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| Law 435C.001 | Personal Injury Advocacy | 2021 Term 2 |
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| Professors:  MARC KAZIMIRSKI and SANDRA KOVACS | Tel: (604) 681-9344  Email: mak@kazlaw.ca Office: 1900-570 Granville Street, Vancouver BC | Mondays 5:00 – 8:00 pm  UBC Allard Hall Faculty of Law  Via Zoom |
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**WEEK 2**

**1.1 Teaching Objectives (Assigned Readings: all bolded cases)**

* The elements of proving liability in negligence:
  + Duty of care (***Rankin (Rankin’s Garage) v. J.J.,*** [**2018 SCC 19**](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17085/index.do)**)**;
  + Breach of that duty;
  + Causation; and
  + Damages.
* Burden of proof
* Standard of proof
* Proving liability in motor vehicle collision cases:
  + Pedestrian collisions: ***Dewar v.******Finnigan,*** [**2020 BCSC 1721**](https://www.bccourts.ca/jdb-txt/sc/20/17/2020BCSC1721.htm)
  + Left turn collisions: ***Chima v. Hans et al,* Oral Reasons, Bernard J., Vancouver Registry, 20171114**
  + Rear-end collision / agony of the collision: ***Uy v. Dhillon,*** [**2019 BCSC 1136**](https://www.bccourts.ca/jdb-txt/sc/19/11/2019BCSC1136.htm)
  + Apportionment of fault, contributory negligence, joint and several liability: ***Aberdeen v. Zanatta et al.,*** [**2007 BCSC 993**](https://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc993/2007bcsc993.html?resultIndex=1)**, varied** [**2008 BCCA 420**](https://www.kazlaw.ca/wp-content/uploads/2019/10/cd08b4_a6471f1eda2c4084800d3c7106fb64e2.pdf) **.**
* Brief discussion of secondary liability defences: *volenti non fit injuria, ex turpi causa* (to be covered in more detail in week 6)
* Vicarious liability: why, how, and when: ***Bowe v. Bowe,*** [**2019 BCSC 1454**](https://www.bccourts.ca/jdb-txt/sc/19/14/2019BCSC1454.htm)
* Psychology of persuasion: using the “Rules of the Road” to prove liability by polarizing the case.
  + ***Davies v. Elston*,** [**2014 BCSC 2435**](https://www.bccourts.ca/jdb-txt/SC/14/24/2014BCSC2435.htm)
* Liability in the context of sexual assault: ***Anderson v. Molon*,** [**2020 BCSC 1247**](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1247/2020bcsc1247.html?resultIndex=1)

**1.2 Understanding the relevant legal principles**

* What do we mean by “negligence”?
  + “Failure to act as a reasonable person would be expected to act in similar circumstances”.
  + In *Ryan v. Victoria (City),* [[1999] 1 S.C.R. 201](https://www.canlii.org/en/ca/scc/doc/1999/1999canlii706/1999canlii706.html?resultIndex=1) the Supreme Court of Canada summarized negligence as follows: Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury.
* What are the elements of negligence - what do you have to prove:
* First, the defendant owed a duty of care to the plaintiff;
* Second, the defendant breached the applicable standard of care; and
* Third, that breach of duty *caused* damage (or injury) to the plaintiff.

**1.3 First Element: Duty of Care**

* What do we mean by a “duty of care” in negligence: “legal obligation imposed on an individual requiring adherence to a standard of reasonable care while performing an act”.
* The Supreme Court of Canada recently addressed the test for duty of care in *Rankin (Rankin’s Garage) v. J.J.,* [2018 SCC 19](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17085/index.do).
  + In July 2006, in Paisley, Ontario, the plaintiff JJ and his friend CC (then 15 and 16 years old) were in the home of CC’s mother. The mother supplied the teenagers with alcohol. Mom went to bed and the boys continued to drink and smoke marijuana. Thereafter, the boys left the house with the intention of stealing valuables from unlocked cars. The pair eventually made their way to Rankin’s Garage, where they found an unlocked Toyota Camry with the keys in the ashtray. CC and JJ decided to steal the car even though neither had a driver’s license and neither had previously operated a vehicle. CC lost control of the vehicle on the highway. JJ, the passenger, experienced a catastrophic brain injury.
  + The action proceeded to a liability-only trial. The trial judge (the trial judge decides a pure question of law) found that Rankin owed a duty to JJ and she instructed the jury accordingly. The Jury accepted the evidence of several witnesses who testified that Rankin’s Garage had a practice of leaving cars unlocked with keys in the vehicles. Ultimately, the Jury found all parties negligent and apportioned liability as follows:

Rankin’s Garage:    37%

CC’s mother:           30%

The friend, CC:       23%

The Plaintiff, JJ:      10%

* + The Court of Appeal engaged in a full *Anns Test* analysis of the duty of care. It found that Rankin’s Garage was easily accessible, and that the risk of theft was clear, such that it was foreseeable that minors might take a car from Rankin’s Garage; it was “a matter of common sense” that minors might harm themselves while joyriding, especially if impaired by alcohol or drugs. The appellate Court decided to recognize this summary “novel” duty of care and in doing so upheld the trial decision for distinct reasons.
  + In a 7-2 majority decision, the Supreme Court of Canada held there was **no duty of care owed** by Rankin to JJ **on these facts**. Writing for the majority, Karakatsanis, J. stressed that determining whether something is “reasonably foreseeable” is an objective test, and that Courts must be vigorous in determining whether foreseeability is present prior to the incident occurring and not with the benefit of hindsight.

*“…I am not satisfied that the evidence here demonstrates that bodily harm resulting from the theft of the vehicle was reasonably foreseeable. I conclude that the plaintiff did not satisfy the onus to establish that the defendant ought to have contemplated the risk of personal injury when considering its security practices. The inferential chain of reasoning was too weak to support the establishment of reasonable foreseeability…For these reasons, the plaintiff has not met his burden of establishing a prima facie duty of care owed by Rankin’s Garage to him. Reasonable foreseeability could not be established on this record.”*

* In reaching its conclusion the Supreme Court reaffirmed that the Plaintiff’s criminal conduct was irrelevant in analyzing whether a duty of care existed. As found in the Court’s previous judgments, the Court held that a Plaintiff engaging in immoral or illegal conduct is not precluded from successfully claiming against tortfeasors. Such behaviour can, however, form a part of the contributory negligence analysis.
* **For Discussion: *Crawford and Rizos v. Osuteye et al.***

**See:** <https://www.cbc.ca/news/canada/british-columbia/attacked-b-c-senior-sues-hospital-over-suspect-release-1.1991137>

**1.4 Second Element: Breach of the standard of care**

* Negligence refers to conduct that falls below the standard required by society. Generally, conduct is considered negligent if it creates an unreasonable risk of harm. For example, driving through a red light without stopping and colliding with another vehicle, rear-ending another vehicle, and driving on the wrong side of the road and causing a collision are all instances where the driver has breached the standard of care.
* How do we prove whether an individual has breached the standard of care:
  + Industry practices and regulatory standards.
    - Note that that trade/professional customs are *prima facie* proof of the standard of care and there is accordingly a heavy burden on the plaintiff to show that a defendant who has followed standards set by government or industry is nonetheless negligent. However, while industry and regulatory standards may be a useful benchmark in determining the standard of care, simply because a defendant adheres to an industry code or regulatory standard will not necessarily be proof that it has met the standard of care. Rather, Canadian courts will evaluate the code or standard to determine whether, considering all of the circumstances, it reflects the appropriate standard of care. This will largely be a question of fact determined by the trier of fact.
  + Professional codes of conduct.
  + The defendant’s own policies, procedures and protocols (and whether these have been followed).
  + Criminal code.
  + Statutory obligations and the common law that interprets those statutes, for example, the *Motor Vehicle Act* in BC.

**1.4.1 The *Motor Vehicle Act***

* Each province has legislation governing the safe operation of motor vehicles. In B.C., regulating drivers is the mandate of the Office of the Superintendent of Motor Vehicles (OSMV). OSMV develops B.C. road laws and policies (the rules of the road) to make travelling safe for drivers, passengers, pedestrians, cyclists and other road users alike.
* The *Motor Vehicle Act,* RSBC 1996 c. 318 defines the law that governs the operation of motor vehicles on B.C. roads – defining the rules of the road and related offences and infractions. In addition, the *Criminal Code of Canada* defines criminal motor vehicle offences. The police enforce road laws by ticketing drivers for traffic violations, issuing sanctions for disobeying the rules (driving bans), and/or laying criminal charges.
* For example, in circumstances where one driver rear ends another vehicle the defendant’s statutory duties are set out in the *Motor Vehicle Act* as follows:

**Careless driving prohibited**

144 (1) A person must not drive a motor vehicle on a highway: (a) without due care and attention, (b) without reasonable consideration for other persons using the highway, or

(c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

**Following too closely**

162 (1) A driver of a vehicle must not cause or permit the vehicle to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the amount and nature of traffic on and the condition of the highway.

* + Even the simple case above can get confusing. What happens if: (1) the plaintiff came to a sudden stop for no reason in the middle of the road without warning; (2) the defendant had a heart attack and lost consciousness before rear-ending the plaintiff; (3) the defendant tried to stop but his brakes failed because his mechanic forgot to put brake fluid back in; (4) the defendant swerved to avoid another vehicle that cut into his lane? Whose fault is it these example? As you can see, it can be confusing!
* Other statutes may apply to different types of accidents. For example, in a slip or trip and fall case the *Occupier’s Liability Act,* RSBC 1996, c. 337 governs. The *Act* requires all “occupiers” of premises – whether indoor, outdoor, residential, or commercial – to “take reasonable care in the circumstances to make the premises safe”. If reasonable care is not exercised, and someone is injured as a result, the occupier may be wholly or partially at fault.

* + 1. **Common Law Consideration of Statutory Duties**
* The standard of care required in any particular situation is often articulated in judicial decisions. These cases articulate the statutory duties, where applicable, and fill in gaps required for the interpretation of the standard of care.

