CITATION: Bhatt v. William Beasley Enterprises Limited, 2015 ONSC 2168
COURT FILE NO.: CV-10-415838
DATE: 20150612

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SHIVAM BHATT, a Minor, by his Litigation Guardian, BINA BHATT, SAURABH BHATT and BINA BHATT Plaintiffs	Peter Cho and Luke Hamer, for the plaintiffs
– and – WILLIAM BEASLEY ENTERPRISES LIMITED and THE CORPORATION OF THE CITY OF TORONTO Defendants/Plaintiffs by Counterclaim	Chris T. Blom, for the defendant / plaintiff by Counterclaim, William Beasley Enterprises Limited George Bekairis, for the defendant by Counterclaim, Saurabh Bhatt
	HEARD: March 18, 19, 20, 23, 24, 25, 26, 2015

FAIETA, J

REASONS FOR JUDGMENT

[1] This action arises from a fractured right tibia and fibula suffered by the plaintiff Shivam Bhatt ("Shivam") as the result of an accident while attempting to board the Sky Ride at the Centreville Amusement Park ("Centreville") located on Centre Island in Toronto. Shivam was 11 years old at the time of accident. He is the only child of Saurabh Bhatt ("Mr. Bhatt") and Bina Bhatt ("Mrs. Bhatt"). Both Mr. Bhatt and Mrs. Bhatt seek damages under the *Family Law Act*.

[2] The defendant, William Beasley Enterprises Limited ("WBEL") operates Centreville. The action against the defendant City of Toronto was discontinued in 2013. The defendant WBEL counterclaims against Mr. Bhatt for contribution and indemnity.

[3] Twelve witnesses testified at this trial over six days.

The "Sky Ride"

1) William Beasley

[4] William Beasley, the President of WBEL, testified that WBEL's operations at Centreville include rides, games and food concessions. Mr. Beasley stated that the Sky Ride was installed in 1968. He described the Sky Ride as an aerial tramway. The Sky Ride operates under a licence issued by the Technical Standards and Safety Authority ("TSSA") for an "elevating device". Centreville is marketed to families with children that are 12 years of age and younger. About half of the customers who use the Sky Ride are under 18 years old. The Sky Ride has 45 chairs which seat two people each. About 200,000 to 300,000 people ride the Sky Ride each year.

[5] The chairs of the Sky Ride hang from a cable that move the chairs to a return station and then back to the main drive load platform area. The Sky Ride is continuously moving. At the time of the accident the chairs moved at a speed of about 220 feet per minute or 2.6 miles per hour. The chairs are about 55 feet apart. As a result the chairs arrive at a fixed point about 15 seconds apart.

[6] The loading platform of the Sky Ride is located on the second floor of a building. The loading platform is about six feet off the ground. Customers walk up a stairway to a platform in order to enter the loading area through a turnstile that is just through the entrance doorway. By entering through the door all passengers walk past a window through which the loading area is visible. As well, before walking up the stairs, customers walk past a "Beasley Bear" sign posted on the wall of the building which states:

Sky Ride 5 tickets/person

FOR YOUR SAFETY

- Maximum 2 riders per chair
- Riders must remain seated with their safety bar closed at all times
- Largest person must sit on left side of chair
- No infants permitted
- Riders under the influence of drugs or alcohol are not permitted
- No food or beverages are allowed on the ride
- Smoking on this ride or in line is not permitted
- No loose articles
- All personal belongings must be carried on the ride

Children under 4 feet tall must be accompanied by a responsible adult over 4 feet tall

[7] Mr. Beasley acknowledged that the operators are not required by WBEL to advise customers that the Sky Ride chair does not stop for boarding.

[8] There are generally two staff members in the loading area and two staff members in the unloading area. There are three positions: a gate operator, a bar operator and an exit operator. In a typical day, a staff member assumes each of the three roles at different times. One of those operators also serves as the foreman for the ride.

[9] The gate operator's role is to take tickets from customers at the doorway before they are allowed through the turnstile, or confirm that they have an all-day pass/wrist band, and then to provide customers with boarding instructions. Mr. Beasley stated that boarding instructions are not provided before customers enter the loading area as it is not required by the TSSA.

[10] The bar operator's role is to steady the chair because it is wobbly as it comes around the bogie wheel. In addition the bar operator is responsible to advise customers that the chair is coming and to assist them in getting in the chair. The chair does not stop as it approaches each rider. Mr. Beasley acknowledged that of the over 20 rides at Centreville, the Sky Ride is the only ride that requires passengers to board while it is in motion. Mr. Beasley noted that the chair can be stopped by use of an emergency stop which cuts off the electricity to the pump that moves the cable to which the chair is attached. More commonly the speed of chair is reduced by raising the "slow bar" that is located on the floor of the loading platform.

[11] Before a staff member is permitted to operate the Sky Ride, they are required to read the Sky Ride Operating Manual and they are given specific operating instructions by the foreman or senior staff.

[12] Customers are asked to stand on footprints and prepare to load into the chair, watch behind them and sit down when chair arrives. The ride does not stop for each set of new riders. However, operators may slow the ride if asked to do so by a customer or if they deem that it would be good to slow the ride down for guest that is a small child, elderly, pregnant or visibly handicapped.

[13] If a customer does not sit on the chair of the Sky Ride, then he or she will be bumped by the chair. The customer could step forward and try to get in the chair again as the loading platform extends about 40 feet from the set of footprints. At or near the end of the loading platform there is a padded area so that a person that has stumbled or fallen in trying to get into the chair will end up falling in the padded area. Mr. Beasley acknowledged that since 1970s there have been customers that failed to get onto the chair of the Sky Ride and that, as a result, had suffered "bumps and bruises", however no one had ever fractured a bone.

[14] Mr. Beasley acknowledged that it would be safer to board a Sky Ride chair that was stopped rather than moving. He also acknowledged that WBEL is ultimately responsible for the safety of the passengers on the Sky Ride. He stated that it is unnecessary to post a sign which

provides boarding instructions to its customers, including notice that the ride does not stop prior to boarding, given that: 1) customers do not typically read signs at Centreville; 2) not all customers read English; and 3) such written notice has not been required by the TSSA. However, he acknowledged that a sign with boarding instructions would be helpful for customers.

2) Chen Chen

[15] Chen Chen was 23 years old at the time of the accident. He had worked at Centreville since 2007 and he was the foreman of the Sky Ride at the time of the accident.

[16] The Sky Ride chair is a plastic seat that with a red or yellow canopy above it. A maximum of two people can sit on the Sky Ride chair. The chair is attached to a cable. There is a safety bar that comes down after the customers are seated to ensure that they do not fall out during the course of the ride. The safety bar is a lever system. You can force the lever forward to clear the customer's head. By raising the bar at the back of the chair it lowers the safety bar at the front of the chair.

[17] Only the gate person and bar person are located in the loading area near the entrance.

[18] The role of the gate person is to take the tickets and to make sure that the customers are suitable for the ride and then to give the instructions. If there are two customers, the taller person is directed by the gate person to stand on the orange footprints on the floor of the loading area and the smaller person is directed to stand on the green footsteps. The taller person stands on the left in terms of the direction in which the Sky Ride chair moves away from the loading area. It is about three to five feet from the entrance turnstile to the footprints painted on the floor of the loading area.

[19] The bar person stands behind the Sky Ride chair. In order to help customers get onto the chair, the bar person has to use enough force to make sure the chair is steady and to make sure that the lip of the chair is positioned in a manner to scoop up customers. Further, the bar person has to make sure that the bar when it comes down over the customer does not hit their head or pinch their fingers.

The Sky Ride Operation Manual

[20] Mr. Beasley testified that a manual for the operation of the Sky Ride was prepared many years ago by WBEL's staff. The Manual consists of the following four pages: 1) Start Up Procedures; 2) Opening & Closing Instructions; 3) Instructions for Loading, Customer Instructions, etc.; 4) Responsibilities for Staff at the Gate, Bar and Exit Positions. The Manual is used to train employees.

[21] One page of the Manual provides the following instructions for loading, customer instructions, etc. states, in part, that:

Loading

1) Tickets collected at turnstile.

2) The customer, when directed by operator, will stand with both feet on loading footprints.

3) The operator must stabilize and announce to the customers the approaching chair.

4) As the chair moves in and picks up the next passengers the operator must ensure that they are all loaded safely. Small children, elderly, handicapped and pregnant customers will need special attention and help when loading.

5) Once loaded, the operator must then slowly lower [the] safety bar before the chair leaves the platform area.

Customer Instructions

1) Customers should be asked if they need help or chair slowed down for loading.

2) Operator will instruct customers to stand with both feet on loading footprint and to look over shoulder for approaching chair.

3) Once seated, have customers reach above their head as the safety bar is slowly lowered. …

Starting Procedures

1) Since the ride is always in constant motion throughout the day, the operators' main job is loading and unloading safely.

2) However, if the ride is stopped in case of an emergency, the ride must be restarted. …

3) Throughout the day the operator may encounter elderly/handicapped/pregnant or small children. For these customers, the operators must slow the speed of the chair by pulling up on the "slow bar".

4) Once these customers have been safely loaded and the safety bar is down, the operator may slowly speed the ride back up. This speed change must be done slowly or a jerking motion is created which could cause the chairs to sway and bounce. …

Safety Procedure

1) If [a] customer falls onto the safety mat, one operator must stop the ride by hitting the emergency stop. The other operator should go onto the mat to ensure that the customer does not get hit by the oncoming chair. If customer is unhurt, the operator may help the customer back up onto the platform. However if the customer has sustained an injury, the operator should send for help and follow incident procedures and return a complete incident report to the office. [emphasis added]

[22] In cross-examination, Mr. Beasley and Mr. Chen disagreed with the suggestion that Customer Instruction #1, shown above, requires staff to ask every customer whether he or she needs help or to have the chair slowed down. They suggested that this direction is discretionary, not obligatory. They drew a distinction between Starting Procedure #3 which states the operator "must" slow down the speed of the chair for customers who are elderly, handicapped, pregnant or small children and Customer Instruction #1 which states that customers "should" be asked if they need help or the chair slowed down for loading. Given that Loading Instruction #4 states that the operator must ensure that all customers are loaded safely, it is my view that the Manual requires operators to ask all customers whether they need help or the chair slowed down unless the operator knows that the customer is able to board the Sky Ride safely because the operator knows that the customer is familiar with the procedure for boarding the Sky Ride and knows that the customer has no physical or other impediments to boarding.

