

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Uy v. Dhillon*,
2019 BCSC 1136

Date: 20190614
Docket: M158435
Registry: Vancouver

Between:

Johnberlyn Uy

Plaintiff

And

**Daljit Singh Dhillon, Day & Ross Inc.,
Her Majesty the Queen In Right of the Province Of British Columbia,
as Represented by the Ministry of Transportation and Highway and
VSA Highway Maintenance Ltd.**

Defendants

Docket: M156431
Registry: Vancouver

Between:

Ma Cezza De Leon

Plaintiff

And

Daljit Singh Dhillon, Day & Ross Inc. and Johnberlyn Uy

Defendants

And

Johnberlyn Uy, Day & Ross Inc. and Daljit Singh Dhillon

Third Parties

Before: The Honourable Madam Justice Marzari

Oral Reasons for Judgment

Counsel for the Plaintiff Johnberlyn Uy:

S.L. Kovacs
C.L. Linegar

Counsel for the Defendants and Third Parties,
Day & Ross Inc. and Daljit Singh Dhillon:

R. Rogers
C.N. Taliunas
J. Steele

Counsel for the Plaintiff, Ma Cezza De Leon:

T.K. Gloux

Counsel for the Defendant and Third Party,
Johnberlyn Uy:

D. Lavoie

Place and Date of Trial:

Vancouver, B.C.
June 3 - 7 and 10 - 13, 2019

Place and Date of Reasons:

Vancouver, B.C.
June 14, 2019

INTRODUCTION

[1] **THE COURT:** These two actions arise out of an accident between a car and a tractor-trailer combination that occurred in the early morning hours of January 31, 2014, on the Coquihalla Highway in B.C.

[2] Mr. Uy was the driver of the car, and Ms. De Leon was his passenger. They are both plaintiffs in their own actions.

[3] Mr. Dhillon was the driver of the tractor-trailer combination, which was registered to Day & Ross and who also insured those vehicles. There is no issue before me that Day & Ross are proper defendants and would be liable for any negligence found on Mr. Dhillon's part.

[4] Liability for the accident is the sole issue before me.

[5] There is no question that Mr. Uy's vehicle struck the rear-end of Mr. Dhillon's tractor-trailer after a loss of control. The only issue is what the cause of the loss of control was. The plaintiffs say that Mr. Dhillon's tractor-trailer encroached without warning into their lane of traffic, cutting them off and requiring Mr. Uy to take evasive actions that led to the loss of control and the collision. Mr. Dhillon says that he was well established in his lane of travel prior to the accident and that the collision must have been the result of Mr. Uy losing control of his car in the winter conditions and colliding with the rear of his trailer.

[6] Mr. Uy bears the onus of establishing Mr. Dhillon's negligence in his claim. He seeks to establish 100% liability to Mr. Dhillon and Day & Ross. In her claim, Ms. De Leon says Mr. Dhillon was entirely responsible for the accident but in the alternative has also named Mr. Uy as a defendant in the event that this court finds Mr. Uy responsible or contributorily negligent as argued by the defendants. Mr. Dhillon and Day & Ross have named Mr. Uy as a third party in Ms. De Leon's claim, and Mr. Uy has similarly cross claimed against the defendants.

LAW

[7] Whether Mr. Dhillon was negligent or not and whether Mr. Uy contributed to his own and Ms. De Leon's injuries will largely turn on the facts established in the evidence at this trial. As stated above, the parties have different interpretations of the physical evidence and different accounts of the moments leading up to the accident. This case will largely turn on my findings of facts based on that evidence.

[8] I will nevertheless briefly review the law that is applicable before moving on to a consideration of the facts.

[9] Mr. Uy and Ms. De Leon bear the onus of establishing that Mr. Dhillon was negligent and that it was his negligence that caused the collision.

[10] If Mr. Dhillon is found to be negligent, I must also consider whether Mr. Uy was also negligent so as to contribute to the injuries that he and Ms. De Leon suffered as a result of the collision. Mr. Dhillon and Day & Ross bear the burden of establishing any such contribution on a balance of probabilities, although they benefit from a presumption arising from the fact that Mr. Uy rear ended Mr. Dhillon.

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*, R.S.B.C. 1996, c. 316 [MVA]. While lack of compliance with the MVA is not necessarily commensurate with a breach of the standard of care by the driver, it can be a significant factor.

[12] Section 144 of the MVA 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* 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* 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 (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, 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 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) of the *MVA* 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 (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, 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 at paras. 16-18.

[25] The law in this respect was neatly summarized by Madam Justice Griffin in *Varga v. Kondola*, 2016 BCSC 2406, at paragraphs 87 to 88 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:

[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, at para. 13; *Cannon v. Clouda*, 2002 BCPC 26 at para. 9; *Cue v. Breitzkreuz*, 2010 BCSC 617 at para. 15; *Stanikzai v. Bola*, 2012 BCSC 846 at para. 7.