**Case Comment (Pedestrian collisions): *Dewar v. Finnigan*,** [**2020 BCSC 1721**](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1721/2020bcsc1721.html?resultIndex=1)

* This case involved a pedestrian crossing a residential road mid-block at night who was struck by a vehicle and grievously injured.
* The plaintiff argued that he had crossed more than half of the roadway by the time the defendant’s vehicle struck him, and that the defendant was speeding above the 30 km/h limit and driving on the wrong side of the road. The plaintiff further argued that the defendant was not exercising due care and attention to see and avoid pedestrians crossing the road, and that the collision could reasonably have been avoided if she had done so.
* ICBC argued that the plaintiff was jaywalking and/or that the vehicle was so close to him at the time he began crossing, that it constituted an immediate hazard to which the plaintiff should have yielded the right of way. ICBC submitted that the plaintiff was wholly liable for not taking care of his own safety, and that the defendant was largely not liable or wholly not liable for the collision.
* The liability trial was five days and the court ultimately concluded that the driver was 65% at fault for the collision.
* While several witnesses and police officers attended the scene of the collision immediately after it occurred, only the plaintiff and the defendant witnessed the collision itself. Although the police took photographs of the scene, they did not take any measurements. As a result, the critical evidence was the expert engineering evidence, that of Dr. Amrit Toor, P. Eng, for the plaintiff, and Mr. Kurt Ising, P. Eng, for the defendant.
* Dr. Toor provided a primary engineer report which estimated that the defendant’s speed was likely between 40-48 km/h at the point of impact, and concluded that the defendant’s vehicle was wholly situated in the northbound section of the road prior to and at the point of impact. Dr. Toor’s report further concluded that the defendant could have avoided the collision if she had applied her brakes before the point of impact.
* Mr. Ising provided a responsive expert report which estimated that the defendant’s speed was likely as low as 35 km/h at the point of impact. Using assumptions Mr. Ising made about the ambient lighting at the collision scene including halogen headlamps for the defendant vehicle, Mr. Ising calculated that the defendant could have only seen a darkly-clad pedestrian from 25 metres away. Mr. Ising concluded that the defendant, at 36-38 m away from the plaintiff at the time when he first emerged between parked cars immediately after stepping out onto the road, could not have seen the plaintiff and avoided the collision.
* At trial, Mr. Ising conceded that Olsen study he used to calculate a 25 m detection hazard range was done on a dark rural road with no street lights or ambient lights. It was further revealed that the defendant vehicle was equipped with high-intensity headlamps and not halogen headlamps as assumed by Mr. Ising in his report. Mr. Ising also disclosed that his speed analysis determined a likely speed of 41 km/h and a likely range of up to 44 km/h. Ultimately, Mr. Ising agreed that the collision would not have occurred if the defendant had been driving the speed limit, or had been driving in correct (southbound) portion of the roadway, or had seen the plaintiff and steered or applied the brakes prior to impact.
* What happened in the moments before the defendant vehicle struck the plaintiff was crucial to determining liability. Was the defendant paying due care and attention? Was the defendant driving just above the speed limit at 35 km/h, or was she driving at an excessive speed between 40-48 km/h? Was the defendant driving her vehicle in the centre of the roadway, or had her vehicle crossed the centre-line, travelling southbound in the northbound section of the road?
* With the expert engineering evidence being critical to the determination of liability, the competing evidence of Dr. Toor and Mr. Ising was very much in issue. Mr. Justice Gomery reconciled that evidence in his reasons, and concluded that the defendant was in a position, at 35-40 m away, to see the plaintiff from the moment he emerged from between the parked cars. He further concluded that the defendant vehicle was likely travelling at 40-44 km/h at the point of impact, and that the defendant was travelling south in the northbound lane when she struck the plaintiff.
* In his analysis, Mr. Justice Gomery first summarized the applicable duty of care owed by the defendant to other users of the roadway, which is derived from the legislated rules of the road and extends to the reasonably foreseeable actions of a pedestrian who may create a hazardous situation or disregard the law (at paras 39 and 41):

*[39] As the driver of a vehicle, Ms. Finnigan owed other users of the roadway a  
duty to take reasonable care for their safety. The driver’s duty of care is informed  
but not exhausted by legislated rules of the road;* Cook v. Teh *(1990),* [*45 B.C.L.R.  
(2d) 194 (C.A.)*](https://www.canlii.org/en/bc/bcca/doc/1990/1990canlii1077/1990canlii1077.html?autocompleteStr=45%20B.C.L.R.%20(2d)%20194%20(C.A.)&autocompletePos=1) *at paras. 17–19;* Salaam v. Abramovic, [*2010 BCCA 212*](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca212/2010bcca212.html?resultIndex=1) *at paras.  
18–21. The duty extends to anticipating the reasonably foreseeable actions of a  
pedestrian who is creating a hazardous situation, even disregarding the law;* Hmaiedv. Wilkinson, [*2010 BCSC 1074*](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1074/2010bcsc1074.html?resultIndex=1) *at para. 23.*

*[**40]      While Mr. Dewar was not in a cross-walk, neither was he crossing illegally.  Section 12(2) of* [*City of Vancouver Street and Traffic By-Law No. 2849 [By-Law 2849]*](https://bylaws.vancouver.ca/2849c.PDF?_ga=2.203577040.1731283102.1610647138-1395434110.1607469139&_ga=2.203577040.1731283102.1610647138-1395434110.1607469139) *prohibits jaywalking, but not where the street in question is a “Minor Street” without lane markings.*

*[41] The following legislated rules bear on an assessment of Ms. Finnigan’s  
conduct:*

*a) Wall Street is a highway as defined in s. 1 of the* Motor Vehicle Act, *R.S.B.C. 1996, c. 318 [*MVA*];*

*b) A person must not drive a motor vehicle on a highway without due care and attention, without reasonable consideration for other persons using the highway, or at a speed which is excessive relative to the road, traffic, visibility, or weather conditions;* MVA *s. 144(1);*

*c) A person must not drive on a highway at a speed in excess of the posted speed;* MVA *s. 146(7);*

*d) A driver on a highway without marked lanes must confine the course of the vehicle to the right-hand half of the roadway if the roadway is of sufficient width and it is practicable to do so, subject to certain exceptions that do not apply in this case;* MVA *ss. 150, 151;*

*e) While there are circumstances set out in ss. 179 and 180 of the* MVA *in which a pedestrian on the highway must yield the right of way over a driver, in these cases the driver must still exercise due care to avoid colliding with the pedestrian and give warning by sounding the horn when necessary; s. 181(a) and (b).*

* Mr. Justice Gomery ultimately determined that the collision was caused by the defendant’s conduct which was negligent in three ways, each of which independently caused the collision: driving without due care and attention, at an excessive speed, and on the wrong side of the road (at paras. 42-46):

*[42] At the time of the collision, Ms. Finnigan was breaching these rules. She was  
driving at 40 to 44 kph, well in excess of the posted speed limit of 30 kph. She was  
driving on the left-hand half of the roadway when there was room for her to drive on  
the right.*

*[43] Ms. Finnigan was also driving without due care and attention. While the poor  
visibility and Mr. Dewar’s dark clothing would inhibit her reaction time, once he was on the travelled part of the roadway, he was there to be seen, illuminated by her  
headlights. Ms. Finnigan testifies that it is her habit to check her mirrors on entering  
a new street and this may be the reason she failed to see Mr. Dewar as she  
approached him. If this is what occurred, she should not have been travelling so  
quickly on a residential street, under conditions of poor visibility, that she could not  
check her mirrors without leaving herself time to spot and react to a pedestrian  
crossing the street directly in front of her.*

*[44] I find that Ms. Finnigan was driving negligently, without taking reasonable  
care for the safety of Mr. Dewar or any other pedestrian who might have been  
crossing the street.*

*[45] The collision occurred because of Ms. Finnigan’s negligence. Had she been  
driving more slowly, at the speed limit, I find that Mr. Dewar would have reached the  
other side of the travelled roadway before Ms. Finnigan’s vehicle reached him. Had  
Ms. Finnigan kept to the right-hand side of the road, Ms. Finnigan’s vehicle would  
have passed behind Mr. Dewar as he crossed the road.*

*[46] Ms. Finnigan’s failure to drive with due care and attention also caused the  
accident. The reaction time of a driver labouring under conditions of poor visibility  
would be approximately 2.4 seconds. Had she maintained a proper lookout, it is  
likely that she would have spotted Mr. Dewar and would have had time to brake or  
swerve sufficiently to avoid the collision.*

* In the second part of his analysis, Mr. Justice Gomery then went on to summarize the applicable duty of care of a pedestrian entering the roadway for his own safety in anticipating irregular or illegal conduct by drivers, which is derived from both statute and the common law (at paras. 49-51):

*[49] In entering the roadway, Mr. Dewar was required to take reasonable care for his own safety. Just as drivers are required to take reasonable care to anticipate apparent potential hazards arising even from irregular or illegal conduct on the part of pedestrians, pedestrians must take reasonable care to anticipate equivalent conduct on the part of drivers. The duties of drivers and pedestrians are symmetrical; each owes an equivalent duty; Liston v. Striegler (1996),* [*25 B.C.L.R. (3d) 57 (C.A.)*](https://www.canlii.org/en/bc/bcca/doc/1996/1996canlii1599/1996canlii1599.html?autocompleteStr=25%20B.C.L.R.%20(3d)%2057%20(C.A.)%20&autocompletePos=1) *at para. 14, leave ref’d [1996] S.C.C.A. No. 477; Mawani v. Pitcairn,* [*2012 BCSC 1288*](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc1288/2012bcsc1288.html?resultIndex=1) *at paras. 103–106, aff’d* [*2013 BCCA 338*](https://www.canlii.org/en/bc/bcca/doc/2013/2013bcca338/2013bcca338.html?resultIndex=1)*.*

*[50] As with drivers, the content of a pedestrian’s duty to take care is informed by legislated rules. A rule of significance in this case is stated in s. 180 of the MVA: When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.*

*[51] In addition to s. 180, the defendant relies on s. 12(1) of By-Law 2849. It states: Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection, shall give the right-of-way to all vehicles upon the roadway.*

