IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Potts v. Heutink et al,***
2006 BCSC 1637

Date: 20061103
Docket: M033172
Registry: Vancouver

Between:

James Bradley Potts

Plaintiff

And

Jannes Hendrik Heutink and The City of Langley

Defendants

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Plaintiff:	M. Campbell
Counsel for the Defendant, Jannes Hendrik Heutink:	E. Carruthers
Counsel for the Defendant, The City of Langley:	L. Afonso
Date and Place of Trial:	October 10-13, 2006 Vancouver, B.C.

INTRODUCTION

[1] The Plaintiff claims damages for personal injuries arising out of a motor vehicle collision that occurred on July 9, 2001, at the intersection of Douglas Crescent and Park Avenue in the City of Langley, B.C. The Plaintiff, who was a pedestrian on a bicycle at the time of the accident, alleges Jannes Hendrik Heutink's ("the Defendant") negligent operation of his motor vehicle caused the accident and the injuries that resulted from it. The particulars of the Defendant's negligence are set out in the statement of claim as follows:

> (a) In driving in a careless manner and at a speed that is excessive relative to the road, traffic, visibility or weather conditions contrary to Section 144 of the ***Motor Vehicle Act*** R.S.B.C. Chapter 318 and amendments thereto;
>
> (b) In failing to keep a proper lookout;
>
> (c) In failing to yield the right away [sic] for a pedestrian travelling in or near a crosswalk contrary to section 179 of the ***Motor Vehicle Act***, R.S.B.C. 1996, Chapter 318 and amendments thereto.
>
> (d) In operating a motor vehicle at a greater rate of speed than designated by a municipality contrary to Section 144 of the ***Motor Vehicle Act*** R.S.B.C. 1996, Chapter 318 and amendments thereto.

[2] In the alternative, and in addition, the Plaintiff alleges the City of Langley was negligent by failing to reduce the speed limit at the site of the accident to 30 kph and such negligence caused or contributed to the collision.

[3] The Defendant denies liability for the accident and argues the Plaintiff is 100% responsible for it due to his acts of negligence. In the alternative, the

Defendant argues the City of Langley caused or contributed to the accident by failing to post signs reducing the speed limit at the location of the collision.

[4] The City of Langley denies liability and maintains the Plaintiff is 100% responsible for the collision due to his acts of negligence. The City also argues the decision to maintain a 50 kph speed limit at the site of the collision is one of pure policy and as such is not reviewable by this Court. Alternatively, the City argues the decision as to the proper speed limit was reasonable in all of the circumstances and, in any event, speed was not a factor in the collision.

[5] The parties restricted the trial to issues of liability reserving quantum to be determined at a later date, if necessary. The issues arising out of this action are:

1. Whether the Defendant had sufficient time to respond to the Plaintiff's presence in the roadway given the Plaintiff's route of travel and speed?
2. Whether the Defendant's speed at the time of the collision was excessive in all of the circumstances and, in particular, given the proximity of Douglas Park and a pedestrian crosswalk?
3. Whether the Plaintiff's state of intoxication, the manner in which he traversed Douglas Crescent on his bicycle, and the rate of speed at which he was travelling caused or contributed to the accident?
4. Whether the Court may review the City of Langley's decision to post a speed limit of 50 kph at the intersection of Douglas Crescent and Park Avenue and, if so, was the policy decision unreasonable in all of the circumstances?
5. If the speed limit posed by the City of Langley was unreasonable, did the speed limit cause or contribute to the accident?

SUMMARY OF THE EVIDENCE

A. Overview of the Accident Site

[6] The collision occurred near the T-intersection of Douglas Crescent, which is an arterial road traversing the City of Langley in an east-west direction, and Park Avenue, which carries primarily local traffic north and south. The speed limit on Douglas Crescent is 50 kph. Although Douglas Crescent is a four lane road, the outside lane in each direction is dedicated to parallel parking. The roadway is divided by a yellow line and each side is 7.6 meters in width. There are sidewalks on the north and south sides of Douglas Crescent.

[7] This area of Douglas Crescent is very busy both in terms of vehicular traffic and pedestrian movement. On the north side of Douglas Crescent there are recreational facilities, public buildings, and commercial establishments that attract a broad range of age groups. Douglas Park is on the south side of the street. Immediately adjacent to the T-intersection is a fenced tot playground to the east and a parking lot and recreation centre to the west. Behind the tot playground are a variety of play areas such as a water park, tennis courts, and sports fields. There is no dispute that this is a busy park in the daylight hours and during the evenings, particularly in the summer.

[8] At the T-intersection of Park Avenue and Douglas Crescent there is a zebra-striped cross walk. Suspended overhead are two signs demarking a pedestrian crosswalk and these signs are visible to motorists travelling east and west along

Douglas Crescent. On the north side of Douglas Crescent, and to the east of the crosswalk, is the opening for McBurney Lane. About 5 meters from the crosswalk the curb slopes down to mark the west side of the lane entrance and then slopes upward to mark the east border of the lane. The entrance itself is about 10 meters in width. McBurney Lane is not a through street. It leads to a parking area for McBurney Plaza and allows access to shops located behind the store fronts along Douglas Crescent. Motorists are not entitled to exit the lane on Douglas Crescent. Immediately to the east of the McBurney Lane entrance there are parallel parking stalls on Douglas Crescent. The speed limits on all the streets abutting Douglas Park are posted as 30 kph zones, except Douglas Crescent.

B. Plaintiff's Evidence

[9] The Plaintiff was nineteen years old at the time of the accident. On the morning of July 9 he had breakfast at McDonald's restaurant and headed over to a friend's apartment to help with a move. Three or four hours after eating, and while packing up and moving furniture, the Plaintiff testified that he consumed a forty ounce bottle of beer having an alcohol content of 8.5 %. He had nothing further to eat during the day. At about 9:00 p.m. the Plaintiff left his friend's apartment with his BMX bicycle and set off for the 7-Eleven on Douglas Crescent to buy a drink. The Plaintiff rode his bicycle in a standing mode. He stayed on the sidewalk along 206th Avenue until he reached the crosswalk at the intersection of Douglas Park and 206th. The Plaintiff then rode across 206th Avenue in the pedestrian crosswalk and stopped at the corner to wait for the lights to change allowing him to cross over to the north

side of Douglas Crescent. After riding within the crosswalk to the north side of Douglas Crescent, the Plaintiff continued in a westerly direction along the sidewalk toward the 7-Eleven which was located west of the T-intersection at Park Avenue and Douglas Crescent.

