary to address whether the infant plaintiff is capable of being negligent as there is, in this case, no issue of contributory negligence. Had I been required to address this issue I would have found Justin was of such age and intelligence and had such experience and training that he was capable of being negligent, and that in fact he was negligent in riding onto the road in the manner he did: *Carson v. Pruden*, [1990] B.C.J. No. 126 and *Heisler et al. v. Moke et al.*, [1972] 2 O.R. 446.

"GREYELL J."