NO. M158435
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JOHNBERLYN UY, by his litigation guardian, ELVIS AMURAO

PLAINTIFF

AND:

DALJIT SINGH DHILLON, DAY & ROSS INC, HER MAJESTY THE QUEEN IN RIGHT OF IN PROVINCE OF BRITISH COLUMBIA, AS REPRESENTED BY THE MINISTRY OR TRANSPORTATION AND HIGHWAYS AND VSA HIGHWAY MAINTENANCE LTD.

DEFENDANTS

PLAINTIFF UY'S CLOSING SUBMISSIONS re: LIABILITY

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INTRODUCTION

1. The plaintiff Johnberlyn Uy was born in the Philippines on August 27, 1974. He moved to Canada in or around 2008.

2. Prior to the Collision, Mr. Uy and his girlfriend, Ma Cezza De Leon, had been dating for four months; they met through an online dating service. Ms. De Leon, who moved to Canada from the Philippines in 2012, worked at a Tim Horton's in Kelowna, while Mr. Uy was a self-employed painting contractor in the Lower Mainland. Mr. Uy was planning to move to Kelowna to live with Ms. De Leon.

3. On January 30, 2014, Ms. De Leon finished her shift at Tim Horton's at 11:00 p.m. She and Mr. Uy thereafter departed Kelowna for Vancouver, where they planned to celebrate Chinese New Year together.

4. On January 31, 2014, at 2:23 a.m., a two-vehicle collision occurred on Highway #5 (the "Coquihalla") between Mr. Uy's 2003 Honda Element and a 2011 Freightliner "B-train" commercial transport tractor-trailer unit (the "Collision").

5. The defendant, Daljit Singh Dhillon, was the operator of the 2011 Freightliner Cascadia "B-train" tractor-trailer (the "Freightliner").

6. Day & Ross Inc. was the registered owner of the Freightliner and its two trailers. Day & Ross Inc. is an international commercial transport carrier that had contracted Mr. Dhillon's professional driving services.

7. Mr. Uy was the operator of the Honda. Mr. Uy, by his litigation guardian, Elvis Amurao, brings action against the defendants, Daljit Singh Dhillon and Day & Ross Inc., for damages for injuries and losses arising from the Collision, including a severe traumatic brain injury that has left him permanently impaired.

8. A plaintiff in her own action, Ms. De Leon, was the front seat passenger in Mr. Uy's Honda. She brings action for damages for her injuries and losses arising from the Collision, as against Mr. Dhillon, Day & Ross Inc., and Mr. Uy.

9. The plaintiffs' actions against VSA Highway Maintenance Ltd. and the Ministry of Transportation and Highways were earlier dismissed, by consent.

10. The plaintiffs' actions against the remaining defendants were bifurcated for the purposes of a joint liability trial. Damages trials are set to proceed at a later time.

PLAINTIFF UY'S THEORY

11. Mr. Uy's collision theory is simple: **Mr. Dhillon's Freightliner negligently "cut off" Mr. Uy's Honda in the "left lane", creating a sudden hazard, causing Mr. Uy to lose control in the agony of the imminent collision.**

12. This theory is consistent with a common sense approach to the preponderance of probabilities and several objectively verifiable facts:

    (a) Mr. Dhillon was operating a heavy commercial vehicle in a B-train combination. He weighed between 25,000 and 30,000 kg, several times more than the average passenger vehicle.

    (b) Mr. Uy was traveling at 70-80 km/h in the Honda Element and he was already established in the "left lane".

    (c) Mr. Dhillon elected to overtake a Super B at a time and place that was unsafe, creating an unreasonable risk of harm to other motorists sharing the highway.

    (d) At the material time, lane demarcations on Snowshed Hill were not visible. There was a "bare-like" well-travelled section on the left, and a lightly snow-and-sand covered section on the right. It was *likely* operating as a two-lane highway, but this is not a finding of fact necessarily critical to the result. What really matters is that Mr. Dhillon elected to change lanes in conditions where he could not see the lanes.

    (e) Mr. Dhillon's Freightliner entered what he believed to be the "middle lane", but the lanes were (a) not visible, and (b) likely condensed in width, because of what appears to be encroachment of a large snowbank on a narrowing shoulder that would have moved the Super B he was passing leftward.

    (f) Mr. Dhillon, at a critical point on the highway, moved his heavy vehicle into Mr. Uy's lane of travel, suddenly, without any signal or any other warning.

    (g) Mr. Dhillon failed to monitor his mirrors for approaching traffic from behind, or he would have seen Mr. Uy at some point. Mr. Dhillon had 300 metres of rearward visibility uphill, and Mr. Uy was traveling at a faster speed; Mr. Uy was not in consistently in a "blind spot". Even if he was, Mr. Dhillon had a duty to be aware of the traffic around him and exercise patience in watching for emerging traffic from his blind spots before commencing or continuing with his lane change to overtake the Super B.

    (h) Mr. Dhillon's Freightliner created a sudden hazard that Mr. Uy was forced to avoid, in the agony of an imminent collision. Mr. Uy aggressively turned

his vehicle to the right, but he lost control. But for the sudden hazard of Mr. Dhillon's Freightliner encroaching into his path, Mr. Uy would not have lost control and there would have been no collision.

(i) The point of impact was in the left, "bare-like" section of the road, immediately adjacent to the debris field observed in the photographs. This conclusion is wholly consistent with:

1) Ms. De Leon's eyewitness testimony that Mr. Uy was in the left lane;

2) The tire marks emanating from the left lane that lead directly to the Honda that both engineers attribute to the Honda; and

3) The obvious abrupt left edge of the debris field visible in the photographs that very likely was present in the left lane, but which was likely swept away by traffic and highway maintenance vehicles operating in the left lane after the Collision.

THE FREIGHTLINER

13. The defendant Day & Ross Inc. was the registered owner of the Freightliner tractor bearing New Brunswick license plate PTP518. The Freightliner was hauling two commercial trailers bearing Ontario license plates H9266W (front) and H8944W (rear), also owned by Day & Ross Inc.

14. The defendant Dhillon was operating the Freightliner and trailers with the consent of Day & Ross. If Mr. Dhillon is found at fault for the Collision, Day & Ross is vicariously liable for his negligence.

15. According to Mr. Dhillon, the Freightliner tractor alone weighed 8,900 kgs. It was hauling a combined total gross weight of approximately 15,000 - 20,000 kgs; the maximum gross capacity of both trailers was 44,000 kgs.