* Mr. Justice Gomery agreed with the plaintiff’s argument that neither of the above legislated rules required the plaintiff to yield the right of way to a vehicle driving on the wrong side of the road. Mr. Justice Gomery thus reframed the issue as whether the plaintiff took reasonable care for his own safety and concluded he had not, and that a cause of the collision was the plaintiff’s contributorily negligence (at paras. 52-53, 66):

*[52] Mr. Dewar maintains that neither* MVA *s. 180 nor s. 12(1) of By-Law 2849 go  
so far as to require him to yield the right of way to a vehicle travelling up the wrong  
side of the street.*

*[53] I agree with Mr. Dewar that, given Ms. Finnigan’s position on the wrong side  
of the road, it is not helpful to frame the issue in this case by asking who had the  
right-of-way. The fundamental question is whether Mr. Dewar took reasonable care  
for his own safety.*

*[…]*

*[66] I find that, had Mr. Dewar exercised reasonable care, he would have waited  
to cross the street and avoided being hit. His contributory negligence was a cause  
of the accident.*

* In apportioning liability between the defendant and the plaintiff, Mr. Justice Gomery summarized the applicable statute and common law, balancing the defendant’s negligence against the plaintiff’s contributory negligence and finding the defendant 65% at fault (paras. 67-71):

*[67] Section 1(1) of the* Negligence Act, *R.S.B.C. 1996, c. 333, requires me to  
apportion the liability to make good the damage or loss suffered by Mr. Dewar “in  
proportion to the degree to which each person was at fault”. By s. 1(2), if it is not  
possible to establish different degrees of fault, the liability must be apportioned  
equally.*

*[68] In this context, “fault” means blameworthiness, and the court must evaluate  
the extent to which each party’s conduct departed from the standard of reasonable  
care;* Alberta Wheat Pool v. Northwest Pile, [*2000 BCCA 505*](https://www.canlii.org/en/bc/bcca/doc/2000/2000bcca505/2000bcca505.html?autocompleteStr=alberta%20wheat%20pool&autocompletePos=1) *at para. 46;* Randhawav. Evans, [*2020 BCCA 292*](https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca292/2020bcca292.html?resultIndex=1) *at paras. 22–23.*

*[69] In* Aberdeen v. Langley (Township), [*2007 BCSC 993*](https://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc993/2007bcsc993.html?resultIndex=1) *at para. 62, varied on  
other grounds* [*2008 BCCA 420*](https://www.canlii.org/en/bc/bcca/doc/2008/2008bcca420/2008bcca420.html?autocompleteStr=2008%20BCCA%20420&autocompletePos=1)*, Justice Groves summarized the factors that courts  
have taken into account in assessing moral blameworthiness and contributory  
negligence. In* Howell v. Machi, [*2017 BCSC 1806*](https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc1806/2017bcsc1806.html?resultIndex=1) *at para. 117, Justice  
MacNaughton considered* Aberdeen *and other cases and refined the* Aberdeen *factors to the specific context of pedestrian-motor vehicle collisions. MacNaughton  
J.’s list of factors is worth quoting in its entirety:*

* + *whether the driver or pedestrian was keeping an adequate look-out for cars or pedestrians, including jaywalking pedestrians;*
  + *whether the driver or pedestrian took reasonable precautions, such as modifying speed in areas where pedestrians might be or looking both ways before proceeding into a crosswalk;*
  + *the speed of the driver compared to the speed limit and the conditions;*
  + *whether the driver obeyed the rules of the road, such as signaling;*
  + *whether the pedestrian or car was ‘there to be seen’ including an assessment of the weather, time of day, state of traffic, use of headlights, light or dark clothing for pedestrians, and other visibility factors;*
  + *the nature of the area where the accident occurred, such as whether it is a busy street or whether there are frequent jaywalkers;*
  + *the presence of nearby crosswalks;*
  + *where the pedestrian crosses, mid-block or nearer to an intersection where any reasonable adult might be expected to attempt to cross;*
  + *whether the pedestrian was wearing headphones; and*
  + *generally, what could reasonably be foreseen by either the driver or pedestrian.*

*[70] Considerations from this list that favour a finding of greater blameworthiness  
on the part of Ms. Finnigan are: her failure to keep a proper lookout; her excessive  
speed on a residential street with a 30 kph limit; and her breach of the rules of the  
road by driving on the wrong side. Considerations that favour a finding of greater  
blameworthiness on the part of Mr. Dewar are: his dark clothing, making it more  
difficult for him to be seen (specifically noted in Howell at para. 141); that he was not  
in a crosswalk or at an intersection; and that he was aware that Ms. Finnigan was  
approaching and was in a better position to foresee what was about to occur.*

*[71] In my view, Ms. Finnigan is more to blame for the collision, because she  
breached multiple rules of the road, while Mr. Dewar was simply careless in a snap  
judgment. However, Mr. Dewar’s contributory negligence is more than simply  
nominal because it was to some degree advertent. Balancing these considerations  
and taking everything into account as best I can, I apportion liability for the accident  
65% to Ms. Finnigan and 35% to Mr. Dewar.*

**Case Comment (Left turn intersection collisions):**

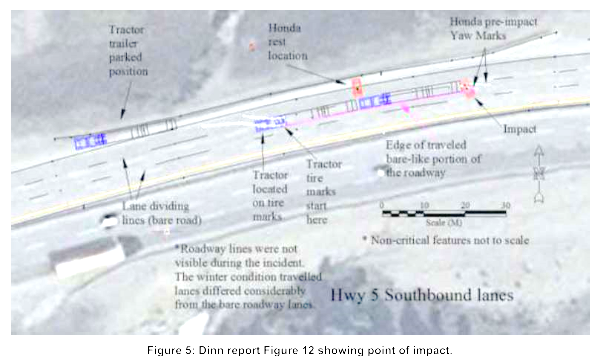
* *Chima v. Hans et al,* Oral Reasons, Bernard J., Vancouver Registry, 20171114

**Case Study: *Uy v. Dhillon,* 2019 BCSC 1136**

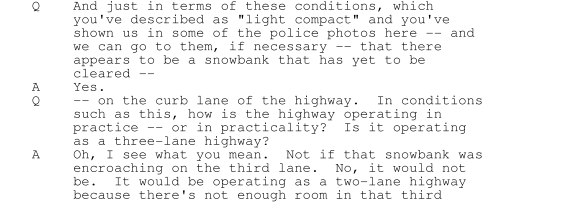
* On January 31, 2014 at 2:30 a.m., Johnberlyn Uy was driving the Coquihalla Highway after picking up his passenger, his girlfriend Ma Cezza DeLeon after her evening shift at work in Kelowna. The couple were on their way to Vancouver to celebrate Chinese New Year. There had been a significant snowfall the day before, leaving portions of the highway snow-covered with some snow banks still accumulated on the shoulders of the highway.
* On the descent toward the snow shed tunnel, Mr. Uy’s Honda Element collided with the rear of a B-combo tractor-trailer unit. The collision was severe. The point of impact was directly to the driver’s side.

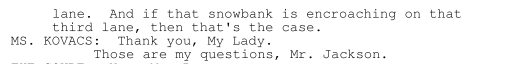


* Johnberlyn suffered a severe traumatic brain injury. He has no memory of the collision.
* The tractor-trailer driver, Mr. Dhillon, admitted he was in the course of passing another Super-B tractor-trailer unit at the time of the collision. He insisted the area of the collision was functioning as a three-lane highway.
* Mr. Uy’s passenger, Ms. De Leon, had been consistent since the day of the collision that Dhillon’s trailer intruded into Mr. Uy’s lane of travel, causing him to take evasive action, leading to the collision. She insisted the area of the collision was only a two-lane highway.
* Dhillon and his employer, the owner of the tractor-trailer unit, Day & Ross, argued Mr. Uy was wholly at fault for rear-ending the tractor-trailer or, in the alternative, that he was contributory negligent.
* The defendants’ private insurer’s entrenched position on liability ensured that settlement negotiations failed. The matter proceeded to a ten-day liability-only trial before Marzari, J. in June, 2019. She gave oral reasons on Day Ten. Her decision is presently under appeal, with the hearing set for May 19, 2020.
* One significant challenge for the plaintiff was that engineering evidence was inconclusive in explaining just how the collision happened, largely because the snow and gravel-covered accident scene was contaminated with tire marks from first responders. For this reason, the plaintiff did not commission or serve a primary expert opinion at the 84-day deadline. Instead, the plaintiff relied upon lay witness evidence from two key sources: the passenger, Ms. De Leon, and the road maintenance worker Mr. Jackson was one of the first responders on scene.
* The defendants did serve a primary engineering report at the 84-day deadline, from Trevor Dinn, P.Eng. He relied on photo-modelling, tire marks, and survey measurements to opine that the impact point was in the “centre” lane. Below is Mr. Dinn’s diagram of the accident scene.