[10] The Plaintiff purchased a drink at the 7-Eleven and left the store walking east along the north sidewalk on Douglas Crescent. He held the drink in one hand and pushed his bicycle with the other. En route back to his friend's apartment, the Plaintiff testified that he was in no hurry to finish up the packing and stopped to visit with some young people smoking outside the Timm's Community Centre, which is located just east of the Park Avenue T-intersection. The Plaintiff had a cigarette and finished his drink before he resumed the journey back to the apartment.

[11] The Plaintiff testified that he did not mount his bicycle. Instead, he put his right foot on one pedal and "scooted" along the sidewalk pushing the bicycle with his left foot. He bypassed the pedestrian cross walk at Park Avenue because there was a family about to cross and continued east along the sidewalk until he came to the place where the curb slopes to create the west border of the McBurney Lane entrance.

[12] The Plaintiff was "pretty sure" he scooted in a diagonal direction from the west side of the McBurney Lane entrance across Douglas Crescent toward the east side of the T-intersection immediately in front of the Douglas Park tot playground. He testified that he looked for traffic before leaving the curb and saw the Defendant's white van some distance away but heading toward him quite quickly. The Plaintiff

believed there would be enough time to traverse the intersection because the driver would have to stop or slow for the pedestrians in the crosswalk. He was under the impression that the speed limit in the area was 30 kph because that was the speed limit on the surrounding streets and Douglas Crescent had no posted speed limit. There were also no hills in the road to obstruct the driver's view of him.

[13] After the Plaintiff stepped off the curb someone yelled from Douglas Park, "Watch out!". The Plaintiff looked left in response and was struck by the front of the Defendant's van on the left, or driver's side. The Plaintiff has a foggy recollection of what occurred immediately after the collision; however, he testified that his bicycle disappeared, that someone stole his wallet, and a crowd gathered around him. He noted that the Defendant did not leave his van and that a high school friend of his older brother, John Russo, arrived on scene soon after the collision and administered first aid until the EHS attendants arrived.

[14] The Plaintiff acknowledged that he was not wearing a helmet at the time of the accident and had no lights on his bicycle. He noted, however, that it was still daylight and thus he did not require illumination to see. The Plaintiff also estimated that the accident occurred at about 9:30 p.m.

[15] The Plaintiff agreed there was a mini-van parked on the north side of Douglas Crescent and east of the McBurney Lane entrance in front of Venete's restaurant. He testified that the mini-van did not block his view of oncoming traffic on Douglas Crescent.

C. Defendant's Evidence

[16] The Defendant was driving his one ton van on Douglas Crescent when the accident occurred. The van was in excellent condition and the brakes had been relined within the past six months. The Defendant was 60 years old at the time, but his health was good, including his vision. He denied consuming any alcohol before driving and there is little more than speculation to the contrary.

[17] As the Defendant drove west on Douglas Crescent, at an estimated speed of between 35 to 40 kph, he noticed a white van, similar in size to his own, parked in front of Venete's restaurant on the north side of Douglas Crescent. He did not see anyone in the zebra striped crosswalk just past McBurney Lane. The Defendant testified that he only saw the Plaintiff when he appeared directly in front of the van. It was in this instant that the Defendant braked hard. Before this instant, the Defendant sensed a blur of movement coming from the north side of Douglas Crescent in front of the van parked adjacent to Venete's restaurant. The Defendant's van came to rest to the west of, and parallel to, the parked mini-van. The Defendant did not see where the Plaintiff left the sidewalk, but assumed it was to the east of the McBurney Lane entrance.

[18] In his examination for discovery, the Defendant said he made the following observations of the Plaintiff prior to the instant of the collision:

> Q.152 And you have indicated that he was travelling at an angle. Can you describe from where he started?

A. I can't tell you where he started, but I can tell you when he passed the front of my van, he was at least five to six feet away from my right hand side. By the time I hit him, I could hit him on the left hand side – I think that was the location at a glance.

Q.153 You say at the time that you hit him, he was five to six feet from your right hand side?

A. Yes. So he would had [sic] to come at an angle or otherwise he would have been straight across.

Q.157 And at the time of the collision, where do you believe you were located and the bicyclist was located?

A. In front of Venete's just past the van that was parked on the road on the side.

Q.158 And how far away from the nearest crosswalk line?

A. It still would be a good 20 feet away if not more.

Q.159 And between impact and when you came to a full stop, how many feet did your vehicle continue travelling?

A. Approximately eight or ten feet.

[19] The Defendant testified that the van blocked his view of anyone coming out of the east side of McBurney Lane; however, neither his statement to the police immediately after the accident, nor his later statement to ICBC, includes a reference to the van as an impediment to his view or a factor in the accident. The Defendant acknowledged that he had a clear view of anyone walking on the sidewalk, but was focused on the crosswalk ahead. The Defendant also testified that there was no time to react to the Plaintiff's presence because of the speed at which the events unfolded. In total, the Defendant estimated he had about six feet of distance to stop before he struck the Plaintiff.

[20] While the Defendant testified the Plaintiff was riding his bicycle when the collision occurred, I have considerable doubt about the reliability of this evidence. It is apparent the Defendant's vantage from inside the van would restrict his view of anyone immediately in front of the van due to its height. A person standing on a BMX bicycle, which is the normal mode of operation, would appear the same as someone actually riding it. Significantly, in cross examination, the Defendant admitted that all he saw was movement across the front of his van and only after the collision did he see the bicycle near the Plaintiff.

[21] The Defendant testified that the sun was not in his eyes as he drove west along Douglas Crescent. He admitted, however, that the accident occurred about 9:40 p.m., close to sunset, and that the sun would have been very low on the horizon as he approached Douglas Park. He did not dispute that it was light at the time of the accident.