16. The exact weight of the load is unknown because the weight and balance documents relevant to this particular load are no longer available.

THE COLLISION

17. The Collision occurred on a southbound downhill section of the Coquihalla, approximately 600 metres from the Zopkios brake check, and approximately two kilometres north of the Great Bear Snowshed, nearest the first runaway lane.

18. This section of the highway is known as "Snowshed Hill" or, as some RCMP members know it, "The Smasher", because it is a particularly treacherous stretch of road renowned for collisions in winter. Indeed, at the direction of British

Columbia's Ministry of Transportation and Highways, VSA Highway Maintenance dedicates an additional plow truck to service just Snowshed Hill under an "Enhanced Maintenance" policy.

19. There are normally six highway lanes on Snowshed Hill, three northbound and three southbound. A concrete barrier divides opposing lanes of travel. The posted speed limit is 110 km/h.

20. The approximate air temperature at the time and place of the Collision was -8 C. The road surface temperature at the time and place of the Collision was approximately -7 C. There was no black ice and no active snowfall precipitation. The sky condition was overcast and clearing. However, lane demarcations were not visible due to sand and light compact snow cover from the previous day's weather storm.

21. The left southbound region of the roadway had less sand and compact snow than the right southbound region. As described by *both* engineering experts, the left side of the roadway was "bare-like". In the photographs, one can see some pavement on the left side of the roadway, but no pavement is visible on the right.

22. A snowbank had accumulated on the right shoulder of the highway, presumably due to earlier plowing of the highway. At the time of the Collision, VSA Highway Maintenance had yet to clear that snowbank up and over the curbside concrete barrier.

23. The defendant Mr. Dhillon stopped at the Zopkios brake check at approximately 2:15 a.m. on January 31, 2014, waiting for the VSA Highway Maintenance vehicles to pass. He estimates he was there for 3-5 minutes. He checked his brakes and cleaned his mirrors.

24. Mr. Dhillon re-entered the highway via the Zopkios onramp, he says with his four-way hazard flashers enabled.

25. A fully loaded and slow-moving Super B combination commercial flat-deck tractor-trailer was descending Snowshed Hill on the right side of the highway (the "Super B").

26. Mr. Dhillon elected to overtake the Super B. The Collision happened while Mr. Dhillon was in the process of overtaking the Super B.

27. Both involved vehicles were travelling at speeds below the speed limit of 110 km/h. Mr. Dhillon estimates he was operating the Freightliner at a speed of 30-40 km/h. According to Ms. De Leon, Mr. Uy's vehicle was traveling at 70-80 km/h.

28. Ms. De Leon also gave the following critical evidence:

- In reply to, “What happened?”, she said: “The truck came into our lane, and John turned his car to the right and everything happened.”

- “The truck was in the right lane, and we were in the left lane. We were ready to overtake the truck. But then the truck came into the lane. And John turned to the right.”

- “It came half-way into the lane and we saw the back and the side.”

- “It was really clear for me, I was the passenger and in the front, looking through the windshield. There was nothing obstructing my view.”

- “John had his headlights on.”

- Ms. De Leon said she “didn’t see any warning or any lights” on the truck before it encroached into their lane.

- Asked how many lanes there were, Ms. De Leon quickly and spontaneously answered, “two”.

29. Mr. Dhillon physically felt the collision impact. He brought his Freightliner to a stop.

30. The plaintiff’s Honda, following impact, came to rest perpendicular to the roadway, with its rear end abutting the snowbank against the curbside concrete barrier. The Honda had sustained substantial intrusion damage to the driver’s side of the vehicle’s cabin, causing the plaintiff to suffer a severe traumatic brain injury that has left him permanently impaired.

THE ACCIDENT SCENE

31. Cst. Marc Verrault of the Hope RCMP arrived on scene approximately one hour after the collision. Paramedics were already there, as was Mike Jackson of VSA Highway Maintenance.

32. Both Cst. Verrault and Mike Jackson gave evidence that they had no challenges getting to the accident scene (no loss of control due to ice or slippery conditions) and they had no challenges bringing their vehicles to a stop at the scene.

33. Both also gave evidence about the snowbank that sat adjacent to the curbside concrete barrier, occupying the shoulder. That snowbank may or may not have been encroaching into the curb lane; the fog line was not visible.

34. Light compact snow mixed with sand covered the roadway. Cst. Verrault and Cst. Byers gave evidence that you could not see the lane demarcations, obvious from the photographs. The photographs show a “bare-like” well-travelled section of the

highway on the left, and a more snow-covered section on the right. Each of Cst. Verrault, Cst. Byers, and Mike Jackson agreed that they have seen this highway operate as two instead of three lanes in winter road conditions; this is in any event a matter of common sense.

35. Cst. Verrault described the highway as "slippery" in his notes because of the snow cover, but he did not have his boot grips on and he did not lose traction while walking. Moreover, he did not walk on or near the "bare-like" side of the road.

36. Several responding vehicles attended the scene. The photographs show a heavily contaminated scene, with tire marks all over the light compact snow, and traffic continuing to travel through the open area of the road where Ms. De Leon says the Collision occurred, necessarily eroding any evidence that might have existed in the "left lane".

37. The RCMP never took any measurements at the scene, only photographs.

ENGINEERING EVIDENCE

38. The defendants rely upon an engineering opinion from Mr. Trevor Dinn. No weight should be afforded to Mr. Dinn's opinion.

39. First, as explained earlier by the plaintiff's responsive engineering expert Dr. Amrit Toor and conceded by Mr. Dinn, any engineering evidence is inherently imprecise since the RCMP never took measurements at the scene.

40. All of the engineering opinion is premised on circumstantial evidence observed in the RCMP's photographs. Indeed, this is why the plaintiff did not serve a primary engineering opinion: because there is simply not enough evidence to reliably reconstruct this accident. Dr. Toor was candid about this in his evidence. But, while Dr. Toor could not give an opinion about the precise point of impact, he was able to conclude that it was <u>unlikely</u> to be where Mr. Dinn says it was and he was able to point to a region southwest of where Mr. Dinn said it was.

41. Second, Mr. Dinn failed to acknowledge – or was instructed to ignore – several critical facts in his report.

    (a) Mr. Dhillon was in the process of overtaking a Super B at the material time. That Super B would have been occupying *at least* 2.6 metres of the slow lane abutting the snowbank. This fact is not accounted for at all in Mr. Dinn's assessment.