[23] A second page from the Manual outlines the responsibilities of WBEL's staff at the gate, bar and exit positions and it states, in part, that:

Gate

- Practices safe loading techniques
- Follows ride rules and regulations …
- Only loads when there is a bar person (i.e. no single person loading)
- Who/how to call in the case of emergency (ride stoppage, customer complaint, customer incident, staff incident)
- When to call a slow bar
- Lowers the safety bar on a slow bar, and call out chair number to exit people
- Knows how/when to hit emergency stop and where they are
- Knows the start-up procedure after an emergency stop
- Knows how to replace the wand

Bar

- Drives the chair through the customer
- Stands in appropriate position
- Does not bang people's heads (gives verbal instructions to customers)
- Does not squish people's hands (gives verbal instructions to customers)
- Knows how to operate slow bar properly: - no stops unless required; right timing; does not "jerk" the slow bar; stays by the slow bar throughout procedure;
- Knows how/when to hit emergency stop and where they are
- Transports food, drinks and large personal objects left on the platform to the exit side
- When no line up, aids exits when only 1 person doing exits

Exit

- Gives instructions to incoming customers …
- Offers hand to customers coming off ride
- Physically removes small children
- Keeps chair stable
- Walks in front of chair, not behind
- Ensures customers go to exit directly
- Calls for slow bar at appropriate times
- Knows how/when to hit emergency stop and where they are. [emphasis added]

[24] The gate operator is directed to only load the Sky Ride chair when there is a bar person (i.e. no single person loading). There was no suggestion by Mr. Beasley or by Mr. Chen that this requirement was discretionary.

Regulatory Obligations

[25] Authority is given under the *Technical Standards and Safety Act, 2000*[1] to make regulations imposing obligations governing the use of "amusement devices" and "elevating devices". Those terms are defined by regulation.

[26] WBEL submits that the Sky Ride is an "elevating device" given that it operates under an authorization issued by the TSSA for an elevating device. An "elevating device" means a non-portable device for hoisting, lowering or otherwise moving persons or freight and includes any machine room, hoist way and hoist way enclosure, supporting structure, terminals and runway associated with the device. However, the evidence relied upon by the parties is not determinative of the issue.

[27] The plaintiffs submit that the Sky Ride is an "amusement device" because various witnesses on behalf of WBEL (Mr. Beasley, Mr. Chen and Ms. Wilson) share that view. An "amusement device" means a machine, contrivance, structure, vehicle or device, or component attached or to be attached thereto, used to entertain persons by moving them or causing them to be moved and includes the area peripheral thereto if such area is integral to the device. The regulation that pertains to amusement devices does not apply to "trains, vehicles or conveyances that are operated primarily for transportation purposes and that are not used exclusively for amusement".

[28] The Sky Ride is not used for transportation purposes, primarily or at all, as there is no opportunity to disembark from the Sky Ride at any point other than at its starting point. In my view, the purpose of the Sky Ride is not to transport people from one location to another location on Centre Island, but rather to entertain people by providing them with a bird's eye view of Centre Island.

[29] As a result, it is my view, the Sky Ride is an "amusement device" as it is a "… machine, contrivance, structure, vehicle or device … used to entertain persons by moving them or causing them to be moved …".[2]

[30] Regardless of whether the Sky Ride is an "amusement device" or "elevating device" there are similar obligations under the *Technical Standards and Safety Act, 2000* that are applicable. For instance, under both regulations an attendant is required to ensure that person move safely to and from the device.[3]

[31] The plaintiffs also rely on a Technical Standards and Safety Authority document, "Best Practices for the Amusement Ride Industry, June 2004", specifically for the purpose of determining whether it was reasonable to have only verbal instructions for customers of the Sky

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[1] S.O. 2000, Chapter 16, as amended.
[2] O. Reg. 221/01, s. 1(1).
[3] O. Reg. 209/01, s. 41(c); O. Reg. 221/01, s. 15(4)(c).

Ride. However, there is nothing in this document which contains specific requirements, such as the need for, or content of, warning signs, that apply to the Sky Ride.

The Accident

[32] Prior to the accident, Shivam had been on a total of 200 to 400 rides at amusement parks, including Centreville, with his parents. He had never had any accidents or injuries on an amusement ride. He had always boarded a ride with one of his parents. The other rides had all come to a complete stop before any rider was allowed to board.

[33] The evidence of Shivam and Mr. Bhatt is as follows. Shivam and his parents arrived at Centreville at about 11:30 am on Saturday, August 21, 2010. After they ate breakfast, Shivam and Mrs. Bhatt went on two rides. Afterwards they noticed the Sky Ride chairs overhead and decided that Shivam and Mr. Bhatt would take that ride. Shivam was excited. Mrs. Bhatt waited at ground level. Mr. Bhatt held Shivam's hand when they walked up the 10 to 15 stairs to the loading platform. There were no customers ahead of them. Shivam and Mr. Bhatt were permitted to walk through the turnstile by the attendant, Chen Chen, after Shivam showed his all day wrist pass and Mr. Bhatt provided the required number of tickets. At no time did they see anyone boarding or disembarking from the Sky Ride. There were no signs that provided boarding instructions or that indicated that the ride did not stop prior to boarding.

[34] Shivam and Mr. Bhatt were told by Mr. Chen to stand on the painted footprints and to wait for the chair to approach them from behind. Mr. Bhatt and Shivam understood the instructions. Mr. Chen did not ask whether they had any questions about the ride nor did Mr. Bhatt or Shivam ask any questions. Shivam and Mr. Bhatt were standing facing the direction that the Sky Ride would travel. Mr. Bhatt was standing to Shivam's left. Both Mr. Bhatt and Shivam assumed that the chair would come to a complete stop so that they could board. Within a few seconds following the completion of the instructions, the chair struck Shivam and Mr. Bhatt. Shivam fell onto the wooden floor on the loading area. Mr. Bhatt stumbled forward but did not fall.

[35] Two employees of WBEL gave the following statements to WBEL on the day of the accident.

[36] Mr. Chen stated:

> I let the customers in through the turnstile. Told them to stand in the correct foot positions (green for adult, orange for the boy). Instructed them to look behind them and get ready to sit down. I moved to the back to the bar position. Since my other staff moved to the gate position, I maintained the chair in the correct position to prevent the swing of the chair as customers get loaded onto the chair. From what I saw, the boy stumbled forward which happens from time to time at Skyride. Then he fell on the platform. I had to lift the chair to prevent it from striking his head as he lay on the floor. My staff hit the emergency stop. Then I found out the boy had twisted his ankle (broke his leg).

[37] Ms. Quinn Wilson, who was 16 years old at the time of the accident, stated:

> Customers were let into loading area, told where to stand (correct feet etc.) Given instructions by the foreman. (Ones everybody else gets, look behind you, prepare to sit down, etc.) They didn't expect the chair to come as quick as it did I expect. I had one hand on his arm the other on the bar of the chair. He didn't sit down. Then freaked out trying to get away, as trying to move away, child fell the wrong way on to his foot. Foreman held chair so it wouldn't hit him. I ran and hit the e-stop so it wouldn't hit the kid. Once stopped both tried to help him up, but realize his ankle has twisted, later found out it was broken.

[38] Mr. Bhatt called 911 and arranged for an ambulance to take Shivam from Centreville to the Hospital for Sick Children ("HSC").

Shivam's Pre-Existing Condition

[39] Dr. Andrew Howard is an orthopedic surgeon at the HSC. He was the only doctor who testified at trial. He was qualified as an expert in the area of paediatric orthopaedics and osteogenesis imperfect ("OI"). In his testimony he reviewed Shivam's medical history, his present condition as well as his views on Shivam's outlook related to his recovery from the accident. Both counsel took Dr. Howard through numerous medical records.

[40] Shivam has been under Dr. Howard's care since 2008. It is Dr. Howard's view Shivam has, and will always have, an intermediate form of OI. He indicated that Shivam is not a child whose bones fracture spontaneously or with handling. With Shivam, a bone fracture is typically accompanied by an impact such as falling on an icy driveway.

[41] Shivam suffered numerous fractures prior to the accident:

1) age 1 ½, left femur, slipped on water at home;

2) age 2 ½, left femur, slipped on water at home;

3) age 2 ½, right elbow, fell while walking outside;

4) age 3 ½, right ankle (tibia);

5) age 6 ½, right wrist, lost balance at home (September 2005);

6) age 6 ½, left tibia and left fibula, fell while running at school with a cast on his right wrist (September 2005);

7) age 7 ½, left tibia and left fibula, fell while playing at home (January 2007);

8) age 8, right femur, slipped on ice or snow at home (December 2007);

9) age 9 ½, left tibia (February 2009).

[42] In October 2005 Shivam was seen by Dr. Unger, a clinical geneticist at the HSC. Dr. Unger noted that Shivam, at that point, had a history of six fractures arising from relatively minor trauma as well as significant joint hypermobility in his fingers and right ankle.

[43] A report by a radiologist at HSC, dated November 28, 2005, indicated that there were several compression fractures in Shivam's spine. Four vertebrae with decreased height were recorded in the thoracic spine, two vertebrae with decreased height in the lumbar spine. Dr. Howard testified that the compression fractures could have been caused by trauma or, as with many patients with OI, by settling of the vertebrae.

[44] In December 2005, Dr. Unger reported that:

> Shivam Bhatt has osteogenesis imperfecta, which is a genetic condition that affects the development and maintenance of bone. Patients with osteogenesis imperfecta have fragile bones that can fracture easily. They can also have loose joints that make them more prone to losing their balance. We therefore advise that he avoid vigorous and contact sports as well as activities involving prolonged running. We also advise that, whenever possible, Shivam use the elevators instead of stairs and that he avoids icy areas in the winter. We do encourage him to continue to be involved in a physical education program, although some modifications will likely be necessary.

[45] A letter, dated February 21, 2006, was sent by Dr. Mark Greenwald, a pediatrician, to Shivam's school. It explained that Shivam had OI and went on to say:

> Every aspect of his schooling creates a dilemma. On the one hand we wish to treat him and have him treated as a normal child developing along. On the other hand it is quite easy to see that he could be pushed and fall at recess, lunch time, moving from class to class, entering and exiting the school and during gym class and this can result in significant fractures very easily with minimal trauma.
>
> His most immediate issue is that he [is] weak on the left leg possibly because of inactivity. We are going to check that with x-rays and have a physiotherapist involved to try and strengthen the muscles and help his ambulation. Similarly he has very significant weakness of the ankles because of the joint looseness and will have orthotics so that his foot will be more directly under his leg and hopefully this will help with his balance. …
>
> Where the school comes is first and foremost awareness that a child such as this has suffered half a dozen fractures at this point and is likely to suffer more in the future. The planning must seriously address the physical and social environment to optimize his development on the one hand to and to reduce to an absolute minimum the chances of trauma on the other. It is reasonable to give consideration to a specific educational aid to help through his day at school. Bussing is already in place. Similarly on the bus of course certain precautions

> must be taken and all who deal with him including the driver must be aware of the potential for problems. ...

[46] Dr. Greenwald prescribed custom foot orthotics in April 2006. Shivam's left leg was two centimetres longer than his right leg. The orthotics improved his gait and stability when walking.

[47] An assessment at the HSC, dated May 12, 2006, prescribed a clamshell ankle foot orthosis ("AFO") for his left leg. It has a front and back shell designed to support the leg. The report noted that Shivam's left leg was approximately two centimetres longer than his right leg. In cross-examination Dr. Howard explained that the two centimetre difference could have resulted from an overgrowth of bone following two earlier fractures of Shivam's left femur. Dr. Howard said that Shivam would have been on the threshold for an epiphysiodesis (which would remove the growth plate of the longer leg in order to allow the growth of the shorter leg to catch up) as that surgery is considered when there is a leg length difference of at least two centimetres. Thus he stated it is possible that Shivam would have had an epiphysiodesis.