[22] The Defendant left his van parked in the street and confirmed that someone had already called for EHS. He saw the Plaintiff lying near the rear wheel of the van on the driver's side. The bicycle was near his legs. Soon after the accident two boys retrieved the bicycle and rode away on it. During his examination for discovery the Defendant said he first saw the Plaintiff lying on his side "about two to three feet from the back of my van towards the driver's side". (Discovery April 13, 2006 at p.26). The Defendant also said the Plaintiff was "close to the centre line but not over it". (Discovery April 13, 2006 at p.27).

D. Independent Witnesses

[23] Elias Notopoulous, a fifteen year old by at the time of the accident, was working at Venete's on that evening. When he ran outside to see what had occurred, Mr. Notopoulous saw the Plaintiff screaming in pain and lying, he believed, in front of the Defendant's van. The bicycle was lying some distance from the Plaintiff and Mr. Notopoulous saw two boys taking it. When questioned, the boys said they knew the Plaintiff and were going to take the bicycle home for him. Mr. Notopoulous recalled that it was still daylight at the time of the accident.

[24] John Russo was driving one or two cars behind the Defendant when the collision occurred. He is a trained first aid attendant so he rushed to the scene to offer assistance. Mr. Russo testified that the Plaintiff was sitting up holding his stomach and was located about ten feet in front of the van and near the driver's side. Mr. Russo noticed debris everywhere, but took no notice of a bicycle. Mr. Russo laid the Plaintiff down, applied pressure to his wound, and tried to calm him while waiting for the ambulance to arrive. By his estimate EHS arrived between five to eight minutes after the accident.

[25] Denise Ingham had been at a dinner held at Venete's restaurant that evening and was standing outside the entrance to the restaurant near the parking area on McBurney Lane when she saw a white van approaching on Douglas Crescent going west at about 40 kph. The next thing she heard was the screeching of brakes and the sound of something crashing. Ms. Ingham also recalled a mini-van parked about 10 feet east of McBurney Lane on the north side of Douglas Crescent. When she

first saw the Plaintiff, he was lying about five feet behind the Defendant's van on the driver's side. She also noticed the driver's side parking light was broken and saw two boys take a bicycle that had been lying near the Plaintiff. Ms. Ingham did not see any debris from the accident and did not recall Mr. Russo administering first aid.

[26] Mavis Bifano was at the same dinner as Ms. Ingham and was also standing outside Venete's restaurant talking when the accident occurred. She was facing Douglas Park and saw a white van approaching at between 30 to 40 kph. A matter of seconds after seeing the van it passed the parked van outside Venete's and then Ms. Bifano heard the screeching of brakes and almost immediately thereafter the sound of a crash. Ms. Bifano saw the Plaintiff lying behind the van and on the driver's side. Ms. Bifano believed the accident occurred at about 9:30 p.m. and at this time the sun was still up and "it was not dark at all". She also saw two boys ride away on a bicycle.

E. Police and Ambulance Attendants

[27] Constable Hillier was assigned to this accident as the primary investigating officer. He testified that the accident report came into the RCMP station at 9:45 p.m. and he was on site at 10:45 p.m. The Plaintiff had already been taken to the hospital and the first officer on site had secured the area with tape and ensured the Plaintiff's vehicle remained where it had originally come to a stop. Constable Hillier marked the van's rest position with paint, measured the skid marks, took measurements of the site, and made rough drawings of the accident. The right skid was measured at 8.35 meters and the left skid at 5.82 meters. He also marked the

debris field on the driver's side of the van and east of its final rest position. The constable testified that the onset of brakes is measured at the beginning of the skid mark; however, this can only be an approximation because this part of the skid fades so quickly that it is difficult to see even after one hour. The final rest position of the front of the van was just north of the centre line on Douglas crescent and about level with the middle of the entrance to McBurney Lane.

[28] Vincent Ford was the EHS attendant who was called to the accident. His crew report indicates that the Plaintiff disclosed he had consumed "a lot of beer". It also says the Plaintiff was a pedestrian. Mr. Ford testified that this information was likely obtained from a bystander. The crew report does not specify the time of the 911 call; however, it notes the ambulance started toward the scene at 9:45 p.m., arrived at 9:49 p.m., and left at 9:55 p.m.

F. Experts

[29] Carolyn Kirkwood is an expert in blood/alcohol analysis and on the effects of alcohol on the human body. Her report, dated April 19, 2006, was commissioned by the Defendant and is based upon hospital records and statements by the Plaintiff that he commenced drinking on July 9, 2001, at about noon. Her opinion is also based upon the Plaintiff's stated weight at the time as either 150 lbs or 170 lbs as he advised the hospital staff he weighed 170 lbs and in discovery indicated a weight of 150 lbs. The key fact contained in the hospital records, which is not disputed, is that at 10:15 p.m. the Plaintiff's blood contained 29 mmol/L of ethanol in serum. This

translates into a blood/alcohol reading, at the time of the test of 121 mg of alcohol in 100ml of blood.

[30] Based upon an assumption that the alcohol consumed by the Plaintiff had all been absorbed at the time of the collision, that he consumed no alcohol after the collision and before the blood test at the hospital, and that he eliminated alcohol at the average rate of 15 mg per hour over the period between the accident and the blood test, Ms. Kirkwood calculated the Plaintiff's alcohol level at the time of the accident to be 130 mg in 100 ml of blood. Ms. Kirkwood also calculated that a 150 lb male, who starting drinking at noon, would have to consume 13.8 eight-ounce glasses of beer, at 5% alcohol, to reach a blood/alcohol reading of 130/100 by 9:40 p.m. A 170 lb male would have to consume 15.6 eight-ounce glasses of beer at 5% alcohol to reach this blood/alcohol level. Although persons with higher tolerances to alcohol eliminate it at the higher rate of 20mg per hour, there is no evidence of the Plaintiff's tolerance level.