    (b) There were arced tire marks leading directly to the rear driver's side of the Honda that were indisputably connected to it, but Mr. Dinn makes only one pithy statement – in one sentence at page 5 – about this in his report.

Moreover, he could not and cannot reconcile how the Honda would have traveled from his assumed point of impact to those connected tire marks, other than – he speculates – back through the bare-like portion of the road, almost like a boomerang. It is difficult to comprehend just how this could have physically happened since another force would have had to be delivered in the bare lane in order for the Honda to be redirected to where it came to rest.

(c) There was a large snowbank on the right shoulder, such that Mr. Dinn admitted his "phase 3" placement of the Freightliner at rest was entirely wrong.

(d) He completely ignored the existence of the debris field, presumably because its placement and pattern did not support his theory about the point of impact. If we assume Mr. Dinn's point of impact, it necessarily leaves an 8-10 metre gap between the point of impact and the debris field, something that is highly unlikely unless, as Mr. Dinn speculated, the Honda was "stuck" to the rear of the trailer and debris was only strewn when it finally disconnected. This is nonsense and this suggestion reflects the lengths Mr. Dinn will go to as an advocate.

42. Mr. Dinn failed to concede even small points that he ought to have conceded in cross-examination. He took every opportunity he could in cross-examination to restate his theory. He may well have been vehemently defending his opinion and not necessarily his instructing party's position, but the Court should be cautious in considering his opinion at all.

43. Moreover, Mr. Dinn's insistence about his ability to comment on what happened *before* Mr. Uy's loss of control – followed finally by his concession after relentless cross-examination – is a big, red flag. Mr. Dinn changed his evidence. His opinion should be treated with extreme caution.

44. But we need not rely on Mr. Dinn's apparent advocacy to reject his opinion. We can reject it on the uncontroversial basis that the factual assumptions underlying it are simply not established; Mr. Dinn concedes the RCMP did not take measurements at the scene and that we are missing many of the puzzle pieces that might support a reliable reconstruction of this Collision. His theory is just that: a theory, but it is a less plausible theory as compared to the plaintiff's, since it fails to consider and cannot discredit critical evidence, including Ms. De Leon's eyewitness testimony.

THE LAW

Plaintiff Uy has no memory

45. Since Mr. Uy testified as to his memory, or lack thereof, no adverse inference can be drawn as it might be if he had failed to give evidence altogether. In these circumstances, the preferable practice is to call the plaintiff to testify as to his memory. Mr. Uy did so.

Rimmer (Guardian ad litem of) v. Langley (Township),
2007 BCCA 350 (CanLII), at para. 40

Credibility and reliability

46. The plaintiff Ms. De Leon, front-seat passenger in Mr. Uy's vehicle, says Mr. Dhillon's Freightliner's rear trailer intruded halfway into Mr. Uy's lane, suddenly and without warning, resulting in the Collision.

47. The defendant Mr. Dhillon denies his Freightliner intruded into the path of Mr. Uy's vehicle. However, he admits he was in the process of overtaking a Super-B at the material time.

48. Ms. De Leon's and Mr. Dhillon's competing evidence must be weighed to determine the most probable scenario.

49. Madam Justice Dhillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 (CanLII) gave a helpful summary of the principles to be employed when assessing credibility (at paras. 186-187):

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet* (Township) (1919), 59 S.C.R. 452, 50 D.L.R. 560(S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 354(B.C.C.A.) [*Farnya]; R. v. S.(R.D.),* [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends

on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 1993 CanLII 7140 (AB QB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

50. Ms. De Leon's eyewitness evidence about what happened in the moments before the Collision should be preferred where it conflicts with Mr. Dhillon's evidence:

(a) Ms. De Leon was forthright and sincere in her evidence. When she was challenged in cross-examination about the certainty of her recollection as to how this Collision happened, and why Cst. Standcumbe had allegedly incorrectly recorded that she said the trailers was "swinging back and forth" but two weeks later recorded, in a signed statement, that the trailer "merged" into Mr. Uy's lane, she answered, "***Because I was there***."

(b) In Chief, asked if she was certain of her recollection of events, she replied, "Yeah, scene that I never, never forget. That is the reason why we have the accident." She went on to say that this memory "always haunts me".

(c) Ms. De Leon's recollection of the Freightliner's encroachment has been steadfast. In her signed, transcribed interview with Cst. Standcumbe of February 13, 2014, just two weeks following the Collision, she was recorded as saying:

> "We were driving and we were in the left lane and the truck was in the right lane. When were (sic) to overtake the truck. I saw the truck ahead of us start to merge into our lane. Then, instead of hitting the back of the truck, Jon turned to the right to avoid hitting the back end. It was too late, we hit the back of the truck anyway. "

This was a prior consistent statement admitted into evidence as an exhibit during cross-examination.

(d) Ms. De Leon is uninfluenced by Mr. Uy who, because of his injuries, was unconscious when she spoke with the RCMP. To this day, he has no recollection of the Collision. Ms. De Leon presently lives in Mississauga, Ontario with her new partner and two young children; she is no longer connected with Mr. Uy.

(e) Ms. De Leon is a financially uninterested witness, since as a passenger suing both drivers, her recovery of an award for her own damages does not depend on the liability trial's outcome.

(f) In cross-examination, Ms. De Leon was asked why she used the word "skidding" at her examination for discovery to describe the movement of the trailer. She answered by explaining that, to her, since English is not her first language, "skidding" was the same thing as moving or shifting. She went on to say that "I am not sure with whatever word I used before, but I am very sure the truck came into our lane and John turned to the right but I am not sure what words I've used before."

(g) Ms. De Leon's evidence is in harmony with the other facts in this case, including the fact of the Collision at all. In the absence of the imminent hazard of the Freightliner moving into his lane of travel, Mr. Uy had no reason to "aggressively" turn his vehicle to the right, causing his loss of control. The location of the Collision was on a left-leaning stretch of road; if there was any loss of control due to ice, he would have gone left. The leftmost lane was "bare-like" and well-travelled. Mr. Jackson said the prevailing conditions were not those in which black ice could form. Mr. Jackson also gave evidence that he consistently drove this stretch of highway at 80 km/h in these same conditions, and that this was a reasonably safe speed for these conditions. No other vehicle lost control in or around the vicinity of the Collision. All of the first responders' vehicles were able to safely navigate the scene. In the absence of the Freightliner's intrusion creating a sudden hazard, there is simply no explanation for Mr. Uy's loss of control.