[48] Shivam was referred to Bloorview Kids Rehab in July 2006 by his family physician, Dr. Sushila Treasurer. An assessment dated July 6, 2006 indicated that Shivam, age 7, was being seen at home by a physiotherapist. It was noted that Shivam had received the clamshell AFO.

[49] Shivam was seen at the HSC on October 2, 2006. A report from the HSC stated, in part, that:

> In September 2005 he [Shivam] suffered a left tibial fracture which was treated appropriately in a cast, but due to some residual procurvatum, he was advised to obtain orthoses by physiotherapy. ...

[50] In cross-examination, Dr. Howard explained that "procurvatum" is anterior bowing of the tibia. If it progresses it may lead to surgery depending on the type of curve.

[51] In January 2007 Shivam, age 7, fractured his left tibia and left fibula while playing at home. His left leg was placed in a cast at the HSC. After the cast was removed, Shivam was instructed by Dr. Cole, an orthopedic surgeon at the HSC, to use a brace for his left leg.

[52] Shivam was seen at the HSC in May 2007 as a result of experiencing pain in both legs. Dr. Cole noted that Shivam had a very convex tibia and directed that he return to Bloorview Kids Rehab to have his lower leg splint adjusted. Dr. Cole stated that he recommended surgical straightening of the left tibia if the leg pain continued.

[53] In May 2007 Shivam was seen at the Bloorview Kids Rehab. It was noted that Shivam was using a four wheeled Kaye walker while at school but normally moved independently at home. However, because he was experiencing a lot of pain when he walked, his parents had been carrying him around. It was suggested that physiotherapy be re-commenced and that Shivam be referred to an agency that would make suggestions for suitable activities.

[54] Alex Tracey was the Principal at Shivam's middle school from about 2007 until 2012. He testified that Shivam's needs were assessed each year by the School Board's Identification, Placement and Review Committee. He confirmed that Shivam was transported to and from school by a taxi. He also recalled that a Special Needs Assistant was supplied by the school to escort Shivam to and from the taxi, class and the washroom. He confirmed that Shivam used a Kaye walker to move from class to class and the SNA would escort him to and from class a few minutes before other students would arrive or leave. The purpose of this arrangement was to reduce the risk of Shivam being inadvertently jostled in the hallway by students rushing about. Mara Charbonneau testified that she was Vice-Principal at Shivam's middle school from the fall of 2009 until the summer of 2012. She confirmed that the arrangements described by Mr. Tracey remained in place until the summer of 2012.

[55] A report from HSC, dated November 27, 2007, stated:

> He [Shivam] continues on IV Pamdironate therapy every four months which he started last May. This is his sixth treatment coming up.
>
> In January 2008, he sustained a left tib/fib stress fracture at the mid diaphysis. It has healed well with significant anterior bow. He does wear bilateral lower leg braces. The braces fit well around the curve of his leg. ...

[56] In cross-examination, Dr. Howard explained that the bilateral lower leg braces were the AFOs referenced earlier. It is an exoskeleton used for younger children as a form of support. It helps to properly align the foot and the tibia.

[57] In December 2007, at age 8, Shivam fractured his right femur after slipping on ice in the driveway of his house. A few days later an intermedullary rod was surgically inserted into his right femur at the HSC. His leg was also placed in a cast.

[58] A report from HSC, dated April 23, 2008, states:

> ... His calcium intake continues to be very good and he is starting to be more active following this femoral fracture. He is using a walker at school and is trying to walk by himself at home. He is still using the braces recommended by Orthopedics. ...
>
> We have decided to continue Pamidronate treatment for another year ... .

[59] Dr. Howard indicated that all people, including people with OI, need weight bearing activity in order to strengthen bones. Shivam needs the pounding force that comes from walking and other activities to make his bones as strong as possible. Shivam can participate in activities such as walking, running, swimming, bicycling, non-sparring aspects of martial arts, dancing and can do whatever other activities are enjoyable for at least three hours per week. Given that Shivam has OI, Dr. Howard recommended against contact sports and riskier activities such as hockey, snowboarding and inverted aerial manoeuvres.

[60] In February 2009, Shivam's left tibia was fractured once again at the same location as the 2007 left tibia fracture. His left leg was placed in a cast. Unfortunately Shivam's left tibia failed to heal and it became painful.

[61] A report from HSC, dated April 23, 2009, indicated that Shivam's left tibia fracture had healed but had never remodelled into solid bone. With time, the bowing in the left tibia increased. A left tibial osteotomy was performed by Dr. Howard on Shivam in June 2009 at the HSC. His tibia was straightened and a growing intermedullary rod (aka a Fassier Duval rod) was inserted into Shivam's left tibia. About one month following this operation, Shivam's cast was removed and he was fitted with a plastic removable AFO to provide support for Shivam's left tibia while it continued to strengthen. The surgery was successful. Shivam's crooked left tibia was now straight.

[62] A clinical note from HSC, dated July 13, 2009, stated:

> He was treated with a Fassier-Duval rod in his left tibia approximately 4 weeks ago. He has been weight bearing as tolerated in a patellar tendon bearing cast. He is doing quite well and has no pain and has been able to walk without any assistive devices...
>
> Shivam is doing quite well. We would like to continue to protect the tibia for a while longer. His cast was removed today and he was sent to orthotics to fit for new AFOs. He will then be placed back in a PTB cast through which he should weight bear. He will be seen 2 weeks from now when we will take off the cast and repeat x-rays outside of the cast at which time his AFO will be ready.

[63] A clinical note from HSC, dated September 2, 2009, stated:

> A discussion was had with Shivam, and his parents, with regard to future management. We have advised him to remain weightbearing as tolerated. He should continue his present management. In addition, we would like to add an AFO for the right side. This will help correct his hindfoot valgus. We have provided him with the requisition for this today. We would also like him to undergo physiotherapy to help strengthen the posterior tibial tendon. We have arranged for following up in six months' time.

[64] Dr. Howard explained that hindfoot valgus means that Shivam's heel is angled to the outside relative to the tibia.

[65] The last time that Dr. Howard saw Shivam before the August 2010 accident was in April 2010.

[66] In a note dated April 21, 2010 Dr. Howard stated that both lower extremities were pretty straight with a good range of motion in both the knees and ankles. The right side had a mild anterior bowing, but was pretty straight. Shivam had a valgus recurvatum of the right knee but that there was nothing that would explain the recurvatum other than possible quadriceps weakness. Shivam was seen by the physiotherapist at HSC and shown exercises to do at home.

[67] Dr. Howard stated that prior to the accident in August 2010, Shivam was doing well:

- Shivam had responded well to treatment using the drug Pamidronate (delivered intravenously at HSC) for a few years as his bone density level had moved into the average range;
- He responded well to left tibia surgery in 2009, as the left tibia was straight and healing;
- His right leg was strengthening following the fracture of his right femur, however he was receiving physiotherapy to strengthen the surrounding muscles because it was mildly bowed;
- Shivam wasn't expected to have substantial bone fractures as a result of OI without some form of trauma;
- He was not anticipating any difficulties with Shivam.

[68] Dr. Howard also noted that the outlook for Shivam in August 2010 was that:

- As an adult he would be independently mobile in the community and with a wide variety of career options excluding extremely physical career options, such as being a firefighter;
- His skeleton would stop growing by the age 18 and as a result the impact of OI on Shivam's life should be greatly reduced; his bones would be stronger and he would be less prone to bone fractures for a few decades;
- The aim was to improve his strength and decrease his reliance on walking aids;
- He should doing weight bearing exercises in a way that was not overtly injury prone;
- There was nothing that would take Shivam out of a regular school setting with his peers;
- Spondylosis (defect or stress fracture in the lowest part of the lumbar spine)- he had a little and some compression fractures higher up his spine; would result in back pain but not surgery
- Spondylolisthesis (the L5 vertebrae has moved forward) can be troublesome if that movement continues it become very painful and require surgery;
- Spondylolisthesis had advanced after the accident;
- No complaints regarding right knee or ankle;
- He did not notice muscle weakness issues.

Fracture of the Right Tibia and Fibula

[69] Immediately after the accident, Shivam was brought to the HSC. An X-ray showed that Shivam's right tibia and fibula were fractured. The tibial fracture was re-aligned to its normal position while Shivam was sedated. This tibial fracture could not obtain and keep a good position in a cast. As a result an operation was undertaken on the day after the accident.

[70] A growing intermedullary rod was inserted into Shivam's right tibia. An osteotomy was performed in order to remove a small part of the right tibia in order to permit the rod to be inserted through the top of the bone. The fibula did not need any form of internal fixation.

[71] On September 28, 2010, about five weeks after the operation, the cast around Shivam's right leg was removed. His wounds had healed satisfactorily. Shivam had good function of his ankle and his knee. X-rays showed some early signs of bone healing. Shivam was able to get up and mobilize with partial weight bearing. The treating physician indicated that Shivam may require a wheelchair at school. He was asked to return for a follow-up appointment in six weeks.

[72] Shivam was seen again at the HSC on November 9, 2010. A report from the HSC for Dr. Kelley, dated November 9, 2010 stated, in part, that:

> Shivam is doing very well and has no issues or concerns. He is able to ambulate pain free. He describes no pain his knee or ankle. He has returned to all activity and sports.
>
> On examination, he does have an obvious limp while ambulating. However, the parents explained that this has been consistent throughout his lifetime. He has full range of motion of his right knee and ankle. There is no tenderness to palpation along the tibia. His tibia does seem to be slightly internally rotated approximately 10 degrees, and his foot is quite lax in terms of soft tissue. He is distally neurovascularly intact.
>
> X-rays done today show excellent callus formation of the tibial shaft. There is evidence of growth seen on the X-ray.
>
> In summary, Shivam is doing very well with regards to his tibial shaft fracture. His parents were quite concerned about the fact that his right leg seems to be internally rotated. We explained to them that this is partly due to the tibia being internally rotated, but the large of this sacroiliac coming from the foot, which does seem to have a significant amount of soft tissue laxity. We reassured them that there is nothing to be worried about, and he is healing very well with regards to his injury. We did recommend that he could wear a foot insole, which may be more comfortable while walking.
>
> We would like to see him again in four months' time with repeat X-rays.

[73] In cross-examination, Dr. Howard agreed that Shivam was able to walk on his own at the time of the November 9, 2010 examination. He also agreed that it was likely that Shivam walked without the use of a walker at that time.

[74] When the right tibia fracture healed, it left Shivam with a noticeable internal rotation deformity of his tibia. Further, Shivam's right leg which was already shorter than his left leg, became even shorter after the operation. Shivam's gait changed a little with the internal rotation deformity. His foot points inwards more than it used to or he compensates by pointing his knee outwards which leads to stress and welling of his right knee. Shivam had some swelling of his knee a few months after the surgery.