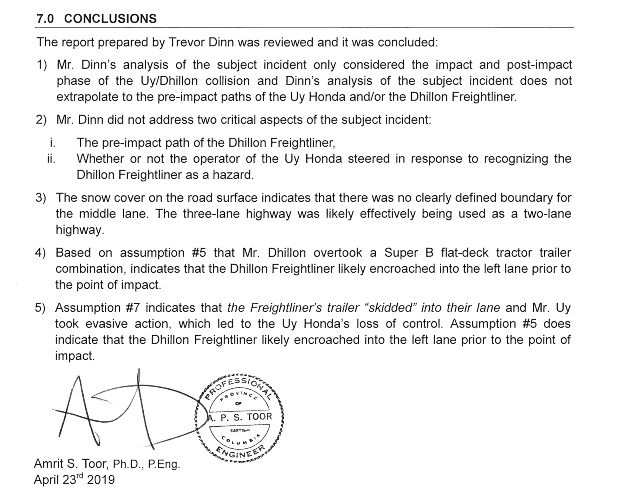


* Critically, Mr. Dinn conceded that the roadway line markings were not visible at the material time, and that there was a “bare-like” traveled portion of the roadway on the left side of the highway.
* There were two critical factual assumptions Mr. Dinn did not account for in his opinion: the existence of encroaching snow banks on the sides of the highway and, most critically, the fact that Mr. Dhillon admitted he was trying to pass another Super-B tractor-trailer on the highway at the time of the collision.
* The evidence about the encroaching snow banks came from a fact witness, Mike Jackson, the road maintenance foreman who was one of the first on scene, and who knows that stretch of highway well. Photographs were put to him and he estimated that the snow bank that had accumulated on the right shoulder of the highway was large enough to encroach into the curb lane – affecting the travel of the mystery Super B tractor-trailer unit Mr. Dhillon was trying to overtake. The close of his evidence from his examination in chief:





* These two facts critically change Mr. Dinn’s modelling of the tractor-trailer’s unit at the point of impact.
* The plaintiff served a responsive expert report from Dr. Amrit Toor, P.Eng, who was informed of the fact that Mr. Dhillon was passing a Super-B tractor-trailer at the material time. His conclusions in response to the Dinn report:



* What happened in the moments before impact was obviously crucial to a determination of liability. Did Mr. Uy take evasive action to avoid Mr. Dhillon’s suddenly encroaching trailer?
* While Mr. Toor assisted in answering this question, the critical evidence was the lay evidence, that of Ms. De Leon and Mr. Dhillon, and the credibility and reliability of their competing evidence was very much in issue. Madam Justice Marzari reconciled that evidence in her reasons, accepting Ms. DeLeon’s evidence and rejecting Mr. Dhillon’s.
* First, she summarized the applicable duty of care and standard of care, derivative from both statute and the common law (at paras. 11-36):

## *Duty of Care and Standard of Care*

*[**11]        It goes without saying that both parties owed a duty of care to the other in this case and were expected to comply with the provisions of the*[*Motor Vehicle Act*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-318/latest/rsbc-1996-c-318.html)*,*[*R.S.B.C. 1996, c. 316*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html)*[*[*MVA*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html)*]. While lack of compliance with the*[*MVA*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html)*is not necessarily commensurate with a breach of the standard of care by the driver, it can be a significant factor.*

*[**12]*[*Section 144*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html#sec144_smooth)*of the*[*MVA*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html)*prohibits a person from driving a motor vehicle on a highway without due care and attention and without reasonable consideration for other persons on the highway. This is related to the common law principle that every motorist owes a duty of care to other motorists around them, and the standard of care is to pay due care and attention and to reasonably consider other persons using the highway.*

*[**13]        Beyond that general duty, a number of more specific*[*MVA*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html)*provisions and common law duties are said to arise in this case, including those related to rear‑end collisions, the changing of lanes or overtaking of vehicles, and special*[*MVA*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html)*requirements for commercial vehicles, which I will now go through.*

## *The Standard of Care for Commercial Vehicles*

*[**14]        The parties are agreed that no expert evidence is required to establish the standard of care of Mr. Dhillon as a commercial truck driver, or Mr. Uy, in these circumstances, and I agree.*

*[**15]        As stated by Madam Justice Rowles in Wang v. Horrod,*[*1998 CanLII 5428*](https://www.canlii.org/en/bc/bcca/doc/1998/1998canlii5428/1998canlii5428.html)*(B.C.C.A.), with respect to the standard of care of commercial drivers, though about a different type of commercial vehicle, at para. 69:*

*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*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-318/latest/rsbc-1996-c-318.html)*, keep a proper lookout, be aware of the conditions of the road, and so forth.*

*[**16]        While expert evidence may be admissible in relation to the operation of a commercial vehicle in relation to the application of the rules of the road, it is not necessary: see MacEachern v. Rennie,*[*2010 BCSC 625 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc625/2010bcsc625.html)*at 549.*

*[**17]        The defendants did tender an expert report by Mr. Bekesinski as an expert in commercial trucking, and I did allow portions of that report to be entered on the basis of the defendants' submissions that it would be relevant to the issues in this trial. However, his evidence regarding the standard of care of truck drivers does not address safe driving distances, lane changes, overtaking slower vehicles or being passed by faster vehicles. His report is limited to issues not raised by the plaintiff, such as the choice of tire in winter conditions and braking while going downhill.*

*[**18]        Mr. Dhillon gave much more useful information in evidence with respect to his own standard of practice as a commercial truck driver of a large, heavy and long tractor‑trailer combination. His evidence was relevant to the issues before me, including his standard practices in passing larger and slower commercial vehicles and being passed by faster and smaller passenger vehicles. His evidence in this regard included that:*

*a)   When changing lanes, he considers that it is necessary to carefully plan ahead and check his mirrors often;*

*b)   Lane changes should be made slowly and subtly with at least 8 to 10 seconds of signalling before any change in lane is made;*

*c)   It is important to avoid over‑steering because that can make the trailer swing, and the load can move;*

*d)   The motion of a poorly made lane change can be amplified in the rear trailer, and can even overturn the rear trailer while the tractor and first trailer remain upright; and*

*e)   He always allows 3 to 4 feet between himself and another vehicle he is passing, especially a commercial vehicle.*

*[**19]        Mr. Dhillon testified that lane changes can therefore be dangerous to himself and others, and that he considers these dangers when making lane changes. He was adamant in his evidence that he would have followed all of these procedures in this case.*

*[**20]        I am satisfied that the issues before me do not require expert evidence to establish the standard of care of either driver. In particular, the standard of care as it relates to motorists avoiding rear‑end collisions, changing lanes and overtaking other vehicles and driving in conditions where the road lines are not visible are all areas where I am able to determine the appropriate standard of care without the assistance of an expert.*

*[**21]        I will now address the law and the standard of care applicable to each of these areas.*

## *Rear‑End Accidents*

*[**22]*[*Section 162(1)*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html#sec162subsec1_smooth)*of the*[*MVA*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html)*states that**a driver of a vehicle must not follow another vehicle too closely, having due regard for the speed of the vehicles and the amount and nature of traffic on and the condition of the highway.*

*[**23]        In Ayers v. Singh,*[*1997 CanLII 3410*](https://www.canlii.org/en/bc/bcca/doc/1997/1997canlii3410/1997canlii3410.html)*(B.C.C.A.), Mr. Justice Lambert stated at paragraph 12 that the standard of care of a vehicle that is following another is that it must have regard for the safety of the other vehicles on the road and the standard of care arises from s. 162. As confirmed in Pryndik v. Manju,*[*2001 BCSC 502 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2001/2001bcsc502/2001bcsc502.html)*, the duty of the vehicle that is following includes a requirement that the driver “allow for emergencies that may arise, such as a sudden stop or unanticipated manoeuvre by a vehicle ahead.”*

*[**24]        As a result, 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: see Wright v. Mistry,*[*2017 BCSC 239 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc239/2017bcsc239.html)*at paras.*[*16-18*](https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc239/2017bcsc239.html#par16)*.*

*[**25]        The law in this respect was neatly summarized by Madam Justice Griffin in Varga v. Kondola,*[*2016 BCSC 2406 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc2406/2016bcsc2406.html)*, at paragraphs*[*87 to 88*](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc2406/2016bcsc2406.html#par87)*as follows:*

*[87]  Ms. Varga also relies on the proposition that an onus exists on a driver of a vehicle that rear‑ends another to demonstrate the absence of negligence, as noted in Wallman v. Doe,*[*2014 BCSC 79 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc79/2014bcsc79.html)*:*

*[409]  When one vehicle rear ends another, the onus is on the rear‑ending vehicle to demonstrate the absence of negligence:  Robbie v. King,*[*2003 BCSC 1553 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2003/2003bcsc1553/2003bcsc1553.html)*, at para.*[*13*](https://www.canlii.org/en/bc/bcsc/doc/2003/2003bcsc1553/2003bcsc1553.html#par13)*; Cannon v. Clouda,*[*2002 BCPC 26 (CanLII)*](https://www.canlii.org/en/bc/bcpc/doc/2002/2002bcpc26/2002bcpc26.html)*at para.*[*9*](https://www.canlii.org/en/bc/bcpc/doc/2002/2002bcpc26/2002bcpc26.html#par9)*; Cue v. Breitkreuz,*[*2010 BCSC 617 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc617/2010bcsc617.html)*at para.*[*15*](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc617/2010bcsc617.html#par15)*; Stanikzai v. Bola,*[*2012 BCSC 846 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc846/2012bcsc846.html)*at para.*[*7*](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc846/2012bcsc846.html#par7)*.*

*[410]  This is because the following driver owes a duty to drive at a distance from the leading vehicle that allows reasonably for the speed, the traffic and the road conditions:  Barrie v. Marshall,*[*2010 BCSC 981 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc981/2010bcsc981.html)*, at paras.*[*23‑24*](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc981/2010bcsc981.html#par23)*; Rai v. Fowler,*[*2007 BCSC 1678 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc1678/2007bcsc1678.html)*, at para.*[*29*](https://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc1678/2007bcsc1678.html#par29)*. This duty is codified in*[*ss. 144*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-318/latest/rsbc-1996-c-318.html#sec144_smooth)*and*[*162*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-318/latest/rsbc-1996-c-318.html#sec162_smooth)*of the*[*Motor Vehicle Act*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-318/latest/rsbc-1996-c-318.html)*.*

*[411]  Driving with due care and attention assumes being on the lookout for the unexpected:  Power v. White,*[*2010 BCSC 1084 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1084/2010bcsc1084.html)*at para.*[*28*](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1084/2010bcsc1084.html#par28)*, aff’d*[*2012 BCCA 197 (CanLII)*](https://www.canlii.org/en/bc/bcca/doc/2012/2012bcca197/2012bcca197.html)*.*

*[88]  One way in which a driver of a rear‑ending vehicle may discharge the onus of showing he was not negligent is to show that the driver of the front vehicle suddenly changed lanes in front of him, not allowing sufficient time to stop, as in Cue v. Breitkreuz,*[*2010 BCSC 617 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc617/2010bcsc617.html)*at paras.*[*15‑16*](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc617/2010bcsc617.html#par15)*, and Bingul v. Youngson,*[*2016 BCSC 1868 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc1868/2016bcsc1868.html)*at para.*[*55*](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc1868/2016bcsc1868.html#par55)*.*