51. Mr. Dhillon's evidence is less reliable than Ms. De Leon's and it does not fit with the surrounding facts:

(a) In the first half-hour of his cross-examination, Mr. Dhillon was impeached five times with inconsistencies between his examination in chief and his examination for discovery. The most glaring inconsistency was his estimate of how long he alleges he was in the "middle" lane before impact: at discovery, he said 1-2 minutes, and in examination in chief, he said 2-3 minutes on one occasion and 3-4 minutes on another. He also gave inconsistent evidence about the gross weight of his load, just how many

vehicles were ahead of him at the Zopkios brake check before descending Snowshed Hill, and just how fast the Super B he was overtaking was travelling. Mr. Dhillon explained away these inconsistencies by saying he was only giving "estimates". At minimum, Mr. Dhillon was apathetic and careless in his various "estimates" but the inconsistencies speak to the unreliability of his evidence overall.

(b) It is impossible for Mr. Dhillon to say with any confidence whether he encroached into Mr. Uy's lane of travel because lane demarcations were not visible at the material time. Until the RCMP's photographs of the scene were put to him near the end of his cross-examination, he insisted he could see the lines dividing the lanes. He thereafter changed his evidence once he viewed the photographs, insisting instead that he knew where the lanes were because he has driven that highway hundreds of times.

(c) Mr. Dhillon insisted he was firmly established and did not deviate from "the middle lane". This oral evidence cannot be reconciled with the hard evidence in this case, including the RCMP's photographs showing a large snowbank accumulation on the right shoulder of the roadway. Just how wide the shoulder was and how big the snowbank was is immaterial. The fact it existed, however, is very relevant. Mike Jackson explained that VSA had not yet cleared the snowbank up and over the concrete curbside barrier. The snowbank either encroached into the curb lane of the highway, or came very close to doing so. In any event, the fog line was not visible. The lanes themselves, according to Mr. Dinn, are 3.65 metres in width. The mystery Super-B had an estimated width of 2.6 metres, the same as the Freightliner. This necessarily means that the Super B was likely encroaching into what would normally be "the middle lane", particularly since the shoulder narrowed in or around the scene of the Collision, as shown in Mr. Dinn's Figure 12. Mr. Dhillon said he kept a minimum clearance of 3-4 feet (or one metre) from the Super B. This means he likely would have also encroached into the far left, fast lane of travel – over the edge of the travelled portion of the road identified by Mr. Dinn – consistent with what Ms. De Leon perceived and described as "half-way" into Mr. Uy's lane. And Mr. Uy was on the bare-like travelled portion of the highway, as Ms. De Leon explains it, in the "left lane".

(d) Mr. Dhillon is an interested party. He was defensive in his answers, and evasive at times. He even speculated that Mr. Uy must have been travelling 120 km/h, presumably in an effort to villainize Mr. Uy.

(e) Mr. Dhillon's evidence about cleaning his mirrors at the rest stop is convenient, particularly since he says he stopped for only 3-5 minutes and in that time he says he also performed a brake check. But, the fact he says he cleaned his mirrors is an implicit admission that he knew or ought to have known he should be looking for faster, smaller traffic approaching from behind as he descended Snowshed Hill. It is obvious that he failed to do

so since his mirrors were clean and he had rearward visibility of approximately 300 metres. He would have seen Mr. Uy's vehicle if he had looked, before changing lanes or, if he had already changed lanes, he ought to have given way to him.

Fault

52. In a rear-end collision, an inference of negligence is usually drawn if there is no explanation as to how the collision could have occurred in the absence of the following driver's negligence.

Wright v. Mistry, 2017 BCSC 239 (CanLII), at paras. 16-18

53. This was no ordinary rear-end collision, for example as often occurs at a red light or a stop sign. This collision occurred on the Coquihalla Highway, at speed, while the defendant was overtaking another tractor-trailer.

54. Moreover, the plaintiff, Ms. De Leon, has given the requisite explanation to rebut the usual inference. She says Mr. Dhillon's tractor-trailer encroached on their vehicle's lane of travel, such that Mr. Uy was faced with a sudden hazard, resulting in his loss of control and the Collision.

55. Upon the Court accepting Ms. De Leon's evidence about the encroachment of Mr. Dhillon's Freightliner into Mr. Uy's lane before the Collision, the surrounding facts and the law support a finding that Mr. Dhillon is 100% at fault for this Collision.

Defendant Dhillon's standard of care

56. Section 144 of the *Motor Vehicle Act* prohibits a person from driving a motor vehicle on a highway without due care and attention and without reasonable consideration for other persons using the highway.

57. Section 151(a) prohibits a driver from changing lanes if it is unsafe to do so or if it will affect the travel of another vehicle:

> 151 A driver who is driving a vehicle on a laned roadway…
>
> (a) must not drive it from one lane to another when a broken line only exists between the lanes, unless the driver has ascertained that movement can be made with safety and will in no way affect the travel of another vehicle,

58. Subsection 151(c) has no requirement that another vehicle be endangered if it is accepted that Mr. Dhillon encroached into Mr. Uy's lane of travel without first signaling his intention to do so:

> 151 A driver who is driving a vehicle on a laned roadway…
>
> (c) must not drive it from one lane to another without first signalling his or her intention to do so by hand and arm or approved mechanical device in the manner prescribed by sections 171 and 172

see also *R. v. Hugh,* 2014 BCSC 1426 (CanLII) at para. 79

59. Section 159 governs passing on the left:

> 159 A driver of a vehicle must not drive to the left side of the roadway in overtaking and passing another vehicle unless the driver can do so in safety.

60. The Court does not require any expert opinion to be critical of Mr. Dhillon's exercise of care on these simple facts.