[75] A report from the HSC, dated March 3, 2011, states in part that:

> Shivam's main concern is swelling in the right knee and an internal rotation deformity of the right foot. On examination, he had no tenderness along the right tibial shaft. There was an effusion in the right knee and he had a good range of movement and was able to do a straight leg raise. With the patella facing the ceiling he did have an internal rotation deformity of the foot measuring approximately 20 degrees.
>
> With Shivam mobilizing, he did have an intoeing gait on the right side but was able to correct this by externally rotating his right leg. He had good flexion and extension of the spine with no tenderness.
>
> He has had a radiograph of the right tibia that shows that the fracture has healed and the metalwork is in a satisfactory position. He also has a spondylosis of L5 with a grade 2 spondylolisthesis of L5 on S1...
>
> We have also referred him to our physiotherapist for abdominal muscle strengthening for his spondylolisthesis as well as quadriceps strengthening.
>
> The spine radiograph show further compression of his thoracic vertebra and the plan is to give him a top up of pamidronate therapy...

[76] In cross-examination, Dr. Howard confirmed that Shivam was referred to a physiotherapist in the community to assist with strength and balance. Shivam went to the Four Seasons Clinic for seven physiotherapy sessions from January 2011 to July 2011.

[77] A report from the HSC, dated August 4, 2011 states:

> Shivam is doing well and we saw him for regular review. The parent's main concern is the externally rotated appearance of the right patella. His foot progression angle is quite good and quite normal.
>
> On examination what he has is some internal tibial torsion and some external femoral torsion on the right side. These likely relate to his old fracture. In particular, his parents have noticed significant change since his fracture in August

> 2010. It may be that he has had a few degrees of rotational malunion on top of an externally rotated femur with internally rotated tibia and this is making the appearance of that leg more noticeable. It is not making a big difference to function or to stability of the kneecap or to strength. He is now beginning to work on strength with the physical therapist. They did not want to entertain derotational osteotomy at present, but we could certainly consider that in the future if this continues to be a problem.

[78] Dr. Howard explained that a derotational osteotomy would involve cutting the right tibia and re-aligning it.

[79] In July 2014 Shivam fractured his right femur. A rod was inserted into his right femur.

[80] A report a radiologist at HSC, dated August 20, 2014, states:

> Intramedullary rod associated with a right proximal diaphyseal fracture of the femur. The fracture shows further callus formation both medially and laterally although the fracture line persists.
>
> Numerous growth arrest lines involving the visualized bones with expected changes of osteogenesis imperfect.
>
> There is a tibial telescoping medullary rod extending the length of the bone. There has been a previous distal diaphyseal fracture involving the tibia and fibula which is partially healed. The cortical lucency persists within the anterior cortex of the tibia at the fracture site. There is a bowing abnormality to the fibula at the site of the fracture.

[81] A report a radiologist at HSC, dated September 25, 2014, states:

> Right Tibia and fibula: The bones are osteopenic with multiple growth arrest lines. Growing right tibial IM nail noted. Old healed right mid tibial and fibular fractures noted. There is an undisplaced fracture through the proximal right tibia. No callus is seen. This is more defined compared to the previous radiograph dated September 18, 2014.
>
> Conclusion: The right proximal tibial fracture is now more defined. No callus formation is seen.

[82] A report from Dr. Howard, dated October 29, 2014, states:

> … He's concerned about the apex anterior bow of the left distal tibia from a cosmetic perspective. It does not particularly bother him from a functional perspective.
>
> Today's decision is he wants to walk around a lot to strengthen and consolidate the right leg. He is not convinced about having a tibial osteotomy on the left side

> unless he's noticing more deformity. I'll see him in six months' time in the Bone Health Clinic and we can review his preferences. For both of his tibias I would be happy to leave them as they are or to do an osteotomy if he is concerned about either the cosmesis or the function.

Impact of the Accident

[83] The accident, on August 21, 2010, significantly impacted Shivam - both physically and socially.

1) Internal Rotational Deformity of the Right Tibia

[84] On consent, various excerpts from a report of Dr. John Townley, an orthopedic surgeon, dated May 1, 2013 were read into evidence. Dr. Townley's report states:

> Examination of Shivam's tibia and ankle in a prone position confirms the presence of a significant internal rotation deformity of the tibial shaft. I am able to passively internally rotate his foot 50 degrees on the right side, whereas I am only able to internally rotate it 10 degrees on the left. Conversely, passive external rotation of the foot is limited on the right side compared to the left. ...
>
> Although the fracture went on to heal, Shivam has been left with a significant internal rotation deformity, which compromises his gait. He has been left with a right tibia that is 2 cm shorter than the left. ...
>
> Shivam will continue to experience difficulties ambulating because of his internal rotation deformity. This will not improve without surgical intervention. Given his current limitations, I believe that he would be a suitable candidate for a derotational osteotomy. It would be prudent, however, to wait until his growth has stopped before performing this procedure. ...
>
> Shivam will require a corrective rotational osteotomy of his right tibia once he stops growing.

[85] Dr. Howard testified that Shivam has changed anatomically as a result of the accident. Shivam's right tibia now contains a rod. He now also has a rotational deformity of his right tibia.

[86] Shivam has adapted to the deformity over the last four years by modifying how he walks. However, his right knee has suffered as a result. His adaptation has also limited his range of activities. The other option for Shivam is to correct the deformity with an osteotomy. An osteotomy would involve cutting the right tibia, rotating the tibia to its correct position, and then setting the bone. So far, Shivam has deferred on having an osteotomy. It is Dr. Howard's view that an osteotomy to realign Shivam's tibia is more likely required than surgery to equalize the length of his legs.

[87] Dr. Howard stated that if the surgery was done next year, while he was living at home, Shivam would have a long leg cast for four to six weeks, then short leg cast for first three

months. He could start bearing some weight on his leg in a short leg cast. The osteotomy would improve his mechanics of walking so that his foot position and knee strain would be improved. Assuming no complications, and a successful osteotomy, then after an appropriate period of rehabilitation, Dr. Howard would ask Shivam to be as active as he can be and increase his walking and weight bearing activity.

Other Possible Future Corrective Surgeries – Leg Length Discrepancy & Rod Adjustment

[88] Dr. Howard testified that Shivam could also require two other surgeries in the future:

> 1) An epiphysiodesis could be required to correct the 2 cm leg length disparity. One way to even Shivam's gait is to perform surgery on his other leg that would close the growth plates of his left leg in order to allow the shorter right leg to catch up during his years of remaining growth. The other way of addressing the leg length discrepancy is to slow the growth of the opposite leg if there is sufficient growth left in that leg. Dr. Howard said that this surgery might not be needed. Dr. Howard indicated that the period of recovery would be about two weeks with walker or crutches, then 6 to 12 weeks of limited activity during which he would require personal care for bathing and washroom assistance;
>
> 2) A rod adjustment for the existing hardware that is now in Shivam's right tibia could be required in the event that the implant were to move within the tibia or if it were to irritate the knee joint. Surgery would involve either repositioning or replacing the rod with something less bothersome. This is the least likely of the three potential surgeries as rod complications are less likely in a patient of Shivam's age. This surgery would probably have the same period of recovery as a tibial osteotomy.

2) Potential Complications from Surgery

[89] Surgery would bring the usual general risks accompanying anaesthesia as well as other medical risks. Additional issues that might arise include wound infections, delayed union or non-union, failure of the anchorage of the rod and compartment syndrome (tight swelling of muscles surrounding the tibia).

[90] Compartment syndrome is a bad complication that is intrinsic to doing tibial deformity or fracture corrections.

3) Unsteadiness - The Use of Walker

[91] Dr. Townley's report states:

> Shivam experiences no pain in his right lower leg, but does complain of unsteadiness when walking. When I ask him to localize the areas of concern for him, he points to his knee and ankle. His parents tell me that he is unsteady even when walking on an even surface. He requires the use of a walker at school and someone in close proximity at all times to make sure that he does not lose his balance and fall over.

> Before the accident … Shivam was about to stop using his walker at school, as both he and Dr. Howard felt it was no longer necessary. Following the accident, Shivam missed almost two months of school and has had to continue using a walker. There is no prospect of him relinquishing his walker in the foreseeable future due to his ongoing unsteadiness while ambulating.

[92] Shivam is now in Grade 10. His plans to stop using a walker at school were dashed by the accident. He continues to be taken to school by a taxi.

4) Recreational and Social Activities

[93] Dr. Townley's report states:

> As a result of the incident on August 21, 2010 Shivam missed almost two months of school and lost a great deal of his independence. He no longer plays cricket with his father or goes on play dates with friends. He requires the use of a walker at school and will continue to do so for the foreseeable future. This injury has therefore had a significant impact on his quality of life.

[94] Ms. Charbonneau and Mr. Tracey testified that Shivam was an enthusiastic, bright outgoing, likeable, gifted student. He was a member of the school's chess team. He presented no discipline issues. Most of his extra-circular activities were limited to chess, computers and such things. Shivam did participate in gym class but to a very limited degree. They both recalled some discussion with Shivam's parents prior to the accident about Shivam no longer using a walker at school. After the accident they both noticed that Shivam seemed different. He did not want to participate in gym class or go outside. As a result he would sit on a bench at recess. Mr. Tracey testified that Shivam appeared to enjoy himself with a limited number of friends at school both before and after the accident.

[95] A neighbour, Bhavana Patel, testified that she lives across the street from the Bhatt family. Prior to the accident she noticed that Shivam had a very slight limp; however, that has become pronounced after the accident. Her son and Shivam used to study together and play in their backyards about twice per month. She and her son used to go for walks with Mrs. Bhatt and Shivam. After the accident they no longer go for walks, and Shivam does not play with her son. She feels that Shivam has become very shy, quiet and introverted. Shivam comes over to her house about once a month, but only with his parents.

[96] Mrs. Bhatt testified that Shivam was a normal boy prior to the accident. He was a talkative, outgoing and obedient boy who liked to play with his friends. He was also a very good student. She stated that Shivam would play cricket or soccer with his father. He would only play cricket with his friends if Mr. Bhatt or Mrs. Bhatt would supervise. After the accident, Mrs. Bhatt feels that Shivam requires more supervision. They have never returned to an amusement park. Shivam no longer plays cricket or tennis because of a fear that he will lose his balance and fall. Now Shivam's time is spent indoors on computer games rather than outside with his friends.

[97] Mr. Bhatt testified that he had a very close relationship with Shivam prior to the accident and that they would play a lot together at the park. After the accident Shivam is not willing to take part in activities. He feels that Shivam has become withdrawn both at home and with his friends both at school and in their neighbourhood.

[98] Shivam testified that he had finished Grade 6 at the time of the accident. He said that he enjoyed school prior to the accident. He did not participate in gym class activities or on a sports team, however he participated in several extra-curricular activities, such as tech support and tutoring other students at lunch. He used his walker as a means of notifying other students that he had a special condition. He is unhappy that he still needs to use a walker, and to be accompanied by a SNA, at school. Before the accident Shivam used to meet his friends from school in the park across from his house. Now, Shivam stays house and does not go outside much. He feels badly that he cannot have the kind of relationship with his parents that he had before the accident. Before the accident, Shivam used to play cricket (using a tennis ball with his father) at the park and accompany his mother while she went shopping. Before the accident Shivam and his parents had been on hundreds of amusement park rides. He has not been on an amusement ride since the accident. Now he does none of the above activities as he feels there is a risk of injury if he does so.