[31] It was Ms. Kirkwood's opinion that the Plaintiff was too impaired at the time of the collision, given his blood/alcohol level, to operate a bicycle safely. Her report says at pp.6-7:

> This individual does not possess the proper judgment, reaction time, balance, coordination, vision, comprehension or fine motor control to attempt to safely bicycle across a busy street.
>
> Vision is one of the first senses to be affected by alcohol. … At a BAC of 130 mg. of alcohol in 100 ml. of blood, the individual will experience prolonged glare recovery time, which is the time the eye requires to adjust after looking at a bright object, such as an on-coming headlight or bright street light and then looking back at a dark roadway. The

> individual has reduced distance judgment, which means he is unable, for example, to accurately judge how far the edge of the road is from his person, or the distance it is to cars approaching in a lane. The individual has reduced speed judgment, which means he is unable to accurately judge the speed at which he is travelling. With reduced depth perception and peripheral vision, the individual sees his environment as though through a tunnel, and may not see obstacles or spaces to his left or right. The individual may be plagued by double vision …
>
> The ability to perceive danger to one's person from the surrounding environment is reduced by the consumption of alcohol, as is the ability to judge exactly what constitutes a danger from the environment. Mr. Potts may be unable to appreciate that there is a definite hazard to his person by bicycling along or across a busy roadway out of the cross walk. …
>
> It is my opinion that an individual with a BAC of 130 mg. of alcohol in 100 ml. of blood is impaired in his ability to bicycle and navigate correctly.

[32] Ms. Kirkwood testified that even if the Plaintiff was walking across the road, his balance, depth perception, lack of peripheral vision, and impaired judgment in regard to present dangers would be severely affected given his blood/alcohol ratio at the time of the collision. She also testified that the risk factor of the Plaintiff being in an accident given his impairment was between 8 and 25 times greater than a sober person.

[33] Robin Brown is a professional engineer who specializes in accident reconstruction. He prepared a report on behalf of the Defendant that reconstructs the circumstances surrounding the collision based upon an examination of the police reports and photographs, the statements of witnesses, measurements of the scene taken several years later, and certain assumptions provided by the Defendant's counsel. In his report, Mr. Brown estimated the onset of brake speed of the van,

based on his analysis of the skid marks, the type of vehicle and its tires, at between 30 to 38 kph, inclusive of the speed change from impact. It was his opinion that the place of impact was likely near the onset of the skid marks, or between 12 to 20 meters east of the crosswalk and within about one meter north of the centre line dividing Douglas Crescent. This opinion was based on his view that the van would have pushed the Plaintiff forward or west upon impact, the debris would follow in a westerly direction, and the van would continue moving west, of both the debris and the Plaintiff, until it was able to stop. This opinion presumes the Plaintiff came to a rest position near the rear wheels of the van and on the driver's side.

[34] Mr. Brown's opinion in regard to the time available to the Defendant to react to the presence of the Plaintiff in his path was based upon a number of assumptions concerning the speed at which the Plaintiff operated his bike, the path he choose to traverse Douglas Crescent, the normal reaction time of a driver, the presence of obstructions to the driver's view, and the accuracy of the skid mark measurements taken by the police. Mr. Brown's conclusions, based upon these assumptions, are set out at pp.8-9 of his report as follows:

> 4. The cyclist would likely have been visible to the van driver for a distance of 6.1 to 7 meters. These distances would correspond to a path straight across the road and a path angled toward the entrance to the parking lot for Douglas Park respectively.
>
> 5. The cyclist could attain speeds of 30 kph on the BMX bicycle. At speeds of 15 to 20 kph the cyclist would be visible to the van driver for times ranging from 1.1 to 1.7 seconds. The minimum reaction time for drivers in non daylight conditions would be 1.5 seconds.

6. If the van driver braked from 30 to 40 km/h for 0.2 seconds he could not slow his vehicle sufficiently to allow the cyclist to clear his path. The collision would still occur.

[35] Essentially, Mr. Brown's opinion is that given a cycling speed of between 15 to 20 kph, and a diagonal route from the east end of McBurney Lane to Douglas Park, the Defendant, based upon average night time reaction times, would not have had sufficient time to react to the Plaintiff's presence in the road in order to take evasive action or to brake soon enough to avoid the collision. The weight accorded to Mr. Brown's opinion evidence, however, must be subject to a number of factors related to his assumptions and his analysis.

[36] First, Mr. Brown's estimate of the speed at which the Plaintiff travelled across Douglas Crescent is not reliable for a number of reasons. Mr. Brown did not take into account the fact that the Plaintiff had consumed a large amount of alcohol and, at the time of the accident, had a blood alcohol reading of 130 mg in 100 ml of blood. As Ms. Kirkwood's evidence clearly indicates, this amount of alcohol would have a serious impact on the Plaintiff's ability to balance on a bicycle. A lack of balance would necessarily affect the speed at which he was capable of travelling. Mr. Brown's speed estimate is also based upon tests of a single 13 year old boy under entirely different circumstances. Factors likely to have slowed the Plaintiff down are absent from Mr. Brown's analysis. These include the fact he was navigating on the sidewalk prior to entering the roadway, he had to build up to the roadway speed after leaving the sidewalk, and he was not riding the BMX, but instead "scooting" along on it. I am also of the view that Mr. Brown's test, involving a single 13 year old boy, is

unlikely to produce a representative speed for the general population of 19 year old boys. Indeed, the tests appear to be quite unscientific because of the small size of the sample used.

[37] Second, Mr. Brown chose average reaction times for the Defendant based upon night time conditions. All of the witnesses testified that it was daylight conditions at the time of the accident. Not even the Defendant suggested it was dark or that the lack of light interfered with his vision.

[38] Third, Mr. Brown's opinion depends upon when and from where the Plaintiff entered the roadway from McBurney Lane. It is also based upon where the Defendant was at the time the Plaintiff left the sidewalk and entered the roadway. All of these variables depend upon my assessment of the evidence as a whole and are not capable of exact measurement.