*[**26]        These cases raise both the responsibility of Mr. Uy to drive with due attention to the conditions and the drivers around him (including the unexpected), and the question of whether Mr. Uy has discharged his onus by establishing that the driver in front of him, Mr. Dhillon, suddenly changed lanes in front of him, not allowing him sufficient time to stop or evade the collision.*

*[**27]        I will turn now to the law regarding the changing of lanes and overtaking of vehicles.*

## *Changing Lanes and Overtaking Vehicles*

*[**28]*[*Section 151*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html#sec151_smooth)*(a) of the*[*MVA*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html)*prohibits a driver from changing lanes if it is unsafe to do so or if it will affect the travel of another vehicle.*[*Subsection 151*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html#sec151_smooth)*(c) prohibits a driver from changing lanes without first signalling his intention to do so.*

*[**29]*[*Section 159*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html#sec159_smooth)*of the*[*MVA*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html)*governs passing on the left regardless of the presence of lane markings and provides that:*

*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.*

*[**30]*[*Section 161(2)*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html#sec161subsec2_smooth)*and*[*(3)*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html#sec161subsec3_smooth)*of the*[*MVA*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html)*specifically require that**the driver of a commercial combination of vehicles must not follow within 60 metres of another commercial motor vehicle or a combination of vehicles, and**must leave sufficient space between his or her vehicle and another vehicle or a combination of vehicles to enable the vehicle to enter and occupy that space without danger.*

*[**31]        In Brook v. Tod Estate,*[*2012 BCSC 1947 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc1947/2012bcsc1947.html)*, this Court reviewed the law in relation to the standard of care of a driver while changing lanes to overtake another vehicle:*

*[22]  There is a duty imposed on drivers by*[*s. 151*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-318/latest/rsbc-1996-c-318.html#sec151_smooth)*(a) of the*[*Motor Vehicle Act*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-318/latest/rsbc-1996-c-318.html)*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 one's self so as to void injury to one's neighbour would apply.…*

*[**32]        The court found in that case that the driver who had changed lanes was liable, despite her evidence that she had checked her mirrors and had not seen the other vehicle approaching in the lane to her left until the last moment, saying at paragraph 33 “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.”*

*[**33]        In other words, when a driver is deciding to overtake another vehicle, he or she must be reasonably certain it is safe to do so. If there is uncertainty, the obligation of the overtaking motorist is to wait until it is reasonably safe: see Ali v. Fineblit,*[*2015 BCSC 1494 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc1494/2015bcsc1494.html)*, at para.*[*21*](https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc1494/2015bcsc1494.html#par21)*.*

## *Lanes Obscured by Snow*

*[**34]        The MVA is clear on what a motorist's duties are in terms of changing lanes to overtake a vehicle, including signalling and ensuring it is safe to enter the lane to the left. This case presents the more difficult question of the obligations of drivers when the lane markings are not visible.*

*[**35]        This Court considered this issue in Wellington v. Hopkins,*[*2000 BCSC 1072 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2000/2000bcsc1072/2000bcsc1072.html)*, which involved a head‑on collision between a tractor‑trailer and a pickup truck in white‑out conditions where neither the centre lane nor the fog lines were visible. Mr. Justice Burnyeat reviewed the case law and set out the obligations of drivers of vehicles when the centre line on a road cannot be seen, which I find to be equally applicable in this case where lane dividers were not visible. Specifically this court found that 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. 158(1)*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html#sec158subsec1_smooth)*of the*[*MVA*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html)*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 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 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.*

*[**36]        In this case both motorists could not see the lane demarcations, and the lanes of travel were not identifiable. In these circumstances the broader duty described in*[*s. 151*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html#sec151_smooth)*(a) and (c) and*[*159*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html#sec159_smooth)*of the*[*MVA*](https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-316/latest/rsbc-1996-c-316.html)*still applies. Drivers are still prohibited from moving out of their own path of travel and into another path of travel if it is unsafe to do so or if it will affect the travel of another vehicle.*

* *Marzari, J. correctly identified the disputed facts she was tasked with finding (at paras. 37-38):*

*[**37]        On the basis of the above case law, it is necessary for me to determine first whether Mr. Uy has established on the evidence that Mr. Dhillon encroached into his lane or path of travel suddenly and without warning causing him to lose control of his vehicle. As I stated above, this largely involved the resolution of factual questions and depends on my interpretation of the physical evidence and my assessment of the credibility of Ms. De Leon and Mr. Dhillon where their accounts differ.*

*[**38]        The main areas of contention that I must resolve on the evidence to reach a conclusion in this regard are:*

*a)   Whether the highway was operating as two lanes or three lanes at the time of the collision;*

*b)   The likely location of the impact;*

*c)   Where each of the involved vehicles were located immediately before the impact; and*

*d)   Ultimately, whether Mr. Dhillon was established in his lane at the time of the collision or whether he was suddenly and without warning moving to the left encroaching on Mr. Uy's primarily lane of travel just prior to the collision.*

* What happened in the moments before the collision ultimately came down to a credibility contest between Ms. DeLeon and Mr. Dhillon. Mr. Dhillon was inconsistent in his evidence under Oath on five material issues, and Ms. DeLeon had no vested interest in the outcome of liability, since she was a passenger and had sued both Mr. Dhillon and Johnberlyn. The trial judge’s conclusions:

*[**158]     I have not reviewed all of Mr. Dhillon's inconsistencies and inaccuracies in his evidence. I think it is sufficient to say that where the evidence of Ms. De Leon and Mr. Dhillon conflict, I prefer the evidence of Ms. De Leon.*

*[**159]      I therefore find on all the evidence, including the oral evidence at trial and the photographic, physical and expert evidence, that Mr. Dhillon was not established in the middle lane for any measurable length of time before the collision.*

*[**160]     Rather I find that he had been travelling in the right lane for the one to two minutes that it would have taken him to arrive at the point where the concrete barrier on the right side of the road began to narrow, and that it was around this point that he began the process of changing lanes to overtake the Super B.*

*[**161]     There were only two safe lanes of travel at that point, and up to that point Mr. Dhillon had been in the right lane, as Ms. De Leon described him to be.*

*[**162]     Just prior to impact, I find that Ms. De Leon's evidence and the physical evidence as I have described above, establish that Mr. Dhillon was in the process of moving to the left into what would ordinarily be the middle lane, but in fact encroached upon the primary lane of travel that Ms. De Leon and Mr. Uy were traveling in, with the goal of passing the Super B ahead of him that was fully occupying the right lane and was likely encroaching into the middle lane as well, although that may not have been apparent to Mr. Dhillon.*

*[**163]     At the time of impact, Mr. Dhillon's tractor had just moved fully into what was ordinarily the middle lane encroaching on the primary path of travel and was, I find, still moving gradually to the left and his rear trailer was still straddling the right and centre lane. I also accept Dr. Toor's evidence that because Mr. Dhillon's rear trailer was at the end of a long fulcrum, the movement of his rear trailer may have been exaggerated, moving more quickly into place behind its tractor as Mr. Dhillon moved to the left to overtake the Super B.*

*[**164]     Ms. De Leon says that this movement occurred without warning. Mr. Dhillon said that he would have turned his left signal on before making this change, which would have changed his four way flashing hazard lights to indicate a left turn. I have to determine this issue on a balance of probabilities based on my assessment of the credibility of the parties.*

*[**165]     I do not accept Mr. Dhillon's evidence for the following reasons:*

*a)   First, I have found him to be an unreliable and self‑serving witness.*

*b)   Second, Mr. Dhillon admitted in examination for discovery that he did see headlights coming from behind him. However, he assumed, indeed believed very strongly, that he did not have to concern himself with that vehicle because it would be able to make use of the third passing lane and that his actions in passing the Super B in what he considered to be the middle lane would not affect that third lane or the ability of the oncoming car to pass his tractor trailer. I find Mr. Dhillon made this assumption in part because he considered this a routine drive in fairly routine winter conditions, and both at the scene and in court he was adamant that a third lane was open to Mr. Uy to pass him.*

*[**166]     I find Mr. Dhillon was wrong in that belief and assumption and that he was careless in making that assumption given the lack of lines on the road. Had he been more attentive to the vehicle behind him and the path of the faster moving traffic as he emerged from the brake check, he would have realized that there was no active middle lane and moving into what was ordinarily the middle lane would encroach on the primary lane of traffic for faster-moving vehicles and the approaching vehicle's path.*

*[**167]     Given Mr. Dhillon's carelessness to the traffic approaching from behind and the many self‑serving discrepancies in his evidence, I cannot accept his evidence over that of Ms. De Leon as to whether he was signalling.*

***Mr. Uy's Evasive Action***

*[**168]     I have found that Mr. Dhillon's tractor‑trailer combination encroached on Mr. Uy's lane of travel suddenly and without warning. I find that in reaction and in order to evade this sudden and unexpected hazard, Mr. Uy steered aggressively to the right in the opposite direction he saw that the tractor trailer was moving. Mr. Uy lost control of the car, and it rotated clockwise hitting the rear left corner of the tractor trailer in the driver area and causing his injuries.*

*[**169]     In this moment, it was not incumbent on Mr. Uy to pick the best type of evasive action. Mr. Dhillon says that Mr. Uy could have and should have moved to his left, where Mr. Dhillon says the left lane was not obstructed. Indeed Mr. Dinn's final opinions about the likely cause of the accident, which I have rejected, are premised on this presumption.*

*[**170]     However, it is not clear to me, and it would not have been clear to Mr. Uy, that moving to the left, the same direction as the tractor‑trailer was moving, would have been a safer option. I have found that Mr. Dhillon was moving to the left to overtake a large Super B combination that itself was shifted to the left by a snow bank in the right lane that Mr. Dhillon was not aware of. In order to overtake this Super B, Mr. Dhillon was required to continue to move further to the left and I find he was in the process of doing at the time of impact.*

*[**171]     As has often been quoted from Brook v. Tod Estate, citing Carswell's Manual of Motor Vehicle Law, , Volume III, 3rd edition, at page 22:*

*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].*

*[**172]     I find nothing careless or negligent in Mr. Uy's spontaneous evasive manoeuvre in the "agony of the collision" to steer aggressively to the right in an attempt to avoid the tractor trailer.*

* Dhillon was found 100% at fault for the collision, and his employer and owner of the tractor-trailer, Day & Ross, vicariously liable for his negligence.
* The decision is presently under appeal.