5) Activities of Daily Living

[99] Dr. Townley's report states:

> Shivam is independent in terms of activities of daily living, apart from getting in and out of a bathtub, where he requires help from his father because of the high risk of a fall when there is a slippery surface to negotiate. Before the accident, he was able to get out of the bathtub by himself, and his father would merely supervise.

[100] Dr. Howard agreed that as of May or June 2011 Shivam could do light housekeeping tasks, make his bed, set the dinner table, and clear the dishes from the dining room table – depending on what his comfort level was. Shivam could shoot basketball hoops, pitch tennis balls to his father at the park, or he could hit tennis balls with a bat. Shivam could visit friends to play video games, visit amusement parks and go on rides. There was no need for him to isolate himself.

[101] Dr. Howard stated that the aim is to have Shivam function with good strength and without needing walkers or other walking aids. Dr. Howard would like Shivam to bear weight as much as he can on his own and use a minimum of walking aids.

[102] Dr. Howard noted that as patients who suffer bone fractures get older, they tend to have more anxiety about the risk of further fracture and as a result limit their physical activities.

[103] Dr. Howard reviewed Dr. Winch's report and supports anything that will allow Shivam to regain independent function in his house and community without being compromised by OI and

by fracture. He thought that the proposed modifications to the house and for attendant care were reasonable.

ISSUES

[104] Shivam seeks damages, including compensation for the cost of future care, for the injuries he suffered as a result of this accident. His parents seek damages under the *Family Law Act* ("*FLA*"). WBEL submits that the plaintiff is contributorily negligent (50 percent) and that Mr. Bhatt's negligence also caused the accident.

LIABILITY

[105] All parties agree that the *Occupiers' Liability Act*[4] ("*OLA*") applies to Centreville and the Sky Ride in particular. WBEL does not dispute it is an "occupier" under the *OLA* in respect of the Sky Ride.

[106] Subsection 3(1) of the *OLA* states:

> Occupier's duty
>
> 3. (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises. [emphasis added]
>
> Idem
>
> (2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on the premises. [emphasis added]

[107] The Supreme Court of Canada has stated that subsection 3(1) of the *OLA*:

> … imposes on occupiers an affirmative duty to make the premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm. The section assimilates occupiers' liability with the modern law of negligence. The duty is not absolute and occupiers are not insurers liable for any damages suffered by persons entering their premises. Their responsibility is only to take "such care as in all the circumstances of the case is reasonable". The trier of fact in every case must determine what standard of care is reasonable and whether it has been met. Occupiers are also not liable in cases where the risk

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[4] R.S.O. 1990, c.O.2, as amended.

> of injury is "willingly assumed" by persons entering the premises or to the extent that such persons are negligent.[5] [emphasis added]

[108] The assessment of reasonableness turns on factors that are specific to each fact situation.[6] However, reasonableness requires neither perfection nor unrealistic or impractical precautions against known risks.[7]

[109] The plaintiffs allege that the Sky Ride was not reasonably safe for Shivam for the following reasons:

1) WBEL failed to post a sign that warned Shivam that the Sky Ride does not stop prior to boarding;

2) WBEL failed to verbally warn Shivam that the Sky Ride would not stop prior to boarding;

3) WBEL failed to ask Shivam whether he needed help to board the Sky Ride or to have the Sky Ride slowed down for loading; and,

4) WBEL failed to have sufficient staff in the loading area to instruct and protect Shivam while boarding the Sky Ride.

Issue #1: Should WBEL have posted a sign that warned Shivam that the Sky Ride does not stop prior to boarding?

[110] There is no dispute that there is not a posted sign near the Sky Ride which indicates that the Sky Ride does not stop prior to boarding.

[111] The plaintiffs rely on *Hutchison v. Daredevil Park Inc.*[8] for the proposition that it is foreseeable that an attendant might fail to provide verbal instructions on how to enter or board an amusement ride, and thus the operator of that amusement park should post a sign with those instructions in order to ensure that the same sort of information is provided to customers. The Court stated at para. 18:

> On balance, I am persuaded that by failing to install a simple sign and a line with a warning not to step beyond it the defendant did not take such care as is reasonable in the circumstances to ensure the users were reasonably safe. It ought to have been within the contemplation of Daredevil Park that an attendant might fail to instruct a customer on how to get into the waterslide. The sign and warning line would have provided the same sort of information as the attendant

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[5] *Waldick v. Malcom,* [1991] 2 S.C.R. 456, at para. 10.
[6] *Waldick*, at para. 21.
[7] *Kerr v Loblaws Inc.*, 2007 ONCA 371, 224 O.A.C. 56, at para. 19.
[8] [2003] O.J. No. 1570.

> was required to provide. They would have served as a backup in the event that the attendant failed to perform her duty. The costs associated with implementing these measures would be minimal. There are no risks that arise from their implementation. Mr. Hutchison is an intelligent man who was using the facility in a careful, although misconceived, manner. While it is clear that Mr. Hutchison fell by stepping from the entry tub into the chute itself, had there been a sign warning Mr. Hutchison to sit in the entry tub behind a warning line I believe the accident would likely have been avoided.

[112] The defendant Beasley submits that a sign is unnecessary as a customer has never a fractured bone as a result of being struck by a chair on the Sky Ride. While that may be so, Mr. Beasley testified that there is a rubber "pit" about 20 or 30 feet in front the loading area where customers have landed, sometimes with "bumps and bruises" after having been struck from behind by the chair. In my view, those previous experiences demonstrated that the boarding of the continuously moving Sky Ride chair is inherently dangerous. The previous accidents represented repeated warnings of the potential for physical injury posed by boarding a continuously moving Sky Ride chair.

[113] WBEL relies upon verbal instructions and visual cues in order to communicate to its customers that the Sky Ride is unlike all other rides in the park in that it is a continuously moving ride that does not stop for boarding. Verbal instructions can be either not given, not heard or not understood. Visual cues may not be available. As I noted above, I find as a fact that neither Shivam nor Mr. Bhatt were instructed that this ride does not stop and that they would have to board it while it was moving. Further, there were no visual cues available that warned that the Sky Ride does not stop. There were no other customers ahead of Shivam that he or his father could have watched board the Sky Ride.

[114] This instructional information could have easily been provided by way of a sign at little cost to the defendant Beasley. In fact, the defendant Beasley had a "Beasley Bear" sign near the entry point of the ride which, as stated earlier, provided other information.

[115] Mr. Beasley's evidence was that people do not read signs at Centreville and thus it would not have mattered if this warning were posted on a sign. However, he indicated there are signs posted at each of the 20 or more rides at Centreville. The presence of the signs suggests that it is WBEL's expectation that the signs will be read by at least some people. Mr. Chen, a former foreman and operator of the Sky Ride, acknowledged that a sign which provided boarding instructions for the Sky Ride would have been helpful.

[116] It is my view that WBEL's failure to post a sign that provided boarding instructions and notice that the ride did not stop amounted to a breach of its affirmative duty to make the premises reasonable safe for its customers under the *OLA*.

Issue 2: Did WBEL fail to verbally warn Shivam that the Sky Ride would not stop prior to boarding?

[117] Were Shivam and Mr. Bhatt told that the ride would not stop prior to boarding?

[118] Mr. Bhatt and Shivam state that they were not told by Mr. Chen or anyone else that the Sky Ride would not stop for boarding.

[119] Shivam went further at his examination for discovery in 2011. At that time Shivam testified that he thought that he was instructed that the ride would stop:

> Q: What were the instructions you got?
>
> A: Well, he said to stand on both the footprint. Like, there was one footprint where my dad stood and one where I stood. And that's pretty much it. And he said that the ride will come from the back and we were – they were like, stopping and then we were supposed to get on it. And then it would continue on.
>
> Q: You remember the guy telling you it would stop?
>
> A: Yes.

[120] At trial Shivam explained that he did not think that Mr. Chen told him that he told him the ride would stop. Instead Shivam said that he assumed the Sky Ride would stop. In any event, Shivam's evidence at trial and at his examination for discovery is consistent to the extent that Mr. Chen did not tell him that the ride would not stop.

[121] Mr. Chen states that he told Shivam and Mr. Bhatt that the ride would not stop. However, he also states that he has no independent recollection of giving them any instructions including telling them that it would not stop. A written statement that Mr. Chen provided to WBEL on the day of the accident did not indicate that he told Shivam and Mr. Bhatt that the ride would not stop before boarding. It merely states that he "…[i]nstructed them to look behind them and get ready to sit down." Further, there is nothing in the Sky Ride Operating Manual that specifically requires an attendant to advise customers that the ride does not stop prior to boarding.

[122] The other operator on duty at the time of the accident, Quinn Wilson, stated that she has no recollection of what instructions given to Shivam or Mr. Bhatt nor could she recall whether she or Mr. Chen gave those instructions. The statement provided to WBEL on the day of the accident by Ms. Wilson did not indicate that Shivam and Mr. Bhatt were told that the ride would not stop before boarding but rather that they were "…told where to stand (correct feet, etc.). Given instructions by the foreman (ones everybody else gets, look behind you, prepare to sit down, etc.)…"

[123] I prefer the evidence of Mr. Bhatt where it contradicts with Mr. Chen and Ms. Wilson as his evidence is more reliable given that he did recall the events of the day of the accident. Had Mr. Bhatt and Shivam been told that the Sky Ride would not stop it is doubtful that they would have allowed themselves to be struck by the chair nor had the "freaked out" reaction that was reported. I find that Shivam and Mr. Bhatt were not told that the Sky Ride would not stop for boarding. I find that WBEL's failure to advise Shivam and Mr. Bhatt that the Sky Ride chair does not come to a stop prior to boarding amounted to a breach of its affirmative duty to make the premises reasonable safe for its customers under the *OLA*.

[124] Based upon my finding that Shivam and Mr. Bhatt were not told that the ride would not stop prior to boarding, and given that they did not see anyone board the Sky Ride, nor were there posted signs that indicated that the ride would not stop prior to boarding, I find that Shivam and Mr. Bhatt were unaware that the ride would not stop prior to boarding.

[125] In my view, the accident would have been prevented had Shivam and Mr. Bhatt been told by the WBEL staff that the Sky Ride does not stop and that the ride has to be boarded while it is moving. The evidence of Mr. Bhatt is that he would not have permitted Shivam to board that ride in those circumstances given his OI condition. I accept Mr. Bhatt's statement as it is consistent with the cautious approach that he and Mrs. Bhatt have exercised with respect of Shivam's previous activities.

Issue #3: Did WBEL fail to ask Shivam whether he needed help to board the Sky Ride or whether he needed help to have the Sky Ride chair slowed down for loading?