[39] Alan Swanson is an expert in the area of traffic engineering. He was retained by the City to provide an expert opinion on the decision to maintain a 50 kph speed limit on Douglas Crescent in the area of Douglas Park and Park Avenue. While the Plaintiff initially disputed that Douglas Crescent was an arterial road, this position was abandoned during the trial. Based on Douglas Crescent being an arterial road traversing Langley in an east/west direction, it was Mr. Swanson's opinion that a reduced speed limit to 30 kph was not warranted for the following reasons:

1. Douglas Crescent is classified and functions as an arterial roadway;

2. There are high-order pedestrian crossing devices that can be used by pedestrians proceeding to the playground and Douglas Park comprising the traffic signal at 206th Street and the cross walk with overhead and side-mounted pedestrian signs at Park Avenue; and

3. Based on a Playground Zone warrant analysis, the reduced speed limit for Douglas Crescent is not warranted.

[40] The Playground Zone analysis used by Mr. Swanson is based upon the type of playground, (i.e., whether it has playground equipment), the road classification where the playground is located, whether the playground is fenced, the location of its entrance, the amount of frontage on the road, and the presence of sidewalks. In this case the primary factors eliminating the need for a reduced speed limit was the fact the tot playground abutting Douglas Crescent at Park Avenue was fenced and had a sidewalk separating it from the road. These elements reduced the risk that children would be running into the street from the playground. The downside to reducing the speed along an arterial route is that motorists are given conflicting messages and may ignore the speed limit. Children would then have only a false sense of security on a potentially dangerous roadway.

[41] Mr. Swanson was unable to explain why there was no proportionate increase in points based on the amount of frontage in the analysis used instead of a zero point designation if under 50 meters and 40 points if 50 meters or more. Further, his explanation for taking into account only the playground in question, and not the entire Douglas Park complex, as a factor in the analysis ignored the potential for an increase in the amount of pedestrian traffic going to and from the playground area because of the other play areas in the park complex.

G. Frances Cheung

[42] Mr. Cheung was the Chief Administrative Officer and Director of Engineering for the City of Langley between 2001 and 2004. He reported directly to the City Manager and is a civil engineer by profession. Among other duties, it was Mr. Cheung's responsibility to establish speed limits for the roadways within the City, including those in and around park and playground areas. According to Mr. Cheung, it was the policy of the City in 2001 to retain a vehicular speed of 50 kph along arterial routes in preference to the efficient flow of traffic. There were exceptions to this policy in defined circumstances. One such exception was the existence of an unfenced playground containing child-centred equipment abutting the arterial route. If the playground was fenced it was felt there was little risk of children running out on to the roadway. Mr. Cheung testified that this policy was based on guidelines used by most municipalities in Canada.

[43] Mr. Cheung testified that a 50 kph speed limit at Douglas Crescent and Park Avenue was consistent with the City's policy because the tot playground at this site is fenced on three sides with the remaining side having garden areas, a community centre, and a parking lot between it and Douglas Crescent. The remaining areas of Douglas Park are not classified as playgrounds within the meaning of the policy because they are passive, which means open areas with no child-play equipment. Speed limits of 30 kph were justified on the streets surrounding the Douglas Park area because of the presence of a school, unfenced tot playgrounds, the curvature of the roadway, or the presence of high density multi-family housing.

[44] In cross examination, Mr. Cheung acknowledged that the City's policy in regard to reducing speed limits near playgrounds is unwritten. The policy applied by the City, however, is based upon the guidelines contained in the Manual of Uniform Traffic Control Devices for Canada and applied to specific facts on a case by case basis.

ARGUMENT

[45] The Plaintiff argues that based upon his evidence as to the events leading to the collision, the Defendant's negligent driving caused the accident and his injuries. Specifically, the Plaintiff maintains the Defendant breached his statutory duty to exercise due care to avoid a collision with a pedestrian who is on a highway (s.181 ***Motor Vehicle Act***); failed to drive with due regard for the safety of others in all of the circumstances (s.121 of the ***Act***); and failed to drive with due consideration for others on the highway at a speed that was not excessive relative to the traffic conditions (s.144 of the ***Act***). In support of the Defendant's liability, the Plaintiff relies upon ***Ashe v. Werstiuk*** 2003 BCSC 184, ***Carvell v. Lai*** (1988), 29 B.C.L.R. (2d) 71 (C.A.), ***Christie (Guardian ad litem of) v. Insurance Corporation of British Columbia,*** [1993] B.C.J. No. 1280, 1993 CanLII 1050 (C.A.), and ***MacKnight v. Nast*** 2005 BCSC 469.

[46] The Plaintiff argues the Defendant either saw him crossing the road in time to avoid a collision, and simply failed to react within a reasonable time, or the Defendant was distracted from his driving for some reason and failed to observe the

Plaintiff in his path until it was too late to react. In the area of a park the Plaintiff says the Defendant has to be more alert to pedestrians crossing the street.

[47] Based upon a walking speed of 1.26 meters per second, the Plaintiff argues he would have travelled ten meters diagonally across Douglas Crescent before the collision. This would mean the Plaintiff was visible to the Defendant for ten seconds and clearly long enough to take evasive measures. Even if the Plaintiff calculated the reaction time based upon the shortest route across the street, which is 6.6 meters, the Defendant still had sufficient time to react. Mr. Brown's evidence supports a conclusion that the Defendant, at between 30 and 40 kph, required only ten meters to come to a complete stop. In support of this argument, the Plaintiff relies upon ***McKee (Guardian ad litem of) v. McCoy,*** 2001 BCSC 1652.

[48] The Plaintiff argues that in the circumstances he did not contribute to the cause of the accident by any negligent conduct. While the Plaintiff acknowledges he crossed Douglas Crescent outside the crosswalk, he argues his actions are not causally connected to the accident. The Plaintiff also maintains his actions must be considered in light of the presence of other pedestrians crossing in the crosswalk at the time of the collision, his reasonable assumption that the speed limit was 30 kph, and the fact that he was near the crosswalk.

[49] Addressing the liability of the City, the Plaintiff accepts that if the designation of speed limits is a pure policy decision based on economic factors, the Court cannot find the City liable in negligence: ***Brown v. British Columbia,*** [1992] 3 W.W.R. 629, 65 B.C.L.R. (2d) 232 (C.A.). The Plaintiff argues, however, that an unwritten policy

cannot be included in the category of administrative decisions that are beyond the scope of review. Further, the City does not apply this policy consistently even if it is within this category. As a consequence, maintains the Plaintiff, the City can be held liable for a failure to reduce the speed limit at Douglas Crescent and Park Avenue because a 50 kph speed limit in this playground area creates a hazard for pedestrians.