**1.5 Third Element: Causation**

* Remember that next week is devoted entirely to the issue of Causation but we have a pre-cursor this week because it is one of the essential elements in proving negligence.
* What do we mean by causation? For a defendant to be found liable in negligence, the law requires a causal link between an act or omission and the harm suffered by the plaintiff.
* There are three cases that you need to know for causation – they come up repeatedly and they form the cornerstone of any contentious case involving causation:
  + *Athey v. Leonati* [1996 3 SCR 458](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html?resultIndex=1)
  + *Resurfice Corp. v. Hanke*, [2007 1 SCR 333](https://www.canlii.org/en/ca/scc/doc/2007/2007scc7/2007scc7.html?resultIndex=1)
  + *Clements v. Clements*, [2012 SCC 32](https://www.canlii.org/en/ca/scc/doc/2012/2012scc32/2012scc32.html?resultIndex=1)
* These three cases are read together – meaning you have to know all three to properly understand the causation analysis.
* However, for the purpose of this week’s discussion we are going to focus on the *Clements* decision. In this case the plaintiff was riding on the back of her husband’s motorcycle when he crashed and caused serious injury. The defendant (husband) acknowledged that he was negligent for driving too fast and for overloading the motorcycle. The defendant disputed liability on the basis that his negligence did not cause the accident because there was a nail in the tire. Therefore, the primary issue at trial was weather the defendant’s negligence caused the plaintiff’s injuries.
* Let’s review the facts in *Clements v. Clements*:
* Mr. and Mrs. Clements were riding their motorcycle from BC to Alberta.
* Mr. Clements (the defendant) was driving while Mrs. Clements (the plaintiff) was his passenger.
* At the time, the bike was 100 pounds overloaded.
* They stopped for gas shortly before the accident and Mr. Clements did not conduct a visual inspection of his motor cycle.
* Mr. Clements did not have much sleep and was tired but wanted to “push on”.
* It was wet weather conditions.
* They crashed when passing another vehicle at a speed of 120 kph, a speed that was about 30 kph over a ‘safe’ speed for the road, according to experts.
* Mrs. Clements suffered a severe traumatic brain injury.
* It was subsequently discovered that the rear tire had a nail puncture.
* Mrs. Clements had brought action against her husband, claiming that his negligence in the operation of the bike caused her brain injury.
* Mr. Clements agreed that he was negligent, however, Mr. Clements argued that his negligence did not cause the crash and injury. In particular, Mr. Clements called an expert witness, who testified that the probable cause of the accident was the tire puncture and subsequent deflation. The accident, the defence said, would have happened no matter what Mr. Clements did. It could not be said that “but for” his (admittedly) negligent acts, the crash and injuries would have not occurred.
* What happened at trial is well summarized by the Supreme Court in its judgment at para 3:

*“The trial judge rejected [the defendant’s expert’s] conclusion, and found that Mr. Clements’ negligence in fact contributed to Mrs. Clements’ injury. However, he held that the plaintiff “through no fault of her own is unable to prove that ‘but for’ the defendant’s breaches, she would not have been injured”, due to the limitations of the scientific reconstruction evidence. The trial judge went on to hold that in view of this impossibility of precise proof of the amount each factor contributed to the injury, “but for” causation should be dispensed with and a “material contribution” test applied. He found Mr. Clements liable on this basis.”*

* The Court of Appeal overturned the trial judgement and found that Mrs. Clements did not prove the cause on a “but for” standard, and that the material contribution test did not apply to the circumstances.
* The Supreme Court of Canada overturned the Court of Appeal decision and affirmed a number of basic principles:

* In Canadian law, the 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. Inherent in the phrase “but for” is the requirement that the defendant’s negligence was *necessary* to bring about the injury ― in other words that the injury would not have occurred without the defendant’s negligence.” This is a factual determination and the onus remains on the plaintiff to prove this.
* However, “…the “but for” causation 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.”
* “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.”
* “Where “but for” causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant’s negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable.”
* Having confirmed those principles, the Court turned to the issue of when, if ever, the “material contribution test” can apply.
* The Court first noted that the material contribution test is not really a causation test at all, but a substitution for it. The Court explained at para 14:

*. . . “material contribution” does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. In such cases, plaintiffs are permitted to “jump the evidentiary gap”: That is because to deny liability “would offend basic notions of fairness and justice”: Hanke v. Resurfice Corp., para. 25.*

* So what then are these exceptional cases in which proof of factual causation can be replaced by proof of a material contribution to the risk that gave rise to the injury? The answer is:
* Where the defendant has acted negligently in a way that exposed the plaintiff to an unreasonable risk of injury, and
* It is “impossible to prove” that the defendant’s negligence caused the injury by a “but for” analysis.

*“What then are the cases referring to when they say that it must be “impossible” to prove “but for” causation as a precondition to a material contribution to risk approach?  The answer emerges from the facts of the cases that have adopted such an approach.  Typically, there are a number of tortfeasors.  All are at fault, and one or more has in fact caused the plaintiff’s injury.  The plaintiff would not have been injured “but for” their negligence, viewed globally.  However, because each can point the finger at the other, it is impossible for the plaintiff to show on a balance of probabilities that any one of them in fact caused her injury.  This is the impossibility of which Cook and the multiple employer mesothelioma cases speak”.*

* 1. **Apportionment of fault**

***Contributory negligence***

* Even though a plaintiff may have suffered damage or loss attributable to another’s negligence, the plaintiff’s claim to damages may be reduced or eliminated if the plaintiff has failed to take reasonable care for his or her own safety, and his or her own negligence has contributed to that loss. In other words, where the plaintiff’s own negligence contributes to his or her injury, his or her right to fully recover is for that loss may be correspondingly affected.
* In *Nance v BC Electric Railway Co*., [[1951] AC 601](https://www.canlii.org/en/ca/ukjcpc/doc/1951/1951canlii374/1951canlii374.html?resultIndex=1), at page 612, Justice Simon described contributory negligence as: "*... a sharing of responsibility for damage where a person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons...."*
* More recently, the definition of contributory negligence was re-stated by the Supreme Court of Canada in *Bow Valley Jusky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.,* [[1997] 3 S.C.R. 1210](https://www.canlii.org/en/ca/scc/doc/1997/1997canlii307/1997canlii307.html?resultIndex=1) where the Court stated, “ *…when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiffs claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full*.”
* Examples of contributory negligence include a plaintiff injured in a motor vehicle accident caused by another but not wearing a seat belt at the time of collision, jay-walking across a road without looking for traffic, or the fact that a plaintiff, at the time the damages occurred, was under the influence of alcohol.
* Historically, contributory negligence was a complete defence to a plaintiff’s claim. Once the defendant was able to establish that the plaintiff contributed to his or her own loss, the plaintiff would be denied any means of recovery. That traditional contributory negligence bar has been replaced by provincial legislation which apportions liability between negligent defendants and contributorily negligent plaintiffs. While the provincial statutes have many similarities, some differ significantly as to whether defendants will be jointly and severally liable, as opposed to severally liable, where a plaintiff is contributorily negligent.
* In B.C. the *Negligence Act* governs the apportionment of liability between negligent parties. Sections 1, 2(c), and 4 of the British Columbia Negligence Act read as follows:

*1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.*

*(2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.*

*(3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.*

*2 The awarding of damage or loss in every action to which section 1 applies is governed by the following rules:…*

*(c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;*

*4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.*

*(2) Except as provided in section 5 if 2 or more persons are found at fault (a) they are jointly and severally liable to the person suffering the damage or loss, and (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.*

* The effect of these sections was explained by the British Columbia Court of Appeal in *Leischner et al v. West Kootenay Power and Light Company, et al*. (1986), [70 B.C.L.R. 145](https://www.canlii.org/en/bc/bcca/doc/1986/1986canlii889/1986canlii889.html?resultIndex=2), as follows: “Sections 1 and 4 apply to different situations; s. 4 applies to cases where two or more persons cause damage to the plaintiff; s. 1 applies where the plaintiff himself is one of the persons found to have caused his damage or loss; s. 2(c) provides that in a s. 1 case the plaintiff shall recover from a defendant only the proportion of the loss that corresponds to that defendant's fault… then by ss.1 and 2(c) he obtains several judgments against the defendants liable for his loss. “
* Where the plaintiff’s own negligence contributes to their injury, their right to full recovery may be proportionately affected. For example, if the plaintiff is found to be 20% contributorily negligent then he/she would only be paid 80% of the value of their claim.
* The defendant has the onus of proving contributory negligence and must show: (1) there has been some breach by the plaintiff (and error or omission); and (2) that this breach caused or contributed to the plaintiff’s loss. For example, a plaintiff could be negligent for riding a bicycle without a helmet but there would be no deduction for contributory negligence if they suffered an injury
* Contributory negligence is a partial defence (as opposed to “voluntary assumption of risk” or “criminal act” which are complete defences). Proving contributory negligence against a plaintiff is much like establishing negligence against a defendant.
* Marzari, J. engaged in an analysis of the defence of contributory negligence in *Uy v. Dhillon, supra*, at paras. 178-187:

*[**178]     As I discussed above, there is a presumption or onus in rear‑end collisions that the following driver is at fault for failing to keep a safe distance for the conditions. In the ordinary case these are conditions that involve one vehicle following another and failing to stop in time when the lead car stops unexpectedly.*

*[**179]     This is not that typical case. Both vehicles were moving at speed, and I have found that the accident was caused by Mr. Dhillon moving into Mr. Uy's lane of travel suddenly and unexpectedly, rather than unexpectedly stopping in front of him. Mr. Uy was anticipating passing Mr. Dhillon to his left in the moments prior to the collision, and there is no reasonable basis to suggest that he should have been keeping a safe distance from the rear of Mr. Dhillon's trailer while he was in a different path of travel.*