[126] As noted, the Operating Manual states that "customers should be asked if they need help or [the] chair slowed down for loading".

[127] There is no dispute that neither Shivam nor Mr. Bhatt were asked by Mr. Chen or anyone else whether they needed help to board the Sky Ride chair or to have the chair slowed down for loading.

[128] In my view, had WBEL's staff asked these questions as directed by the Operations Manual then the accident would have been avoided. I accept Mr. Bhatt's evidence that he would not have allowed Shivam to board the Sky Ride while it was in motion. I also accept Shivam's evidence that he would not have attempted to board the Sky Ride until it had come to a stop.

[129] In my view, WBEL breached its affirmative duty to make the premises reasonably safe for its customers under the *OLA* by failing to ask Shivam whether he needed help to board the Sky Ride Chair or whether he needed to have the Sky Ride chair slowed down for loading.

Issue #4: Did WBEL fail to have sufficient staff in the loading area to instruct and protect Shivam while boarding the Sky Ride?

[130] The Sky Ride's Operation Manual states:

> ...[o]nly loads when there is a bar person (i.e. no single person loading)....

[131] Shivam and Mr. Bhatt state that Mr. Chen was the only attendant at the Sky Ride prior to the accident. Shivam believes that two other attendants came after the accident – a male and a female. He is not sure when they arrived. He thought that they came two to three minutes after the accident. Mr. Bhatt stated that a supervisor and two other attendants came over after the accident. They asked for Mr. Bhatt's contact information.

[132] Mr. Chen states that he was the bar operator at the start of the shift. He was the foreman that day as well. Mr. Chen states that he served as both the gate operator and the bar operator for Shivam and his father. Quinn Wilson was the gate operator that day, however, at the time of the

accident Ms. Wilson was one of the two operators at the unloading area. Mr. Chen stated that Ms. Wilson came to the loading area about five seconds after he gave instructions to Shivam and his father.

[133] Ms. Wilson testified that she thought that she was working in the loading area at the time of the accident. However, after reading Mr. Chen's statement, she could not recall whether she was at the loading or unloading area at the time of the accident. Her first memory of the accident is Mr. Bhatt "freaking out" which she says occurred a few seconds before the accident.

[134] I accept the evidence of Shivam, Mr. Bhatt and Mr. Chen that Mr. Chen was the only WBEL employee that served Shivam and Mr. Bhatt in the loading area prior to the accident.

[135] In my view, WBEL breached its affirmative duty to make the premises reasonable safe for its customers under the *OLA* by failing to have a bar person and a gate person in the loading area at the time that Shivam and Mr. Bhatt were admitted into the loading area for boarding onto the Sky Ride.

Issue #5: Was the accident caused by Shivam's negligence?

[136] Subsection 9 (3) of the *OLA* provides:

> The *Negligence Act* applies with respect to causes of action to which this Act applies.

[137] In turn, section 3 of the *Negligence Act*[9] states:

> In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

[138] In determining whether a child is negligent, the question is whether the child exercised the care expected from a child of like age, intelligence and experience. The following guidance has been provided:

> There are three factors involved in this assessment, all of which tend to subjectivize the standard of care. If chronological age only were being considered, one could determine with relative ease the usual caution exercised by children of particular ages. By adding intelligence to the mixture, one must commence an assessment of capacity and knowledge, something that is more subjective and unpredictable. When the experience variable is included, the test becomes even more individualized. Thus, extra precautions may be expected of a 12 year-old child who is possessed of "more than ordinary intelligence" and

[9] R.S.O. 1990, c. N.1, s. 3.

> "shrewdness" and, presumably, from one who is experienced in the injury-producing activity. On the other hand, where children had no actual experience with matches or fire, even though they were taught that they were dangerous, they may be relieved of liability for causing a fire, since they did not "appreciate the risk". One commentator has suggested that the test is subjective only for the purpose of determining whether the child was capable of perceiving danger and avoiding the injury, but that thereafter it is an objective standard.[10]

[139] WBEL submits that Shivam failed to exercise the reasonable care expected by an 11 year old boy with his intelligence, with the knowledge that he needed to be careful about his environment given that he was vulnerable to fracture injuries.

[140] WBEL submits that the evidence shows that Shivam had been taught by his parents to recognize situations that presented a physical risk of injury and to advocate for himself. There is little evidence that Shivam advocates for himself in any situation to prevent risk of physical injury given his OI condition. In cross-examination, Shivam was asked about situations where he had advocated for himself to prevent risk of physical injury. After some prodding he was able to recall one situation where that had happened at school. None of the other witnesses were able to come up with examples.

[141] I do not accept that Shivam should have appreciated that boarding this ride presented a risk of physical injury. While Shivam would have perceived that the boarding was different from all of the other rides that he had taken, in that he was brought into a loading area to board a car where there was none present and waiting for him to board, Shivam had no reason to believe that the Sky Ride chair would not come to a stop. Shivam was in the company of his father. For as long as he likely could remember, his father had gone to great lengths to minimize any risk of physical harm to Shivam. Like any boy his age, and even more so given how active his parents had been in trying to reduce the risk that he would be put in a situation where he could fall and suffer a further bone fracture, Shivam would have trusted his father's judgment. Accordingly, he did not "appreciate the risk" of being struck by the Sky Ride car while he stood on the loading platform.

[142] In my view, it was reasonable for Shivam, given his age, intelligence and experience, to defer to his father's assessment of the risk presented by the Sky Ride. In *Gough v Thorne*[11], a 13 and a half year old girl was found not contributorily negligent for injuries she suffered after being struck by a motor vehicle as a result of crossing a road after being beckoned by an adult on the other side of the road. Lord Denning stated:

> A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame should be attached to him or her.

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[10] Linden & Feldthusen, *Canadian Tort Law*, 9th ed., (Markham LexisNexis, 2011), at pg. 157.
[11] [1966] 1 W.L.R. 1387, at p. 1390.

> A child has not the road sense nor the experience of his or her elders. He or she is not to he found guilty unless he or she is blameworthy.

[143] In my view, Shivam was not contributorily negligent for the accident.

Issue #3: Was the accident caused by Mr. Bhatt's negligence?

[144] Relying on s. 9(3) of the *OLA* and the *Negligence Act*, the defendant WBEL seeks contribution and indemnity from Mr. Bhatt for any damages awarded against the defendant WBEL on the basis that Mr. Bhatt: (1) failed to give notice of Shivam's medical condition so that steps could be taken to allow Shivam to board the Sky Ride in a manner that would take account of that condition; (2) failed to look out for Shivam; (3) failed to heed instructions of the operator; (4) rushed Shivam to board the Sky Ride; (5) failed to review the layout of the Sky Ride; (6) failed to assist Shivam to board the chair.

[145] A parent is required to supervise their child and a parent may be liable in negligence for their child's injuries if the parent's behaviour falls below the accepted standard of care by parents generally in the community. In *Arnold v. Teno*[12] the Supreme Court of Canada found that a mother who gave her six year old child money to buy a treat from an ice cream truck outside their house was not liable for the injuries suffered by her child after she was struck by an automobile. In arriving at this conclusion, the Court stated:

> Here was a mother of four young children who was speaking to her husband on the telephone and was interrupted by the two youngest crying for money to buy ice cream confections to be supplied by the defendant...from a vehicle designed to attract if not entice young children...The children had both received very strong instructions as to how they should behave in reference to crossing the street and, in fact, had crossed the street for that very purpose on other occasions.
>
> ...
>
> The standard of care put on the mother is, I think, properly the standard of care of mothers in the immediate community of the approach of this ice cream truck which was designed to attract and actively operate so that even children of tender years were enticed to purchase their wares. Yvonne Teno and the other mothers were entitled to rely on the vendor of the ice cream from such a vehicle to exercise some care toward the children which it attracted. I, therefore, am of the opinion that the appeal of Yvonne Teno should be allowed and that no contribution should be assessed against her.[13]

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[12] [1978] 2 S.C.R. 287.
[13] pp.312-313

[146] In *Taggart (Litigation Guardian of) v. Heuchert*[14] the Court dismissed a third party claim against the parent of a 10 year old child who was struck by a car while walking across an unmarked cross-walk commonly used by adults and children in the community. The Court stated that:

> An error of judgment standing alone does not prove negligence if the parent's actions are those a reasonably careful parent might have taken, viewed by the standard of care generally accepted in the community. The standard of care is not one of perfection. It does not require a parent to take every possible step to ensure the safety of the child. It includes both an objective and subjective aspect.
>
> The objective aspect requires a determination of the community standard at the time generally expected of a reasonably prudent parent. The subjective aspect places the reasonably prudent parent in circumstances identical to those Ms. Taggart faced at time, and knowing only what she believed and understood.[15]

[147] In my view, the onus of proof is on the defendant WBEL to demonstrate that Mr. Bhatt knew or ought to have known that the Sky Ride chair would not come to a stop for boarding.

[148] There was no suggestion in WBEL's submission that Mr. Bhatt knew that the ride would not come to a stop for boarding. I have rejected Mr. Chen's evidence that he told Mr. Bhatt that the ride did not stop. I accept Mr. Bhatt's evidence that he would not have let Shivam try to board the ride had he known that the ride did not come to a stop for boarding.

[149] The defendant submits that Mr. Bhatt ought to have known that the ride did not stop for boarding. Specifically, the defendant states that Mr Bhatt, with the unique knowledge of his son's OI condition, should have discussed the risks of boarding the Sky Ride with the operator. The defendant submits that it was unreasonable for Mr. Bhatt to assume that the Sky Ride chair would have stopped for boarding given that they were looking ahead and were told that the chair would approach them for behind. In my view, WBEL seeks to impose a standard of perfection or near perfection upon Shivam and Mr. Bhatt to make up for its failure to make its premises reasonably safe for them. Mr. Bhatt had been on hundreds of amusement rides with his son and they had all come to a stop before boarding. The mere fact that the chair which they were to board was not stationary when they went into the loading area was not, in my view, sufficient reason to impose a duty on him to ask the operator if it would stop.

[150] In cross-examination, Mr. Beasley stated:

> None of our rides say that they do stop or that they don't stop. None of our rides have signs that tell customers how to load on to a ride. <u>All of our rides rely on the customer or the responsible person with the smaller child to visually see what's</u>

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[14] 2013 BCSC 1248, [2013] B.C.J. No. 1523.
[15] At paras. 189-190.

> going on, and they are then given verbal instructions and if they don't understand the verbal instructions and are responsible they will ask a question or ask for help or say they don't understand. It's up to them at that point to assess their situation. They're responsible. [emphasis added]

[151] Mr. Beasley also stated that WBEL relies upon customers being notified of boarding instructions through observation by the customer and verbal instruction by the staff.

[152] This view likely explains why from time to time customers are struck by the chair in the loading area, sometimes suffering bumps and bruises, and fall onto the "rubber mat" area located in front of the chair.