[50] The Defendant argues the accident was solely the result of the Plaintiff's negligence. The Plaintiff failed to use the pedestrian crosswalk to traverse a busy arterial road. It is unlikely the Plaintiff was scooting as opposed to riding his bicycle across the road. The Plaintiff dangerously traversed the road on the diagonal to avoid two crosswalks. Alcohol was a significant factor substantially reducing the Plaintiff's judgment and interfering with his perception of depth and speed. It also adversely affected his ability to take evasive actions such as braking or turning to avoid the collision. The Defendant argues the Plaintiff's evidence of the amount of alcohol consumed should not be accepted in light of his failure to call as witnesses any of the friends he helped move and in light of his blood/alcohol level.

[51] The Defendant also argues that his version of the events is supported by the experts and the independent witnesses. In particular, the Plaintiff's resting position after impact could not have been west of the van; it could only be east of the debris field which is more consistent with the collision occurring almost at the onset of braking just to the west of the van parked in front of Venete's.

[52] The Defendant argues that the Plaintiff entered the roadway from behind a parked van so suddenly, and at such a high speed, that there was no time to react. The Plaintiff says his evidence is supported by the expert opinion of Mr. Brown as well as the evidence of Constable Hillier. The evidence also supports the Defendant's position that the parked van obscured his view of anyone entering the roadway suddenly from McBurney Lane and at dusk the light does not provide the same illumination as daylight. The Defendant says there is no evidence of negligence on his part. He was travelling below the speed limit.

[53] In support of his argument, the Defendant relies upon ***Harrington (Guardian ad litem of) v. Latta,*** [1984] B.C.W.L.D. 2380, [1984] B.C.J. No. 367 (S.C.) (Q.L.), ***Hennessy v. Rothman*** (1988), 26 B.C.L.R. (2d) 322, [1988] B.C.J. No. 350 (S.C.) (Q.L.), ***Aubin (Guardian ad litem of) v. Rector,*** Unreported (July 19, 1991) New Westminster Reg. No. C902474 (S.C.), ***Ibaraki v. Bamford et al,*** Unreported (April 4, 1996) Vancouver Reg. No. B926206 (S.C.), ***St. Louis v. Carter,*** Unreported (May 13, 1997) Vancouver Reg. No. B940081 (S.C.), ***Embury v. Vanderryst et al,*** Unreported (June 16, 1997) Vancouver Reg. No. B936743 (S.C.), ***Russell v. Wang,*** 2000 BCSC 534, ***Beauchamp v. Shand,*** 2004 BCSC 272, and ***Singh (Guardian ad litem of) v. Saragoca,*** 2004 BCSC 1327.

[54] The City argues the decision to impose a 50 kph speed limit in the subject area is a policy decision and that, accordingly, it is exempt from any duty of care owing to the Plaintiff. Alternatively, the City maintains the policy was reasonable in all of the circumstances and thus there is no evidence of a breach of its duty of care.

Finally, the City argues that speed was not a causal factor in the accident and maintains the Plaintiff was 100% responsible for the collision.

[55] In support of its submission, the City relies upon ***Just v. British Columbia,*** [1989] 2 S.C.R. 1228, ***Brown v. British Columbia (Minister of Transportation and Highways),*** [1994] 1 S.C.R. 420, 112 D.L.R. (4th) 1, ***Hilton Canada Inc. v. Magil Construction Ltd.,*** [1998] O.J. No. 3069, 47 M.P.L.R. (2d) 182 (Ont. G.D.), ***Dao (Guardian ad litem of) v. Sabatino***, [1993] B.C.J. No. 1225, 16 C.C.L.T. (2d) 235 (S.C.), and City of Langley, Traffic Reg. Bylaw No. 2352.

DECISION

A. Defendant's Liability

[56] Whether the Plaintiff was riding or scooting along on his bicycle, he jaywalked across Douglas Crescent in circumstances where he did not have the right-of-way in respect of oncoming vehicular traffic. In such a case, the Plaintiff, as well as the Defendant driver, have an obligation to avoid a collision. Both the Plaintiff and the Defendant have a duty to exercise due care and, where the accident occurs as a consequence of a breach of their respective duties, the apportionment of fault is resolved on the basis of the whole of the evidence: ***Embury*** at para. 10.

[57] It is incumbent upon the Plaintiff, however, to prove, on the balance of probabilities, that the Defendant breached his duty of care: ***Russell*** at para. 20. The

Plaintiff's onus is described in ***Walker v. Brownlee,*** [1952] 2 D.L.R. 450 (S.C.C.) as follows:

> While the decision of every motor vehicle collision case must depend on its particular facts, I am of the opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A … (at p. 461).

[58] Although ***Walker*** concerned two drivers, the reasoning of the case is equally applicable to a collision between a pedestrian (or a cyclist) and a motor vehicle: ***Russell*** at para. 21

[59] To restate the issue based on the case at hand, has the Plaintiff proven on the balance of probabilities that the Defendant, by the exercise of reasonable care, should have become aware that the Plaintiff was jaywalking across Douglas Crescent on his bicycle in sufficient time to take steps to avoid a collision that a reasonably careful and skilful driver would have taken in the circumstances? In turn, the answer to this question depends upon when the Defendant should reasonably have been aware of the Plaintiff's presence in the road and how much time he had to react to him.

[60] The expert opinion of Mr. Brown indicates the Defendant was travelling an estimated speed of 30 to 38 kph just prior to the collision. This estimated speed is

consistent with the Defendant's evidence and that of two independent witnesses. Although the Plaintiff believed the Defendant to be travelling quite quickly, he provided no speed estimate and I accept that his ability to perceive the speed of oncoming traffic would have been impaired because of the amount of alcohol he had consumed. Thus it is probable that the Defendant was in fact travelling between 30 and 38 kph.

[61] In addition, Mr. Brown estimated the location of impact as east of the debris field, near the onset of the skid mark caused by the left side tires of the van, or about 20 meters east of the zebra crosswalk. This estimate is fairly consistent with the Plaintiff's evidence that he took a diagonal path across Douglas from the McBurney Lane entrance, the Defendant's evidence that when he saw the Plaintiff just before the collision he was proceeding on an angle toward the left or driver's side of the van, and the evidence of two independent witnesses that the collision occurred just west of the mini-van parked on the north side of Douglas Crescent and adjacent to Venete's restaurant.