*[**180]     Given these circumstances, I find that the defendants are not able to rely on the presumption of liability in rear‑end collisions, or putting it another way I find that the presumption in those cases has been rebutted on the proven facts.*

*[**181]     The defendants have led no other evidence of inattentiveness or carelessness on Mr. Uy's part. Rather they say I should find that Mr. Uy's speed of 70 to 80 kilometres an hour is objectively unreasonable in these circumstances and that had he been driving more slowly, he could have avoided the collision.*

*[**182]     It is not enough for a defendant to point at the plaintiff and allege wrongdoing. It is critical that the defendant also prove that a plaintiff's failure to take reasonable care contributed to the injuries suffered: See Wormald v. Chiarot,*[*2016 BCCA 415 (CanLII)*](https://www.canlii.org/en/bc/bcca/doc/2016/2016bcca415/2016bcca415.html)*, at paragraphs*[*14 to 15*](https://www.canlii.org/en/bc/bcca/doc/2016/2016bcca415/2016bcca415.html#par14)*, which read as follows:*

*[14]  The analysis for contributory negligence involves two considerations: (1) whether the plaintiff failed to take reasonable care in her own interests; and (2) if so, whether that failure was causally connected to the loss she sustained:  Enviro West Inc. v. Copper Mountain Mining Corporation,*[*2012 BCCA 23 (CanLII)*](https://www.canlii.org/en/bc/bcca/doc/2012/2012bcca23/2012bcca23.html)*at para.*[*37*](https://www.canlii.org/en/bc/bcca/doc/2012/2012bcca23/2012bcca23.html#par37)*.*

*[15] To satisfy the requirement of a causal connection between the plaintiff’s breach of the standard of care and the loss sustained, the defendant must establish more than that but for her negligence, the damage would have been avoided. The plaintiff’s conduct must be a "proximate cause" of the loss in that the loss results from the type of risk to which the appellant exposed herself:  Bevilacqua v. Altenkirk,*[*2004 BCSC 945 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2004/2004bcsc945/2004bcsc945.html)*at paras.*[*39–43*](https://www.canlii.org/en/bc/bcsc/doc/2004/2004bcsc945/2004bcsc945.html#par39)*(per Groberman J., as he then was). In other words, the plaintiff’s carelessness must relate to the risk that made the actual harm which occurred foreseeable:  Cempel v. Harrison Hot Springs Hotel Ltd. (1997),*[*1997 CanLII 2374 (BC CA)*](https://www.canlii.org/en/bc/bcca/doc/1997/1997canlii2374/1997canlii2374.html)*, 43 B.C.L.R. (3d) 219, [1998] 6 W.W.R. 233 (C.A.) at para.*[*13*](https://www.canlii.org/en/bc/bcca/doc/1997/1997canlii2374/1997canlii2374.html#par13)*.*

*[**183]     The defendants rely upon Mawani v. Pitcairn,*[*2012 BCSC 1288 (CanLII)*](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc1288/2012bcsc1288.html)*, to support their argument for contributory negligence on grounds that Mr. Uy was going too fast for the conditions. However, I note in that case evidence was led about causation in the form of perception response time to support the finding (at para. 72).*

*[**184]     In this case I have no such evidence. While I do accept that I do not need evidence on standard of care to determine what the appropriate standard is, I cannot find on the evidence before me that Mr. Uy's speed of 70 to 80 kilometres was careless or negligent. Mr. Jackson said that he considered 80 kilometres an hour to be an appropriate speed for the conditions for a passenger vehicle equipped with snow tires, and Mr. Uy's vehicle was so equipped. I do not agree with the defendants that while that speed may have been appropriate for Mr. Jackson, who knew this portion of the highway intimately, it was negligent in Mr. Uy's case.*

*[**185]     Nor do I have any evidentiary foundation upon which to find that Mr. Uy would have avoided the accident at any speed lower than the one he was driving at short of not exceeding the speed of Mr. Dhillon's tractor‑trailer. The evidence before me, however, does establish that tractor‑trailer combinations are required to go significantly slower than passenger vehicles down the steep grade involved here and that indeed Mr. Dhillon fully expected to be passed by such vehicles.*

*[**186]     I conclude that there was nothing that Mr. Uy could have reasonably done to avoid the collision. He was driving well below the speed limit. His Honda had snow tires and his headlights were activated. There is no evidence to suggest that Mr. Uy's Honda had any mechanical problems that could have contributed to the collision. There is no reliable evidence to suggest that Mr. Uy was distracted.*

*[**187]     I find the defendants have not established that Mr. Uy was contributorily negligent or that he contributed to Ms. De Leon's injuries.*

***Joint and several liability***

* Joint and several liability allows the innocent plaintiff to recover the entire claim for damages from one of several negligent defendants regardless of the degree of fault between the defendants. The defendants should contribute and indemnify each other in the degree to which they are found to be at fault. This scheme ensures that an injured plaintiff can collect from the most solvent defendant and gives the paying defendant the right to pursue the other liable defendants for their proportionate contributions.
* Joint and several liability arises in circumstances where there are joint torts or independent torts that combine to cause a single indivisible injury.
* Example 1 – The plaintiff is struck by a vehicle driven by an intoxicated driver (defendant 1), who was served an excessive amount of alcohol in a tavern (defendant 2). Defendants 1 and 2 may be held jointly and severally liable for the plaintiff’s injuries. If the plaintiff’s claim is 1M and defendant 1 is 90% at fault and defendant 2 is 10% at fault, the plaintiff may recover the full damages from either of the defendants.
* Example 2 – Defendant 1 injuries the plaintiff in a motor vehicle accident causing soft tissue injuries. Defendant 2 injuries the plaintiff in a second motor vehicle accident causing a further aggravation of those injuries. The plaintiff’s injuries are indivisible and the defendant’s are jointly and severally liable for the plaintiff’s damages.
* In cases where the plaintiff is partially at fault for the accident (meaning they are contributorily negligent), the *Negligence Act* severs liability and requires the court to apportion liability in “proportion to the degree in which each person was at fault”.
* Example: The plaintiff is found 25% contributorily negligent for an accident. Defendant A (an insured corporation) is found 25% at fault. Defendant B (an individual) is found 50% at fault. Under the *Negligence Act*, the plaintiff can only seek 25% of their judgment from Defendant A, and must seek the remaining 50% from Defendant B . If Defendant B has no funds, the plaintiff is left with no recourse.
* Note that the BC *Negligence Act* is unique amongst many provinces in this regard. Consider the philosophical/policy reason behind a statute that allows the innocent (non-liable) plaintiff to collect 100% of the damages from a defendant that may only be 1% at fault.
  + Joint and several liability is efficient, promotes access to justice
  + The defendants are in the best position to apportion damages amongst themselves.
  + Once liability has been established and damages awarded, the defendants are free to litigate amongst themselves to better divide liability.
  + It should not be the responsibility of those harmed as a result of multiple defendant to have to seek out all those responsible in order to obtain full compensation. The burden should rest on those found responsible to pursue indemnification from each other.
  + J and S liability protects victims from being under compensated if one of the defendants cannot pay his or her share of proportionate liability.
  + Opponents of the principle of J and S liability note that its use (instead of proportionate responsibility) has led to cases in which a party with a very minor part of the responsibility unfairly shoulders the burden of damages.
* *Aberdeen v. Township of Langley et al.,* [2007 BCSC 993](https://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc993/2007bcsc993.html?resultIndex=1), rev’d [2008 BCCA 420](https://www.canlii.org/en/bc/bcca/doc/2008/2008bcca420/2008bcca420.html?resultIndex=1) is an excellent example of a liability analysis (how negligence is proven), the issues of joint and several liability, and the allocation of fault (based upon moral blameworthiness). The facts of the case are relatively straightforward:
* Zanatta (van driver) – crossed the yellow line of 272nd street creating a hazard which caused Aberdeen’s accident (para 26-30).
* Township of Langley – gap between the metal barrier and a cement no-post barrier; gravel on the side of the road (para 31-41).
* Aberdeen – possible contributory negligence relating to speed (paras 23 -25), however, no evidence of speeding and confirmation that Aberdeen was an expert cyclist (paras 42-53).
* Para 67 – the key inquiry in assessing the allocation of liability is comparative blameworthiness – this is the relative degree by which each of the parties departed from the standard of care to be expected in the circumstances. This inquiry is informed by numerous factors, including the nature of the departure from that standard of care, its magnitude, and the gravity of the risk thereby created.
* Para 68 – plaintiff claims that Zanatta’s negligence was a minor departure from the standard of care imposed on motorists. In contrast, the plaintiff argues that Langley’s departure from the standard of care imposed on municipalities was extreme: Langley created the gap, failed to take action to remedy the gap for three years, and vehicles would have been redirected the metal barrier and then speared by the no-post barrier. Cyclists were at risk of being directed by the barrier and directed through the gap into the ravine. The plaintiff argued that negligence should be apportioned at 10-20% to Zanatta and 80-90% to Langley
* Para 78 – Liability apportioned at 25% to the Zanatta defendants and 75% to Langley.
* In the Court of Appeal *(Aberdeen v. Township of Langley et al.* [2008 BCCA 420](https://www.canlii.org/en/bc/bcca/doc/2008/2008bcca420/2008bcca420.html?resultIndex=1)) the defendants appealed liability, including the finding that the plaintiff was not contributory negligent, and the quantum of damages for future care costs, which were assessed at $4,151,504 plus $388,639 for the replacement of the plaintiff’s house with one specially equipped for him. The Court of Appeal affirms the award of damages but remits the issue of contributory negligence against the plaintiff for retrial. In particular, at paragraphs 23 – 26 the Court of Appeal states that the trial judge erred in failing to consider specifically whether Mr. Aberdeen had been taking reasonable care for his own safety.
  1. **Vicarious liability**
* Vicarious liability is a legal doctrine that holds one person or entity legally responsible for the acts or omissions of another – if the wrongdoer was acting within the scope and course of the control and/or authority of the secondary entity or person, such as an employer, or the owner of a vehicle.
* Why is vicarious liability important? Because the vicariously liable entity will often have assets or insurance where the tortfeasor does not.
  + For example, a Catholic Diocese is usually vicariously liable for the sexual assaults of its clergy, and a clergyman often has no assets of his own and is judgment proof.
* In *Bowe v. Bowe,* [2019 BCSC 1454](https://www.bccourts.ca/jdb-txt/sc/19/14/2019BCSC1454.htm), Mr. Justice Voith gave detailed reasons summarizing the principles of vicarious liability of registered owners under the *Motor Vehicle Act*.
  + The plaintiff passenger, Tyson Bowe, had taken his stepfather’s keys without permission.
  + His cousin, Dale Bowe, who lived in another house, went along for the ride. Both were age 15 years old. Neither had a driver’s license. Both took turns driving the vehicle.
  + Dale crashed the car, and Tyson was seriously injured. A jury found him to be contributory negligent to his own injuries.
* Section 86 of BC’s Motor Vehicle Act establishes vicarious liability for vehicle owners when their vehicle is being driven by a household member or by anyone who acquired the vehicle with the owner’s consent:

**Responsibility of owner or lessee in certain cases**

86(1)    In the case of a motor vehicle that is in the possession of its owner, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who

(a)      is living with, and as a member of the family of, the owner

* Mr. Justice Voith found that, even though Cousin Dale was not a household member, vicarious liability was triggered by this section and the registered owner was vicariously liable for the collision. His reasons:

[65]         It is important in this case not to be swayed by the fact that the Plaintiff took Mr. Boltz’s car keys without his permission.  This lack of consent, on the part of Mr. Boltz, is irrelevant, on a principled basis, to the intention and operation of s. 86(1)(a).  The provision is, instead, engaged in the first instance on account of the family relationship that exists between Mr. Boltz and the Plaintiff.  The Plaintiff’s own fault and contributory negligence, in taking the keys to the vehicle and in the events that gave rise to his injuries, are addressed by the jury’s specific findings on that issue.

[66]         Furthermore, the application of s. 86(1)(a) is not influenced by whether the injured party in a motor vehicle accident is an innocent and unknown third party who is struck by a vehicle or a passenger in that vehicle.  Under s. 86(1)(a), the same result necessarily ensues whether Dale struck an innocent person crossing the street or whether he injured the Plaintiff who was sitting beside him at the time of the Accident.  If the Defendants are correct, an innocent third party would have no recourse against Mr. Boltz.  I raise these matters because the result of this application must be consonant with the language of s. 86(1)(a) and with the object of that provision in the various circumstances that I have described.

[67]         The purview of s. 86(1)(a) clearly extends beyond those cases where a family member of the owner of the vehicle is involved in a motor vehicle accident while “driving” the vehicle.  It extends to cases where the family member is “operating” the vehicle.  How the words “operate” or “operating” are interpreted is a function of the meaning of those words and, to the extent different meanings are reasonably possible, a consideration of what meaning best achieves the intended purpose of the provision.

[68]         “Operate” in the MVA is, in other provisions, defined as having “the care or control” of a motor vehicle.  A somewhat extended definition of “operate”, found in the IVR, has earlier been considered in the context of s. 86.  That definition “includes” instances where an individual is in the “care, custody or control” of the vehicle.  The word “includes” in the IVR contemplates an even broader definition.  Furthermore, the specific words “care, custody or control” operate disjunctively.

[69]         In Hudson, the Court considered that the common sense meaning of “operate” extended to the “use” of the vehicle: see also Grey at paras. 9 and 10 and Barsaloux at para. 26.

[70]         In Morrison, providing access to the keys to a vehicle, albeit in the context of s. 86(1)(b), was associated with providing “the required degree of exclusivity of control”.

[71]         In this case, over the course of the evening, the Plaintiff and Dale drove Mr. Boltz’s vehicle and were passengers at different times.  When they changed roles, one would “drive” and the other would not.  This narrow set of activities only addresses the question of who was “driving” at different times.

[72]         When the Plaintiff obtained Mr. Boltz’s car keys, he initially sat in the driver seat and he held the car keys in his hand.  At that point, though he was not “driving”, the vehicle was in his “care, custody or control”.  I do not consider that that would change when he gave the keys to Dale.

[73]         To be specific, if the Plaintiff no longer held the keys he would likely no longer overtly have “control” of the vehicle.  He would, however, still have “care or custody” of the vehicle.  It would be open to him to ask for the return of the keys.  It would be open to him to require that they return to the Plaintiff’s home and that they return Mr. Boltz’s vehicle.

[74]         I posit an example that arises in a slightly different context but one that mirrors, on a principled basis, the circumstances of this case.  If a father gives his son his vehicle keys and his son, while on a trip, allows a friend to drive, while he sits in the passenger seat, can it be said that the son no longer has “care” or “custody” of his father’s vehicle?  Can it be said that he is not “using” the vehicle?  Based on the common sense meaning of these words, and on the authorities I have referred to, I do not consider that this is so.  To determine otherwise would be to make the words “drive” or “operate” virtually synonymous in circumstances where it is clear that the two words are both intended to, and do, have different meanings.

[75]         These conclusions are further informed by the intended remedial purpose of s. 86(1).  It is to be recalled that the “only policy reasons underlying s. 86(1) to be considered are those in favour of protecting innocent third parties seeking compensation for injuries suffered at the hands of negligent automobile drivers and, vicariously, owners”: Barreiro at para. 28.

[76]         Having regard to the foregoing considerations, I am satisfied the Plaintiff was, at the time of the Accident, “operating” Mr. Boltz’s vehicle notwithstanding the fact that he was a passenger in the vehicle.

[77]         This conclusion recognizes and gives effect to each of the words “drive” and “operate”.  It is consistent with the meaning of the word “operate” in the MVA and the IVR––a related enactment.  It is consistent with the object and remedial purposes of s. 86(1).  Still further it is consistent with the relevant authorities.

[78]         Based on this conclusion, and on the deeming provision in s. 86(1), Mr. Boltz is vicariously liable for the Accident.  There is no need to consider whether the circumstances of this case would establish vicarious liability at common law: Morrison at para. 23.

**1.7 Psychology of persuasion and the Rules of the Road**

* Discussion re:*Davies v. Elston*, [2014 BCSC 2435](https://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc2435/2014bcsc2435.html?resultIndex=1).
  1. **Liability in the context of sexual assault**

**Case Comment: *Anderson v. Molon*,** [**2020 BCSC 1247**](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1247/2020bcsc1247.html?resultIndex=1)

* Liability in Battery and Consent:

*[181] In any case, the plaintiff argues that she could not have consented to the sexual activity, because of the power imbalance between her and Fr. Molon. Consent must be meaningful, voluntary, and genuine to be effective: P.P. v D.D., 2016 ONSC 258 at para. 83. In this context, consent obtained through the exploitation of a position of power is often referred to as vitiated consent.* ***In my view, this is a phrase that ought to leave the lexicon in this area. Consent obtained through the exploitation of a position of power is no consent at all.*** *I am satisfied that Fr. Molon is liable in battery for the sexual abuse on the plaintiff that took place between September 1976 and May 1977.*

* Vicarious liability and institutional (direct) negligence:

*[182] The Diocese has conceded vicarious liability: it is therefore jointly and severally liable for this same abuse.*

*[183] In addition, the plaintiff claims the Diocese was directly liable for failing to take reasonable steps to protect the plaintiff from a risk of harm it knew or ought to have known existed. The significance of this allegation relates primarily to the plaintiff’s claim for punitive damages against the Diocese.*

*[184] In particular, the plaintiff alleges Bishop Exner failed to: a) take adequate steps to investigate Fr. Molon’s sexual improprieties; b) document any investigation of the allegations against Fr. Molon in the spring of 1976, contrary to the church’s own Canon Law policy; c) terminate Fr. Molon in the spring of 1976; d) restrict or limit Fr. Molon’s duties; e) warn parishioners of the risk of harm by Fr. Molon; and f) prioritize the protection of the parishioners above the avoidance of a scandal.*

*[185] For the purpose of this analysis, Bishop Exner and the Diocese are to be considered one and the same: John Doe v. Bennett, 2004 SCC 17 at para. 14. If a bishop is negligent in the discharge of his duties, the diocese is directly liable, because the office of the bishop, the enterprise of the diocese, and the episcopal corporation are legally synonymous: Bennett at para. 7.*

*[186] The plaintiff’s claim against the Diocese, like any claim in negligence, requires proof of the following elements:*

*a) the existence of a duty of care;*

*b) a breach of the standard of care; and*

*c) that the breach caused damage to the plaintiff.*

*[187] In this case, I am satisfied that all of these elements were present.*

*[188] It well established that a diocese owes its parishioners a duty of care to prevent their abuse at the hands of its priests: K. (W.) v. Pornbacher (1997), 32 B.C.L.R. (3d) 360 (S.C.). Although these cases typically deal with the abuse of children, I see no reason why that duty should not also encompass vulnerable, adult parishioners. In any case, at the time Bishop Exner became aware of rumours of Fr. Molon’s sexual improprieties, there was undoubtedly sufficient proximity and foreseeability to found a duty of care. Accordingly, I find the Diocese owed the plaintiff a duty of care to take reasonable steps to prevent her abuse at the hands of Fr. Molon.*

*[189] The findings of fact I have made in this matter leave no question that Bishop Exner failed to take any such reasonable steps. His conduct fell far short of the applicable standard of care. That said, I do not conclude that the evidence supports a finding Bishop Exner deliberately failed to document the investigation; as was urged by the plaintiff.*

*[190] Finally, it is clear that but for Bishop Exner’s negligence, Fr. Molon would not have committed the assaults. Had Bishop Exner taken appropriate steps prior to the arrival of the plaintiff, Fr. Molon would never have engaged in the abuse of the plaintiff starting that fall. Whatever damages flow from Fr. Molon’s abuse therefore also flow from the Diocese’s negligence: both were necessary causes of this damage.*