61. In *MacEachern v. Rennie,* 2009 BCSC 585 (CanLII), Mr. Justice Ehrcke allowed the *admission* of expert evidence on the issue of a professional tractor-trailer driver's standard of care. But this decision does not stand for the principle that a trial judge must have expert opinion evidence to determine fault against a tractor-trailer driver. It simply stands for the proposition that expert evidence is *admissible* to assist the trier of fact in determining the applicable standard of care where technical facts beyond the ordinary experience of the trial judge are at issue. Indeed, in his trial decision (2010 BCSC 625), Mr. Justice Ehrcke made the following remarks (at para. 549):

> The standard of care in motor vehicle accident cases is **usually determined without reference to expert evidence**, but such evidence **may** be considered in a case involving a large commercial vehicle. In *Tucker (Public Trustee of) v. Aselson* (1993), 1993 CanLII 2782 (BC CA), 78 B.C.L.R. (2d) 173 (C.A.), Southin J.A. wrote at pp. 194-195:
>
> > To my mind, motor car negligence cases differ significantly from all other actions in which one person alleges that the acts or omissions of another in breach of a duty of care have done him injury.
> >
> > First, the Legislature has laid down for motorists many rules of the road and many requirements concerning the equipping of vehicles, all of which the motorist is expected to obey and which he expects others to obey. The only other aspect of ordinary life so governed is that of the movement of vessels upon certain navigable waters. But I do not say that obedience to these rules relieves the motorist from all other obligations. See *British*

Columbia Electric Railway v. Farrer, 1955 CanLII 43 (SCC), [1955] S.C.R. 757.

Secondly, experts are not called to prove the standard of care which is appropriate. **Each judge brings into court his or her own notions of what constitutes driving with reasonable care.** As I said in *McLuskie v. Sakai* in a passage quoted in the appeal from my judgment (1987), 1987 CanLII 2757 (BC CA), 12 B.C.L.R. (2d) 372 at 378 (C.A.):

> The difficulty with these motor car cases and matters of negligence is that whatever we may be saying, what we are doing as judges is, in fact, applying our own knowledge of driving to the facts in the absence of any other evidence. That is what a judge does every time he says that the defendant should have avoided an obvious obstruction. I, on the balance of probabilities, am not satisfied that a competent driver coming upon that ice on that bridge on that morning with both hands on the wheel could have done other than Mr. Sakai did. Therefore, it follows that I do not think he was negligent.

To put it another way, in motor car cases the judge is his or her own expert. That is not to say that there could not be expert evidence on the proper way, for instance, for the driver of a mammoth transport vehicle to drive. If, on such an issue, the plaintiff called an expert to say that such a vehicle should not be driven under certain circumstances at more than 40 miles per hour and the defendant called another expert who said the contrary, the learned trial judge could and usually would be obliged to choose one expert over the other.

[Emphasis added]

62. Similarly, in *Murao v. Richmond School District No. 38,* 2005 BCCA 43 (CanLII), Mr. Justice Lowry for the Court made the following remarks (at paras. 11-12):

> The standard of care is the measure by which the discharge of the duty owed by one person to another is determined in the law of negligence. Where the conduct in question conformed to a recognized or general practice in any given circumstance, the standard of care required is normally met. **In cases where the nature of the conduct in question is beyond the common understanding of judge and jury, as in medical malpractice cases, expert evidence is routinely introduced to prove an established practice and hence the requisite standard of care**: *ter Neuzen v. Korn*, 1995 CanLII 72 (SCC), [1995] 3 S.C.R. 674, 127 D.L.R. (4th) 577. **By contrast, in motor vehicle negligence cases, evidence**

of an accepted practice often need not be adduced to establish the standard of care either because the practice to be followed in any given instance has been prescribed by legislation or because what is required is so broadly understood as a matter of common sense by everyone regularly travelling on city streets and provincial highways: *Tucker (Guardian Ad Litem of) v. Asleson* (1993), 1993 CanLII 2782 (BC CA), 102 D.L.R. (4th) 518, 78 B.C.L.R. (2d) 173 (B.C.C.A.) at 553.

…. The standard may be derived from evidence of a general practice that prevailed, or from evidence of what might reasonably have been done to prevent the injury that gives rise to the cause of action, **or from the simple application of common sense where the circumstances permit it**.

[Emphasis added]

63. In *Wang v. Horrod,* 1998 CanLII 5428 (BCCA), the Court emphasized the distinction to be made between an allegation that a bus failed to meet a standard of care applicable to all motor vehicles versus an allegation that a bus failed to meet a standard of care with respect to "acts or omissions which are peculiar to a bus as a public conveyance" (at paras. 68-70):

There is a distinction to be drawn in the case of alleged negligence arising from the operation of a public conveyance such as a bus between those cases in which the accident is alleged to be caused by bad driving of a bus in what I will call its persona as a motor vehicle, and those in which it is said to be caused by acts or omissions which are peculiar to a bus as a public conveyance.

Much of the competent driving of a bus is the same as the competent driving of any other motor vehicle – the driver should obey the rules of the road as laid down in Part 3 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, keep a proper lookout, be aware of the conditions of the road, and so forth.

I have remarked previously that, as driving motor vehicles is something judges and juries do, it is not necessary to have expert evidence on proper driving [*Tucker v. Asleson* (1991), 1993 CanLII 2782 (BC CA), 78 B.C.L.R. (2d) 173 at 194-95]. We are all experts on proper driving, or so we think. **We consider ourselves, governed in part by the rules of the road, able to decide whether a motorist has fallen below the standard of reasonable care**.

[Emphasis added]

64. There is nothing technical about the facts of this particular case. Her Ladyship does not require the assistance of expert opinion to make the following findings:

(a) Mr. Dhillon's Freightliner was a heavy commercial vehicle weighing several times more than the average passenger vehicle.

(b) Mr. Dhillon was operating his Freightliner on a steep descent on the Coquihalla Highway, in winter conditions, at a slow speed.

(c) Mr. Dhillon knew that smaller, faster vehicles would approach him from behind and overtake his Freightliner in the usual course.

(d) Mr. Dhillon knew he should be checking his mirrors in order to take notice of and give way to vehicles approaching from behind. This is why he cleaned his mirrors at the Zopkios brake check.

(e) Mr. Dhillon knew his heavy commercial vehicle posed a hazard to approaching vehicles because of its size and slower speed. Indeed, this is why there is a well-observed common practice for tractor-trailer drivers to activate their four-way flashers whilst descending or ascending hills.

(f) Mr. Dhillon elected to overtake another heavy commercial vehicle in winter road conditions, where the highway lane demarcations were not visible and snow encroachment on the shoulder and into or abutting the curb lane had altered the flow of traffic and condensed the width of what was ordinarily a three-lane highway. In electing to overtake in lieu of staying behind the Super B, at least until at a lower elevation where road conditions might be improved, Mr. Dhillon unreasonably increased the risk of serious injury to other motorists around him. He chose speed over safety.