[153] There were no visual cues to suggest that the chair would not stop for boarding. There were no customers ahead of Mr. Bhatt or Shivam for them to observe board the ride while it was moving. Accordingly, the visual cue upon which WBEL relied upon to notify its customers that the ride does not stop for boarding was absent. Further, neither Mr. Bhatt nor Shivam were told by the attendant that the chair would not stop nor was this required by WBEL's operating manual for the Sky Ride, nor were they asked if they needed help to board the ride although the Operating Manual recommended this action which would have been helpful given the absence of a visual boarding cue and the lack of a sign explaining the boarding procedure.

DAMAGES

[154] The plaintiffs make the following claim for damages:

1) Special Damages;
2) Non-Pecuniary General Damages;
3) Future Pecuniary Loss;
4) *Family Law Act* claims.

The Law

[155] In determining whether the defendant WBEL's negligence caused the damages claimed by the plaintiffs the following legal principles apply:

(1) Proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant's negligence (breach of the standard of care) caused the injury. That link is causation.[16]

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[16] *Clements* v. *Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 6.

(2) Causation is established where the plaintiff prove to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury.[17]

(3) The general test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. In other words, the injury would not have occurred without the defendant's negligence.[18]

(4) The "but for" test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury.[19] Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss.[20]

(5) Exceptionally, courts have accepted that a plaintiff may be able to recover on the basis of "material contribution to the risk of injury", without showing factual "but for" causation.[21] This approach is only used where it is impossible to say that a particular defendant's negligent act in fact caused the injury.[22]

(6) It is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. As long as a defendant is part of the cause of an injury, the defendant is liable even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.[23]

(7) A tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person. This is the "thin skull" rule.[24]

(8) Although a defendant is liable for the injuries caused, even if they are extreme, the defendant need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable

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[17] *Athey v. Leonati,* [1996] 3 S.C.R. 458, at para. 13.
[18] *Clements,* at para. 8.
[19] *Clements,* at para. 9.
[20] *Clements,* at para. 10.
[21] *Clements,* at para. 13
[22] *Clements,* at para. 15.
[23] *Athey*, at para. 17.
[24] *Athey,* at para. 34.

for the additional damage but not the pre-existing damage.[25] This is the "crumbling skull" rule.

[156] For the reasons described earlier, it is my view that the defendant WBEL's negligence caused the injuries suffered by Shivam on August 21, 2010.

[157] The outstanding issue is the application of the "crumbling skull" rule to the damages claimed. This requires a consideration of Shivam's pre-existing condition.

Issue #1: Special Damages

[158] A subrogated claim by the Ministry of Health and Long-Term Care in the amount of $3,111.23 was acknowledged by the defendant WBEL.

Issue #2: Non-Pecuniary General Damages

[159] The plaintiffs submit that an appropriate range for non-pecuniary general damages in this case for the minor plaintiff, Shivam Bhatt, would be $175,000 to $200,000 considering Shivam's age at the time of injury (11 years old), his current condition and his future outlook. Shivam's pain and suffering and loss of enjoyment of life will be prolonged over a number of years.

[160] WBEL submits that an award of $120,000 for non-pecuniary general damages is appropriate given the following considerations: the fractured tibia and fibula were treated with ORIF and rod; very good result in terms of symptoms; no pain; future surgery required to fix rotation and leg length discrepancy; future restrictions in terms of right knee loading and bending.

[161] Given the impact that this accident has had on Shivam both physically and socially, as well as taking into account the impact of anticipated future corrective surgeries, I award $140,000 in non-pecuniary general damages.

Issue #3: Future Pecuniary Loss

[162] Special damages are calculated with certainty on a balance of probabilities since those losses have already occurred. On the hand, the assessment of future pecuniary loss is a forward-looking exercise mandated because the principle of finality requires that such losses be assessed at the time of trial rather than on a continuing basis as new evidence becomes available. As a result, damages for future pecuniary loss are assessed on a lower standard of proof – namely by asking whether there is a "real and substantial possibility" of the claimed loss occurring in the future. As always, the objective is to place the plaintiff in the position that he or she would have been in had the loss not been incurred. Accordingly, unless the claim for future pecuniary loss is

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[25] *Athey*, at para. 35.

entirely speculative, an award for future pecuniary loss is not an all or nothing determination[26]. An award for future pecuniary loss will reflect the Court's estimation of the chances of whether that loss will occur.

[163] In *Townsend v. Kroppmanns*[27] the Supreme Court of Canada stated that future pecuniary damages:

> …are assessed and not calculated. Since it is impossible to calculate the exact amount of money that will be needed in the future, courts have to rely on actuarial evidence…Actuarial evidence is itself based on experience and not on individual circumstances. Future costs and loss of future earnings are amounts that are estimated because, by definition, they are not yet incurred or earned. Although this hypothesis may seek to simulate reality, it remains notional. Courts can only provide the victim with an adequate amount to cover the loss caused by the defendant. There is no assurance that the amount will cover the actual costs of care that become incurred nor is the defendant guaranteed that he or she is not disbursing more than the strict minimum that becomes necessary to cover the victim's loss. In assessing damages, courts do not take into consideration what victims actually do with the award.…

[164] Shivam claims compensation for the items described below:

ITEM	**AMOUNT ASSESSED** **(HST included)**
House Maintenance	$20,000.00
Occupational Therapy Assessments	$2,781.00
Orthotics	$500.00
Orthotics (Annual)	NIL
Future Care Report	$3,000.00
Post-Surgical Attendant Care, Treatment and Safety Devices	$4,300.00

[26] *Athey*, at para. 27.
[27] 2004 SCC 315, [2004] 1 S.C.R. 315, at para. 19.

[165] The plaintiffs rely upon the evidence of Mr. Fred Winch. Mr. Winch was qualified as an expert in future care needs and cost analysis. Mr. Winch met with Shivam and his parents on November 1, 2014 for about 75 minutes at their house. In addition he reviewed various medical records, including records from the HSC. He provided his views on Shivam's future need for goods and services as a result of the accident.

House Maintenance

[166] Mr. Winch offered no opinion on whether Shivam would require assistance for housekeeping and other indoor household management assistance once he was no longer living with his parents. Accordingly, he did not estimate an amount for this possible expense.

[167] Mr. Winch indicated that he did not see Shivam ever owning a house given that he would be physically unable to undertake the outdoor management activities related to owning a house, such as yard care and snow removal. If Shivam did live in a house, he would need someone to do that work. Mr. Winch felt that it would be more likely that Shivam would live in a condominium. However, we would have to pay condominium fees which would include a portion for outdoor management activities. Mr. Winch estimated a cost of $900 for house maintenance based on $75 per month for that portion of the condominium fee from the time he moves out over the course of his life.

[168] In cross-examination Mr. Winch acknowledged that Shivam would not require assistance with outdoor household management if he did not live in a house. He also agreed that Shivam might have chosen to live in a condominium even if the accident had not occurred given his pre-accident injuries.

[169] Shivam claims $34,120.80 for house maintenance based on $900 per year from age 19 for his lifetime. Given the above evidence, and my view that Shivam may decide at some point in his life to live in a house despite any physical limitations, I assess future house maintenance costs at $20,000.

Assessment for Psychological Counselling

[170] Shivam claims $2,000 for the future cost of assessing whether he requires psychological counselling. Mr. Winch recommended these services because Mr. and Mrs. Bhatt have observed that Shivam is more withdrawn since the accident. He estimates that the cost of this assessment will be $2,000.

[171] I assess the claim for a counselling assessment for Shivam at $2,000.

[172] Mr. Winch also recommended an assessment to determine whether Mr. and Mrs. Bhatt require counselling. I will deal with this aspect later in the decision under the *FLA* claim section.

Occupational Therapy Assessments

[173] Shivam claims the cost of seven future assessments by an occupational therapist in order to determine his future attendant care needs. Mr. Winch opines that Shivam will continue to

require some level of attendant care for the rest of his life as result of the accident. Mr. Winch recommends that Shivam's needs be assessed at intervals of five to seven years at a cost of $625 per assessment.

[174] I assess the claim for a counselling assessment for Shivam, as presented, at $2,781.

Orthotics

[175] Mr. Winch also opined that Shivam will require orthotics on an ongoing basis, given his leg length discrepancy with respect to surgery from the incident. Mr. Winch set aside $500 for the fitting/casting fee and a $100 for an annual set of orthotics. However, Mr. Winch acknowledged that Shivam used orthotics in both feet before the accident. Mr. Winch's view is that a further orthotic evaluation of Shivam's current needs is required given Shivam's leg length discrepancy and bowing of the knees.

[176] While the assessment may be required, the attribution of the annual cost of orthotics to this accident is inappropriate given that there is no evidence that Shivam would have not continued to need his orthotics replaced on an annual basis in the future but for this accident.

Future Care Report

[177] Shivam claims $3,325.59 for the preparation of a further future care report in five years at the age of 21. Mr. Winch recommends this report in order to assess Shivam's future needs related to the accident, including attendant care, counselling, and post-secondary school needs/accommodations. He estimated that this report would be in the range of 3,000. I assess this claim at $3,000 and that assessment takes into account that this expense will not be incurred until Shivam is 21 years old

Post-Surgery Good & Services

[178] Mr. Winch noted that Shivam may require three further surgeries on his legs as a result of this accident.

[179] Mr. Winch assumed two surgeries would be required. He has also assumed that Shivam would require attendant care services, rehabilitation services and the installation of a safety grab bar in the bathroom.

1) **Attendant Care**

[180] Shivam claims $8,624 for future attendant care based on the estimated cost of post-surgery attendant care services of $4,312 per surgery. This amount is based on Mr. Winch's opinion that such services would be provided by a Personal Support Worker at the rate of $22 per hour, four hours per day, seven days a week for seven weeks. Mr. Winch indicated that four hours per day reported by Personal Support Worker service providers, and other past clients, as was reasonable. Mr. Winch assumed that Shivam would need specialized care, such as wound care and dressing changes, however he has no idea whether Shivam will need such specialized care nor whether Shivam required such specialized care after the 2010 leg surgery.

[181] Mr. Winch's cost estimate does not take into account the services that the publicly funded Community Care Access Centre ("CCAC") may be able to provide Shivam. Mr. Winch was aware that the CCAC had provided publicly funded PSW support services to Shivam after the surgery in 2010 and he acknowledged that such care is still available through the CCAC. Mr. Winch expressed some doubt that the same level of service would be available due to budget cuts, however he had no idea what level of service CCAC would be able to provide Shivam now. Mr. Winch did not check Shivam's medical records to find out the duration of the PSW support (whether in hours per day or the number of weeks that the service was delivered) to Shivam in relation to the 2010 leg surgery.

[182] I have dismissed the claim for post-surgery attendant care service as Mr. Winch's assessment of the need for privately funded post-surgery attendant care services is entirely speculative.

2) Rehabilitation Program

[183] Shivam claims $10,000 for the delivery of rehabilitation services following two future surgeries. Mr. Winch recommended a 40-day rehabilitation program at the Health Recovery Clinic following each surgery at a cost of $125 per session. Rehabilitation activities would include range of motion and strengthening exercises. Mr. Winch acknowledged that the cost for each session could be as low as $75 at other clinics. He had recommended the Health Recovery Clinic because he was familiar with it and did not investigate what the cost of treatment might be at any other clinic.