[62] While two independent witnesses contradict Mr. Brown's opinion of the place of impact based on their observations of the Plaintiff after the accident as west or ahead of the final rest position of the Defendant's van, I find their evidence unreliable. It is apparent that the place of impact must be east of the debris field that would have followed the Plaintiff as he was pushed in a westerly direction. The debris field is on the driver's side of the van and east of the van's final rest position.

[63] Lastly, it is not disputed that the site of impact was less than a meter from the centre line on the roadway. The north lane of Douglas Crescent is measured at 7.6 meters in width. Thus from the point of departure to the site of impact, Mr. Brown's report indicates a straight path across the lane would produce a travelled distance of 6.6 meters and an angled path would increase the distance to 7.5 meters.

[64] Based upon the evidence as a whole, I am satisfied that it is unlikely the Plaintiff took a straight route across Douglas Crescent from the east end of the McBurney Lane entrance. The evidence of the Plaintiff and the Defendant are consistent in establishing an angular or diagonal path to reach the entrance to Douglas Park. A diagonal path is also consistent with the Plaintiff's stated objective which was the entrance to Douglas Park. Accordingly, using Mr. Brown's figures, the Plaintiff likely travelled 7.5 meters diagonally on the roadway before being struck by the front of the Defendant's van on the left or driver's side.

[65] The crucial fact in determining the length of time the Defendant reasonably had to react to the presence of the Plaintiff in his path is the speed at which the Plaintiff was travelling the 7.5 meters across Douglas Crescent. As outlined above, I cannot accept Mr. Brown's estimate of the Plaintiff's probable speed for a number of reasons. Mr. Brown's analysis is flawed because it is based upon an unscientific experiment that failed to reasonably recreate the relevant facts surrounding this case, because the speed estimates fail to take into account that the Plaintiff's ability to operate his bicycle was impaired by alcohol, and because the estimates fail to

take into account the likelihood that the Plaintiff would take some time to build up to his travelling speed after leaving the sidewalk.

[66] The eye witness evidence concerning the probable speed of the Plaintiff is quite unsatisfactory in this case. There are no independent witnesses who saw the Plaintiff before the collision. The Defendant testified that the Plaintiff was operating his bicycle very quickly; however, it is apparent that the Defendant did not see the Plaintiff until he was in front of the van immediately before the collision. Based upon the Defendant's limited opportunity to make observations of the Plaintiff prior to the collision, it is highly unlikely he could estimate the Plaintiff's speed accurately. For the same reasons, I find the Defendant could not reasonably determine whether the Plaintiff was standing on his BMW in a riding position as opposed to a "scooting" position.

[67] The Plaintiff testified that he was in no hurry to resume helping his friends pack; he took a leisurely time riding along the sidewalk to the 7-Eleven and continued in this fashion on the return trip. The Plaintiff testified that he scooted across the intersection rather than riding his bicycle. The credibility of the Plaintiff's evidence must be carefully assessed in light of his obvious state of impairment. Ms. Kirkwood's evidence clearly indicates the Plaintiff's judgment of speed would be suspect.

[68] Even if I am unable to accept the Plaintiff's evidence as reliable, I am satisfied, based upon the amount of alcohol in his blood at the time of the collision, that he had a significantly reduced ability to operate a bicycle. As Ms. Kirkwood's

expert opinion indicates, he lacked the balance, vision, fine motor control, and co-ordination necessary to properly operate a bicycle.

[69] Taking into account all of the circumstances, I find the Plaintiff's speed was probably about half of the higher estimate given by Mr. Brown or 10 kph. This speed is twice as fast as a quick walking pace and takes into account the Plaintiff's impaired co-ordination and the necessarily slower route he took along the sidewalk before entering the roadway. I have made very little adjustment in the speed estimate based on a "scoot" across the street. Both the riding position of a BMX bicycle and a "scoot" position requires the cyclist to stand up on the bicycle and there is no evidence to suggest the Plaintiff could not achieve comparable speeds using either riding method.

[70] Accepting all of Mr. Brown's mathematical calculations, and his estimate that for the first half meter the Plaintiff would not be visible to the Defendant due to the mini-van parked adjacent to Venete's restaurant, I find the Plaintiff would have been visible to the Defendant for 2.6 seconds before impact. (At 20 kph Mr. Brown calculated the Plaintiff would be visible to the Defendant for 1.3 seconds on the angular route. Thus one half of that speed produces double the visibility time).

[71] Mr. Brown chose the perception reaction time of 1.5 seconds which is the minimum night time reaction time for a surprised driver. While I accept his evidence that the sun set at 9:17 p.m. on the evening of the accident, none of the witnesses testified that it was dark. Each of the independent witnesses testified that it was light out even though the sun was not shining. The Defendant also acknowledged that it

was still light at the time of the collision. Thus, in my view, the reaction/perception time is probably less than 1.5 seconds, and more than the daylight norm of 1.1 seconds.

[72] Subtracting the higher reaction time of 1.5 seconds from the total time the Defendant should have been aware of the Plaintiff's presence (2.6 -1.5 seconds), there was a period of 1.1 seconds in which the Defendant could reasonably have taken evasive action or braked to avoid the collision. Again, using Mr. Brown's mathematical calculations, at 30 kph the Defendant could slow his vehicle by 2.8 kph in 0.2 seconds. As a consequence, in 1.1 seconds the Defendant could have braked to reduce his speed from 30 kph to 15.4 kph. Using a reaction time of 1.3 seconds, the Plaintiff could have slowed his van by an additional 2.8 kph or to 12.6 kph. As the Defendant reduced his speed in a westerly direction, the slowing of the van would probably have given the Plaintiff sufficient time to move clear of the oncoming vehicle. This conclusion is supported by the fact that the Plaintiff was hit by the headlight on the left or driver's side of the cab. Only a matter of inches was necessary to allow the Plaintiff to complete his route across the front of the van and escape a collision.