(g) Mr. Dhillon encroached into Mr. Uy's lane of travel suddenly and without warning. He did not signal before doing so. This created an unexpected hazard for Mr. Uy.

65. Moreover, Mr. Dhillon gave evidence during cross-examination about his own standard of practice with respect to overtaking and other matters, and he also made various admissions that he failed to meet his own expressed standard.

Analogous cases

66. In *Lowe and Einfeld v. Greyhound Canada Transportation Corp,* 2008 BCSC 64 (CanLII), the plaintiff was in the left lane, overtaking a bus on Highway 97 in winter conditions. The lane markings were "completely obliterated" due to snow cover and the vehicles were following tracks on the road. The bus started to move into the left lane as the plaintiff was beside it, requiring her to take evasive action, but she then suffered a loss of control due to the poor road conditions. The bus operator was found 100% at fault for the collision. At paragraph 44, the Court said it was reasonable for the plaintiff to assume the bus would not merge into her lane

until she had safely passed it. At paragraph 45, the Court said "it is not possible to know whether a more skillful driver would have been able to maintain control of the vehicle and it is not reasonable to criticize her judgment for decisions made basically in the agony of the collision".

67. *Wellington v. Hopkins,* 2000 BCSC 1072 (CanLII) involved a head collision on Highway 97 between a tractor-trailer and a pick-up truck in white-out conditions. There was loose snow on top of a layer of compact snow; neither the centre line nor the fog lines were visible. The main issue at trial was whether one or both vehicles were encroaching into the opposing lane of traffic. As a result of first responders attending at the scene and the snow on the surface, it was "impossible to attempt to ascertain what happened by examining marks on the road which may or may not have been present as a result of the accident", and debris was also moved (at para. 2). The parties were left to rely on RCMP photographs taken one hour after the collision. There was no independent witness of the actual accident, either, and one party had no memory of the collision because of his injuries. But there were witnesses who gave evidence that the pick-up truck driver, before the collision, had been driving too fast for the conditions. The Court gives helpful comment on the obligations of drivers of vehicles when the centre line on a road cannot be seen (at paras. 37-38, citing *Ryall v. Coombs,* [1995] N.J. (QL) No. 230 (Nfld.S.C.). Where lane markings are obscured by snow, a driver is entitled to follow the tire tracks and expect that another driver will follow their own tracks, and the provisions of s. 150(1) of the *Act* still apply:

> For the purposes of determining whether a driver is driving in accordance with the provisions of s. 150(1) when it is not possible to ascertain the exact centre of the "roadway", the driver of the vehicle must confine the course of his or her vehicle to the right hand half of the travelled portion of a roadway. Accordingly, the questions that must be determined in this case will relate to the travelled portion of the highway and not to the question of where the vehicles were in relation to the centre line marked on the highway.

68. Notably, in *Wellington,* the point of impact could not be determined by any of the experts. On the available evidence in that case, the Court concluded that he pickup driver and not the tractor trailer driver encroached upon the opposing lane of travel; he did so either deliberately to overtake another tractor-trailer or, alternatively, he did so because he was disoriented by a snow cloud after following too close to another tractor-trailer.

69. In *Stanikzai v. Bola,* 2012 BCSC 846 (CanLII), the plaintiff's vehicle struck the rear of the defendant's vehicle, but the plaintiff alleged this occurred because the defendant suddenly moved into his lane of travel. The defendant driver denied the allegation, and said she had been in the left lane for "a couple of minutes" and did not see the plaintiff's vehicle before the impact from behind. The Court went on to review the applicable law and to weigh the conflicting facts (at paras. 7-10):

> There is no doubt that when one vehicle hits another from behind, the onus is on the driver of the rear vehicle to show that the collision was not caused by his or her fault: *Barrie v Marshall*, 2010 BCSC 981 (CanLII). A driver following other vehicles is expected to keep his vehicle under sufficient control to be able to deal with sudden stopping or slowing of the vehicle in front: *Pryndik v. Manju*, 2001 BCSC 502 (CanLII).
>
> But while liability for a rear end collision usually rests entirely with the following driver, that is not an invariable result. For example, in *Saffari v Lopez*, 2009 BCSC 699 (CanLII), both drivers were found to be equally at fault for a rear end collision. In that case, the front driver stopped or slowed suddenly, ostensibly to retrieve a fallen cigarette, but the court found that the rear driver was travelling either too fast or too close behind to stop when confronted with the hazard.
>
> …. I find that the defendant, in changing lanes, failed to notice or properly assess the position of other vehicles, and failed to ensure that she had sufficient room to change lanes safely. Section 151(a) of the *Motor Vehicle Act,* R.S.B.C. 1996, c. 318 reads:
>
> > 151 A driver who is driving a vehicle on a laned roadway
> >
> > (a) must not drive from one lane to another when a broken line only exists between the lanes, unless the driver has ascertained that movement can be made with safety and will in no way affect the travel of another vehicle,

70. In *Brook v. Tod Estate,* 2012 BCSC 1947 (CanLII), the plaintiff was a passenger in her husband's Dodge pick-up truck, westbound on Highway 1, approaching a descent. There were two eastbound, uphill lanes for opposing traffic, but only one single lane westbound. The defendant Tod, who suffered fatal injuries in the collision, was operating a Toyota and he was forced into the westbound lane to evade Ms. Goodrick, who had suddenly changed lanes into his in order to overtake a camper in the slow lane. She gave detailed evidence about checking her mirrors, doing a shoulder check, and activating her turn signal before beginning to move her vehicle to its left. She said she did not see Mr. Tod's Toyota until she did her final shoulder check. At that point, she said Mr. Tod's Toyota made an abrupt swerve into the oncoming westbound lane but that she had at no time actually crossed over the broken line marking the change between the two eastbound lanes. In other words, she denied encroaching into Mr. Tod's vehicle's path, such that he was forced into oncoming traffic. At paragraphs 22 and 23, the Court engaged in a review of the law and found that Ms. Goodrick was negligent:

> There is a duty imposed on drivers by s. 151(a) of the *Motor Vehicle Act* not to change lanes unless that movement can be safely made and without affecting the travel of other vehicles. Even if that subsection did not exist, the common law duty to take reasonable care to conduct oneself so as to avoid injury to one's neighbour would apply. I find Ms. Goodrick failed to take reasonable care when she changed lanes.
>
> I will add that it was negligent on her part not to have seen Mr. Tod's vehicle earlier as she travelled up the hill. If she had been alert to his presence, she could have avoided presenting the danger to him that led to his evasive actions. I do not accept Mr. Tod's presence in her blind spot excuses her failure to see his car. She had a legal obligation to be aware of the traffic near her.