[184] Mr. Winch indicated that he recommended a 40-day program because: 1) that it is one of the programs offered by Health Recovery Clinic; 2) he assumes that any surgery will be during the summer and Shivam will have time to dedicate himself to the program; 3) based on prior clients a daily program is more beneficial.

[185] Mr. Winch also acknowledged that Shivam may need far less than a 40-day program. He was unaware that Shivam had only attended seven sessions at the Four Seasons Clinic after an osteotomy on his left leg in 2010. He acknowledged that the number of sessions could be as low as 14 sessions. Mr. Winch indicated that the number of sessions required would turn on an assessment made by the clinic following surgery.

[186] I assess the claim for rehabilitation services at $4,000 based on $2,000 per surgery.

3) Safety Devices

[187] Mr. Winch recommenced the purchase of a grab bar to assist Shivam with getting in and out of the bathtub at his parents' house. He also recommended the installation of a raised toilet seat. Mr. Winch explained that it would be beneficial post-surgery. Mr. Winch recommended a total of $300 for these items. I assess this claim at $300.

<u>Issue #4: Family Law Act claims</u>

[188] The plaintiffs, Saurabh Bhatt and Bina Bhatt, seek damages for a loss of care, guidance and companionship, loss of expenses and a lòss of income for Bina Bhatt, pursuant to the *FLA*, R.S.O. 1990, c F. 3.

[189] Section 61 of the *FLA* states, in part, that:

> 61. (1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.
>
> (2) The damages recoverable in a claim under subsection (1) may include,
>
> (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
>
> (b) actual funeral expenses reasonably incurred;
>
> (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
>
> (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
>
> (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

Loss of Guidance, Care and Companionship

[190] The plaintiffs submit that an appropriate range of *FLA* damages for Saurabh and Bina Bhatt would be between $40,000 to $60,000, given the age at which Shivam was injured, that he is their only son and the evidence about how close the Bhatt family was and how this incident has impacted their family unit. The defendant WBEL submits that the *FLA* claims should bear some relationship to the amount awarded to Shivam for general damages. The defendant submits that an award of $12,000 for each of Mr. Bhatt and Mrs. Bhatt is appropriate.

[191] I award $30,000 to each of Mr. Bhatt and Mrs. Bhatt.

Attendant Care Costs

[192] Mr. Bhatt and Mrs. Bhatt claims $30,000 for past attendant care costs pursuant to s. 61(2)(d) of the *FLA*. Mr. Winch recommended the payment of this amount to recover the assistance that Shivam received from his parents following the accident to: 1) help him get in and out of the bathtub on a daily basis; 2) to assist him to walk from his house to the school bus that picks him up at home and to provide the same assistance when he is dropped off at home by the school bus. Mr. Winch indicated that this service was required about one hour each day. He estimated the amount of attendant care to be $30,000 for services provided from November 2010 to October 2014 at the rate of $20 per hour. In cross-examination Mr. Winch agreed that no compensation should be paid for attendant care costs if such services were being provided by Mr. Bhatt and Mrs. Bhatt prior to the accident. The evidence of Mr. Bhatt and Mrs. Bhatt was that they had been walking Shivam to the bus as described above prior to the accident. Mr. Bhatt's evidence was that he had monitored Shivam getting into, and out of, the bathtub prior to the accident and that after the accident he also held his hand for support as Shivam got into, and out of, the bathtub. However, there was no difference in the amount of time spent providing these services to Shivam before and after the accident. Further, I think 60 minutes per day is an inflated estimate of time spent each day performing these services as Mr. Bhatt's evidence is that he did not stay in the bathroom while Shivam took a bath. At most, I would have awarded $15,000 for these services. However, I deny this claim given that there is no evidence that the amount of time spent providing these services increased following the accident. The available evidence suggests that the time spent providing these services did not increase after the accident.

Loss of Income

[193] Mrs. Bhatt claims $73,879.41 for loss of income for a six-year period following the date of the accident. She submits that she would have been working during that period had the accident not occurred. The amount of the loss is based upon Mrs. Bhatt's average annual employment earnings of $12,313.24 from the two years before the accident.

[194] The defendant WBEL submitted that this claim should be dismissed. I agree, and dismiss this claim for the following reasons:

1) Shivam attended school for the entire day and ate lunch at school. There is no evidence that Dr. Howard or any other health care professional, recommended or believed that Mrs. Bhatt should stay at home for six years from the date of the accident in order to care for her son due to injuries he sustained as a result of the accident;

2) The evidence shows that Mrs. Bhatt had other activities during the day other than employment;

3) Mrs. Bhatt was able to start an office administrator executive program at Centennial College in September 2014. She attends classes four days a week. Her program will be completed in April 2016. She expects that she will look for work once Shivam starts university later in 2016. As the defendant WBEL stated: "If she could go to college, she could work".

4) The evidence shows that Mrs. Bhatt had other persons who did, and could take care of Shivam, if needed. Shivam's grandparents lived with the Bhatt family during their visit to Canada from October 2012 until December 2013. She indicated that they took care of Shivam during that period. They offered to return to Canada to continue to care for Shivam however Mr. and Mrs. Bhatt refused their offer as they felt that, given their age, it would be a strain for them to do so.

5) According to Mrs. Bhatt, her inability to find work largely turns on the fact that Mr. Bhatt had rotating shifts until 2012 or 2013. Since that time Mr. Bhatt's hours have been 7 a.m. until 3 p.m.

6) Mrs. Bhatt states that she tried to find part-time work at Walmart and Dollarama without success. I am not persuaded that Mrs. Bhatt could not find entry level work that that starts each day after Shivam leaves for school;

[195] Further, with respect to the assertion that the Mrs. Bhatt's average income during the period 2010 to 2016 would be $12,313.24, had this accident not occurred, the available evidence shows that Mrs. Bhatt's employment income was $3,771, $12,436 and $12,190 for the years 2007, 2008, and 2009 respectively. Total income, including any employment income, for the years 2005, 2006 and 2007 was $6,747, $9,523 and $7,424 respectively. If I were going to award damages for lost income to Mrs. Bhatt, I would have averaged her employment income for the period 2005 to 2009 rather than just 2008 and 2009. As a result, using the available employment income information for the periods 2007 to 2009, her average employment income was $9,465.67 per year rather than $12,313.24 per year.

[196] Finally, Mrs. Bhatt's employment history does not suggest that she would have been employed for the entire six-year period after August 2010. Mrs. Bhatt testified that she worked in a clothing company in 2005 for six or seven months. She then worked at a chocolate manufacturing company intermittently from 2005 to 2007. Her last job ended in July 2009 after she was laid off from a furniture company that she had worked for since 2008. After being laid off in 2009 Mrs. Bhatt collected Employment Insurance. She did not look for work; however she took classes to improve her English language skills in order to secure a better job. In light of the above evidence, I would have applied a 50 percent contingency to her claim for loss of income.

Future Pecuniary Loss Claims

[197] Mr. and Mrs. Bhatt claim compensation for the following items described below:

ITEM	**AMOUNT ASSESSED** **(HST INCLUDED)**
Railings	$1,000.00
Bathroom Modifications	$20,000.00

Assessment for Psychological Counselling	NIL

Railings

[198] Mr. and Mrs. Bhatt claim $2,825 to replace two sets of railings at their house. Mr. Winch stated that there are steep stairs to Mr. and Mrs. Bhatt's house and several stairs inside the house. Both sets of railings adjacent to those stairs are loose. He recommends that the railings should be replaced. Mr. Winch estimated the cost of replacing the railings at $2,000 to 3,000. Mr. Winch did not explain why the railings had to be replaced rather than merely better secured, nor is it apparent that such repairs will be made given that about four and a half years have passed since the time of Shivam's injuries from the accident without such obvious safety concerns being addressed. I assess $1,000 for the repair or replacement of the railings.

Bathroom Modifications

[199] Mr. and Mrs. Bhatt claim $25,425 for the cost of modifying the bathroom in their house in order to install a "wheel-in" device that will permit Shivam to more easily access the bathtub. Their bathroom includes a standard bathtub that is 14 inches high. Mr. Winch states that it is difficult for Shivam to lift his legs to get in and out of the bathtub. Accordingly, he recommends that a "wheel-in" device be installed to permit Shivam to more easily access the bathtub. Based on very preliminary discussions with a few contractors, Mr. Winch estimated that the cost of this modification would be in the range of $20,000 to $25,000. I assess $20,000 for bathroom modifications.

Assessment for Psychological Counselling

[200] Mr. Bhatt and Mrs. Bhatt claim $2,000 for the future cost of assessing whether they require psychological counselling. In my view, this type of future pecuniary loss is not recoverable under s. 61 of the *FLA* even though it does not come within any of the discrete categories found in s. 61(2) of the *FLA*. In my view, this claim comes within the scope of s. 61(1) of the *FLA* as it is "...pecuniary loss resulting from the injury..." of their son.

[201] I assess $500 for this claim. More than four and a half years have passed since the date of the accident. In my view, if Mr. Bhatt and Mrs. Bhatt felt that they required a psychological assessment as a result of the accident, they would have likely obtained such assessment by now. Nothing in Mr. Winch's evidence nor in their own evidence before this Court suggested that Mr. and Mrs. Bhatt felt that they needed a psychological counselling assessment. Their comments to Mr. Winch were focussed on assessing whether Shivam need psychological counselling.

Summary

[202] The plaintiff Shivam Bhatt shall have judgment against the defendant WBEL in the amount of $173,693.23 calculated as follows:

1) Special Damages: $3,112.23;

2) General Damages: $140,000;

3) Future Pecuniary Loss: $30,581.

[203] The plaintiffs Mr. Bhatt and Mrs. Bhatt shall have judgment against the defendant WBEL in the amount of $81,000 calculated as follows:

1) Loss of Guidance, Care and Companionship: $30,000 for each of Mr. Bhatt and Mrs. Bhatt;

2) Attendant Care Costs: NIL;

3) Loss of Income: NIL;

4) Future Pecuniary Loss: $21,000.

[204] WBEL's counterclaim for contribution and indemnity against Mr. Bhatt is dismissed.

[205] The plaintiffs and defendant by counterclaim shall deliver their written cost submissions within two weeks of today's date. WBEL shall deliver its reply written cost submissions, if any, within four weeks of today's date.

Mr. Justice M. Faieta

Released: June 12, 2015

CITATION: Bhatt et al. v. William Beasley Enterprises Limited et al., 2015 ONSC 2168
COURT FILE NO.: CV-10-415838
DATE: 20150612

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SHIVAM BHATT, a Minor, by his Litigation Guardian, BINA BHATT, SAURABH BHATT and BINA BHATT

Plaintiffs

– and –

WILLIAM BEASLEY ENTERPRISES LIMITED and THE CORPORATION OF THE CITY OF TORONTO

Defendants/Plaintiffs by Counterclaim

REASONS FOR JUDGMENT

Mr. Justice M. Faieta

Released: June 12, 2015