[73] It is apparent from the Defendant's evidence that he did not see the Plaintiff until the cyclist was immediately in front of his van and that he applied the brakes as soon as he realized the Plaintiff was in his path. I accept this evidence. Nevertheless, based on the whole of the evidence, I find the Defendant should have seen the Plaintiff sooner if he had been keeping a proper lookout. This is not a case

where the Plaintiff came into his view so suddenly that there was no time to react at all.

[74] Motorists are not expected to operate their vehicles to the standard of perfection. Indeed, motorists are entitled to assume pedestrians and other drivers will observe the rules of the road: ***Walker*** at p.460. Moreover, the Defendant was not speeding, he was in fact driving at a speed significantly below the speed limit.

[75] It is also the case that the Defendant was approaching a pedestrian crosswalk in an area that was well known to him as a busy pedestrian-centred part of Langley. Notwithstanding Douglas Crescent is an arterial road with a 50 kph speed limit, the Defendant should have been vigilant to the presence of pedestrians coming and going from Douglas Park, the community centre, and the tot playground located at the T-intersection, whether inside or outside the marked crosswalk. While the standard of care is not as high as in ***Carvell***, where the defendant motorist should have slowed considerably because of the possibility of children darting out of a school bus, the proximity of the pedestrian crosswalk and the tot playground called for extra care to be taken by the Defendant.

[76] I thus find the Defendant was negligent in failing to keep a proper lookout for pedestrians and cyclists crossing Douglas Crescent outside of the marked crosswalk. Further, I find that had the Defendant kept a proper lookout, he would have had sufficient time to take evasive measures, such as braking or turning out of the cyclist's path.

B. The Plaintiff's Contributory Negligence

[77] I find the Plaintiff breached his duty of care as a cyclist, or a pedestrian, and his negligence was a contributing cause of the accident. He failed to utilize a marked crosswalk to traverse Douglas Crescent, which is a busy arterial road having a speed limit of 50 kph. The Plaintiff was also negligent in traversing the roadway on the diagonal thereby increasing the chances of being hit by both east and west direction traffic.

[78] Further, the Plaintiff crossed this busy arterial road at a time when his ability to do so was substantially impaired by alcohol. At 130 mg of alcohol in 100 ml of blood the Plaintiff's ability to safely cross the street was substantially undermined. In addition, the Plaintiff's lack of depth perception, balance, impaired vision, judgment, and co-ordination would make it almost impossible for him to take evasive or defensive measures to avoid a collision. In particular, the Plaintiff would have been unable to judge how far away the Defendant was when he began his route across Douglas Crescent; nor would he have been able to accurately estimate the Defendant's speed.

[79] Moreover, as Meredith J. says in ***Hennessy***, expert opinion evidence is not necessary to establish that the more intoxicated a pedestrian is, the more accident prone they will be (at p. 233). Ms. Kirkwood estimated the increased chances of an accident at the Plaintiff's blood/alcohol level at between 8 and 25 times that of a sober person.

[80] Finally, given the Defendant's significant impairment by alcohol, I find it highly improbable that he checked for traffic before attempting to traverse Douglas Crescent as he testified. Armed with such a reduced judgment quotient, it is far more likely the Plaintiff stepped off the curb and out of McBurney Lane without any regard for oncoming traffic. Even if he did look for traffic as he left the curb, the Plaintiff failed to look again while he attempted to traverse the intersection. The degree of negligence associated with the Plaintiff's probable course of action is further enhanced by the fact that vehicles are prohibited from exiting McBurney Lane on the Douglas Crescent side, making it unlikely motorists would readily anticipate anyone coming out of this entrance.

[81] As to the relative degrees of fault, I find the Plaintiff's negligence was substantially more serious than that of the Defendant. There are no mitigating circumstances associated with the Plaintiff's dangerous course of action. Unlike the facts in ***McKee***, the Plaintiff did not cross the road "at a place any sensible adult would have done so" (at para. 23). On the other hand, the Defendant's momentary lapse of attention, or insufficient regard for pedestrians jaywalking, must be seen in light of the unexpected nature of the Plaintiff's actions and his complete disregard for the rules of the road. Most significantly, the Defendant was not speeding. Indeed, he was travelling about 20 kph below the speed limit.

[82] On the whole of the evidence before me, I assess contributory negligence on the part of the Plaintiff at 80% fault and at 20% on the part of the Defendant.

[83] Turning to the liability of the City, I find that speed was not a factor in this accident. The Defendant was travelling at a speed of between 30 and 38 kph at the highest. Thus it is unnecessary to address whether the City's decision not to reduce the speed limit in the subject area is one of pure policy or operational.

[84] If I am wrong in this conclusion, I am satisfied that a policy of establishing speed limits for arterial roads that are routed past a playground based upon the presence or not of a fence is a policy decision within the criteria established in ***Just*** and ***Brown v. British Columbia (Minister of Transportation and Highways)***. It is a policy based primarily on economic, social and political factors and it is a policy decision in each case that is made at a high level. The Director of Engineering is responsible for designating the speed limits in accordance with this policy and that authority is found in Section C 1 of the Langley Traffic Regulation Bylaw No. 2352.

[85] The underlying rationale for the City's policy is based upon a balancing of social and political factors. The primary function of an arterial road, which is to carry through traffic in and out of the City with as little interference as possible, must be balanced against the social and political interests in ensuring proper safety measures are implemented near children's playgrounds. Where there is a fence abutting a playground adjacent to an arterial road, the justification in favour of retaining a 50 kph speed limit is based upon a reasoned conclusion that it is unlikely children will be running into the road by scaling the fence.

[86] There is no allegation that the City's policy is so irrational that it cannot be a proper exercise of discretion. Nor is there any suggestion that the policy decision to

retain the 50 kph speed limit in this case was not *bona fides*. Finally, the City's policy does not need to be in writing provided there is evidence of a clear and definable procedure supporting it: ***Hilton*** at paras. 80-83. I find the policy in this case, although unwritten, is clear and well defined. The action against the City is thus dismissed.

[87] I retain jurisdiction to address the matter of costs and quantum of damages if required by the parties.

Bruce, J.