71. In *Wepruk v. Martinuk,* 2015 BCSC 2561 (CanLII), the plaintiff Ms. Wepruk was driving her Ford Explorer SUV northbound on the Coquihalla. She made an unsafe lane change and collided with a motorcycle operated by the defendant, Ms. Martinuk. One would think that Ms. Martinuk would be the plaintiff, but Ms. Wepruk was advancing a claim for her own injuries, alleging Ms. Martinuk, on her motorcycle, was the negligent party. Specifically, she alleged she was traveling only 40 km/h because her SUV's tire blew out, and as she changed lanes to pull her vehicle to the side, a collision with Ms. Martinuk's motorcycle resulted. She argued that liability resulted with Ms. Martinuk for failing to take evasive manoeuvres and for having run into her. Ms. Martinuk gave conflicting evidence, saying that the plaintiff's SUV suddenly and without warning did a lane change into her. The court accepted Ms. Martinuk's evidence, corroborated by another independent motorist, and concluded at paragraph 28 that the "accident occurred solely because of the plaintiff having made an unsafe lane change…. This accident most probably occurred due to no fault on the part of the defendants."

72. When a driver is going to pass another vehicle, he must be reasonably certain it is safe to do so. If there is uncertainty, the obligation of the passing motorist is to wait until it is reasonably safe to do so.

Ali v. Fineblit, 2015 BCSC 1494 (CanLII), at para. 21

Causation

73. First, there is direct evidence of causation here: Ms. De Leon says that Mr. Uy lost control of his Honda because he was forced to "aggressively" steer to the right when the Freightliner's trailer encroached into his lane.

74. Even in the absence of this direct evidence on causation, the "common sense" approach to "but for" causation has application. The Court can reasonably infer that Mr. Uy would not have lost control but for Mr. Dhillon's encroachment into his

lane. Scientific proof of causation is not required; common sense inferences from the proven facts may suffice.

Borgfjord v. Boizard, 2016 BCCA 317 (CanLII), at para. 55, citing *Clements (Litigation Guardian of) v. Clements,* 2012 SCC 32 (CanLII) at paras. 38, 46.

See also *Curtiss v. The Corporation of the District of West Vancouver,* 2018 BCSC 509 (CanLII) at paras. 69-71

75. On these facts, a common sense inference can be made finding Mr. Uy would have never aggressively steered his vehicle to the right and lost control in the absence of a hazard avoidance, and the only available hazard was Mr. Dhillon's Freightliner's rear trailer. There is simply no other plausible explanation for his loss of control.

Agony of the collision

76. The defendants Dhillon and Day & Ross carry the burden of proving contributory negligence. But there is zero evidence to support such a finding.

77. Rather, Ms. De Leon's evidence completely absolves Mr. Uy of responsibility for this collision. He was operating the vehicle well below the speed limit, at 80 km/h, and Mr. Jackson of VSA Highway Maintenance gave evidence that it was customary for him to drive his own truck at 80 km/h in light compact snow cover conditions such as those that existed at the material time. There is no evidence that Mr. Uy's speed or inattention was a contributing factor.

78. There is no evidence that Mr. Uy's decision to aggressively turn his vehicle to the right was negligent. Moreover, he was in the agony of the impending collision and cannot be held to a standard of perfection.

79. In *Lowe and Einfeld v. Greyhound, supra*, where the plaintiff was avoiding an encroaching bus in winter conditions, the Court said (at para. 45): "it is not possible to know whether a more skillful driver would have been able to maintain control of the vehicle and it is not reasonable to criticize her judgment for decisions made basically in the agony of the collision".

80. In *Brook v. Tod Estate, supra* (at paras. 26-27):

> Mr. Tod's counsel stresses the law in relation to the agony of collision which would exonerate Mr. Tod of mistakes which he made in an emergency situation. In *Van Zanten v. Bruhs*, 1991 CanLII 1023 (BCSC), Mr. Justice A.G. Mackinnon referred to *Carswell's Manual of Motor Vehicle Law*, Volume III, 3rd edition, at page 22, where there is a discussion of agony of collision. These words are found:

> In a number of cases concerning what is commonly called 'agony of the collision,' it has been pointed out that a driver acting in an emergency created by another vehicle or by some extraneous fact cannot be expected to exercise nice judgment and prompt decision, and mere errors of judgment in such circumstances may often be excusable … Where an emergency arises, it is not necessary for a driver to possess extraordinary skill, presence of mind, poise or self-control, and his failure to act as an ordinary person in an emergency is not held to be negligence. He is not necessarily required to adopt the most prudent course and is entitled to a reasonable time, depending on the circumstances, to exercise his judgment as to what steps should be taken to avoid a collision [citations omitted.]

Counsel has submitted that it was Mr. Brook who faced the agony of collision and yet his evasive efforts, although fruitless, have not been characterized as negligence. On the other hand it is argued Mr. Tod had choices available to him and his circumstances cannot be properly characterized as the agony of collision. Notwithstanding the able arguments of Ms. Goodrick's counsel, I do not agree that Mr. Tod did not face an agonizing choice with no time to make a considered decision. I have found Ms. Goodrick's vehicle intruded into the fast lane already occupied by Mr. Tod's vehicle. She began her lane change and simultaneously saw Mr. Tod's vehicle overlapping hers by several feet. It was not realistic to expect Mr. Tod to make an instantaneous decision to accept a collision, no matter how minor it might in retrospect have been, with Ms. Goodrick's vehicle. In the negligible time available to Mr. Tod, he cannot have been expected to weigh that fine calculation. It is true he could have braked. One difficulty with that proposition is that it cannot be now known if he both braked and swerved. What we do know from the evidence of Mr. Leggett is that Mr. Tod was travelling at a safe speed. He did not create the danger that caused him to react in the agony of the moment. If there had been a collision between his car and Ms. Goodrick's car, we cannot know if one or both of those cars would have lost control leading to this accident.

81. Mr. Uy was in no way contributory negligent. He was entitled to expect Mr. Dhillon would obey the rules of the road. He was not required to anticipate that Mr. Dhillon would negligently encroach upon his own established lane of travel.

Ali v. Fineblit, *supra*, at para. 20

Missing evidence

82. The defendants have lost relevant documents pertaining to the Freightliner's weight and balance, including the bill of lading, which Mr. Dhillon says would have given us the exact weight of the load.

83. Moreover, photographs and video Mr. Dhillon personally took with his phone at the scene of the Collision are also lost, despite the fact Mr. Dhillon says he gave them to Day & Ross. Mr. Sullivan of Day & Ross purports to have no knowledge of the existence of these photographs or video.

84. In Mr. Carter's words in his audio-recorded interview of Mr. Dhillon on March 2, 2014, Mr. Dhillon's video "is the best thing in the world" (at 10:08). You can also hear Mr. Carter saying, as he is viewing the video on Mr. Dhillon's phone, "this is still on the highway" (at 07:15), meaning Mr. Dhillon's video and/or photographs were taken before the RCMP's photographs, before he moved his Freightliner to the side of the road. This evidence would have demonstrated the exact rest position of the Freightliner following impact.

85. There is no suggestion that the loss of this evidence was deliberate. However, the defendants appear to have approached Mr. Uy's claim for his injuries somewhat apathetically. The apathy was present in both Mr. Dhillon's and Mr. Sullivan's testimonies.

86. Mr. Uy is not asking for an adverse inference to be drawn, nor is he asking for any formal exclusion order of specific evidence.

87. But there must be some civil remedy for the prejudice naturally arising to the plaintiff through the unavailability of this evidence. Mr. Uy was unable to pursue an entire train of inquiry regarding how the trailers' weight or balance may have contributed to this Collision. The scene photographs and video would also have provided critical evidence with respect to where exactly Mr. Dhillon's Freightliner was on the highway immediately following impact.

88. It was incumbent on the defendants to take reasonable steps to preserve all relevant evidence, including bills of lading and other shipping documents, as well as photographs and video of the accident scene. Day & Ross specifically assigned an adjuster immediately after the Collision to investigate, yet this critical evidence was not preserved.

89. In *Chow-Hidasi v. Hidasi,* 2013 BCCA 73 (CanLII), the plaintiff suffered injuries in a single vehicle collision. Her action was dismissed at trial with a finding of no negligence because mechanical failure may have contributed to her husband's loss of control of the vehicle. The plaintiff argued that an adverse inference should be drawn against the defendant because the vehicle was prematurely destroyed by ICBC. The Court of Appeal affirmed the Supreme Court's summary trial decision, and in doing so provided the following helpful summary on the law of spoliation (at paras. 29-30):

> On the present state of the law, it is clear that spoliation requires intentional conduct: see *St. Louis v. Canada* (1896), 25 S.C.R. 649; *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353 at para. 29; *Endean v. Canadian Red Cross Society* (1998) 157

> D.L.R. (4th) 465 (B.C.C.A.); *Dawes v. Jajcaj*, 1999 BCCA 237 at para. 68; and the discussion in *Holland v. Marshall*, 2008 BCCA 468 at paras. 70-2. (I understand 'intentional' to mean 'with the knowledge that the evidence would be required for litigation purposes'.) As stated in *McDougall v. Black & Decker*, "When the destruction is not intentional, it is not possible to draw the inference that the evidence would tell against the person who has destroyed it." (Para. 24).
>
> The Court observed in *McDougall* that where evidence has been destroyed unintentionally, a court of law may fashion a civil remedy to assist in ensuring the fairness of a trial. A costs award may be made, or evidence may be excluded. We were not referred to any case binding on us, however, that would indicate that such remedies would include the drawing of an adverse inference such as that sought in this case by Ms. Chow-Hidasi. (See *McDougall*, para. 25, British Columbia Law Institute, *Report on Spoliation of Evidence* (2004), at 10-20.)

90. Mr. Uy seeks two remedies for the defendants' loss and/or destruction of relevant evidence in this case:

(a) The court should be mindful of the lost video and photographs in assessing the weight to be afforded to Mr. Trevor Dinn's opinion about the position of the Freightliner, to ensure a fair trial on the merits; and

(b) An order for special costs ought to be made after judgment.

91. Her Ladyship has discretion under Rule 14-1 to make a costs order as a remedy for the destruction of evidence in this case. Rule 14-1(14) reads:

> Costs arising from improper act or omission
>
> (14) If anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court or a registrar may order
>
> (a) that any costs arising from or associated with any matter related to the act or omission not be allowed to the party, or
>
> (b) that the party pay the costs incurred by any other party by reason of the act or omission.

92. The British Columbia Law Institute's Report on Spoliation of Evidence (BCLI Report No. 34, November 2004) specifically suggests that then-subrules 57(3) and (14) provide the requisite authority for special costs (at page 15):

> Rule 57 deals with costs. It does not contain a subrule that addresses spoliation directly. Rule 57 (14), which is concerned with costs arising from an improper act or omission, comes the closest to being a provision directed at spoliation. Under rule 57 (14) the court or the registrar may award costs against or withhold costs from a litigant "[w]here anything is done or omitted improperly or unnecessarily, by or on behalf of a party. . ."
>
> … One case has cited a litigant's ". . . delay . . . in completing discoveries, producing documents, and providing particulars" and his opponent's ". . . poor recollection and inadequate records" as bases for making an order under rule 57 (14). The court did not find that the delay in producing documents and the inadequacy of record-keeping were due to spoliation. Nevertheless, spoliation could cause these results in other cases, and give a court scope to make an order under rule 57 (14).
>
> The other subrule that is significant in this context is rule 57 (3), which describes the power to order special costs. The court will award special costs in the face of "scandalous," "outrageous," or "reprehensible" conduct "as a form of chastisement." The word "reprehensible" has been interpreted as having a wide meaning, one that embraces "milder forms of misconduct" that are "deserving of reproof or rebuke." Depending on the circumstances, spoliation of evidence could come within these categories and result in an award of special costs.

ORDERS SOUGHT

93. The plaintiff Johnberlyn Uy seeks a trial order declaring the defendants Mr. Dhillon and Day & Ross Inc. wholly at fault for the Collision.

94. The plaintiff Uy also seeks an order for special costs as a remedy for the loss of relevant evidence by the defendants Dhillon and Day & Ross Inc.

All of which is respectfully submitted.

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