[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, at paras. 23-24; *Rai v. Fowler*, 2007 BCSC 1678, at para. 29. This duty is codified in ss. 144 and 162 of the *Motor Vehicle Act*.

[411] Driving with due care and attention assumes being on the lookout for the unexpected: *Power v. White*, 2010 BCSC 1084 at para. 28, aff’d 2012 BCCA 197.

[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 at paras. 15-16, and *Bingul v. Youngson*, 2016 BCSC 1868 at para. 55.

[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(a) of the *MVA* 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(c) prohibits a driver from changing lanes without first signalling his intention to do so.

[29] Section 159 of the *MVA* 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) and (3) of the *MVA* 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, 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(a) of the *Motor Vehicle Act* not to change lanes unless that movement can be safely made and without affecting the travel of other vehicles. Even if that subsection did not exist, the common law duty to take reasonable care to conduct 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, at para. 21.

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, 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) of the *MVA* 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(a) and (c) and 159 of the *MVA* 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.

ISSUES

[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 primary lane of travel just prior to the collision.

[39] In order to reach the factual findings on these more contentious questions, I will first go through the agreed facts and then move on to resolve factual issues that are less contentious but that will assist me in reaching a final conclusion on the key factual questions, including:

- a) The events leading up to the collision;
- b) The general location of the collision;
- c) The road conditions at the time of the collision;
- d) The speed of each party;
- e) The post-accident location of each vehicle; and
- f) The angle of impact.

[40] From there I will go on to reach conclusions about the liability of Mr. Dhillon and if necessary, consider the defendant's arguments of contributory negligence and contribution on Mr. Uy's part.

FACTS

Agreed Facts

[41] At the outset of the trial, the parties entered into an agreed statement of facts for the purposes of this liability trial. Those facts include:

- Mr. Johnberlyn ("John") Uy was the driver of the car involved in the collision, a Honda Element, and Ms. De Leon was his front-seat passenger.
- Mr. Dhillon was a commercial driver driving a freightliner tractor hauling two trailers in a "Super B" configuration. This was also described at trial as a B-train, and I will use that description or simply refer to it as the tractor-trailer combination. The defendant Day & Ross was the registered owner of the tractor and the trailers.

[42] The collision occurred on a downhill section of the Coquihalla Highway travelling westbound (also described as southbound) from Kamloops towards Hope just past the Zopkios Brake Check, approximately 2 kilometres north of the Great Bear Snowshed. In these reasons I am going to use the term "up road" to describe events and objects in the direction of Kamloops and "down road" to describe events and objects in the direction of Hope in relation to this collision area.

[43] As a result of the collision, Mr. Uy's vehicle sustained substantial intrusion damage to the driver's side of the vehicle cabin, causing Mr. Uy to suffer a severe traumatic brain injury. Mr. Uy has no memory of the collision or the time before the collision.

[44] The posted speed limit at the location of the collision was 110 kilometres per hour.

[45] There are six highway lanes on the Coquihalla at the place of the collision, three in each direction. Opposing lanes of travel at the place of the collision are divided by concrete barriers.

[46] Snow had accumulated on the shoulder barriers of the highway.

[47] In the moments leading up to the collision, there was a slower moving Super B combination commercial tractor trailer occupying the far right or curb lane of the highway. Mr. Dhillon elected to overtake the slower moving vehicle, and the collision occurred while Mr. Dhillon was in the process of overtaking the slower-moving Super B.

[48] Mr. Dhillon felt the collision impact.

[49] Paramedics arrived at the scene approximately 30 to 40 minutes following the collision, and the first RCMP officer arrived just under an hour after the collision.

[50] Also included in the agreed statement of facts is the statement taken by Constable Gordon Standcombe from the plaintiff, Ms. De Leon. He spoke with her

first at the Chilliwack Hospital shortly after the accident and then took a signed handwritten statement from her on February 13, 2014, which stated in part:

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

[51] Although this is a prior *consistent* statement, it was entered by agreement and introduced in full by the defendants in cross-examination of Ms. De Leon.

Evidence at Trial

[52] In addition to the above agreed facts, I heard evidence from each of the parties: Mr. Uy, Ms. De Leon, Mr. Dhillon, and a representative of Day & Ross. I also heard evidence from two RCMP officers who attended the accident scene, Constable Verrault and Constable Byers. I heard from Mr. Jackson, the supervisor of VSA Highway Maintenance Services, responsible for clearing and maintaining this portion of the Coquihalla Highway and who attended just after the collision; and Mr. Carter, a private retained accident investigator.

[53] Finally, I had the benefit of three expert reports, two prepared by mechanical engineers as to the dynamics of the accident, Mr. Dinn and Dr. Toor, and a third by an expert in commercial truck driving, Mr. Bekesinski, whose report I have already commented on. Both Mr. Dinn and Dr. Toor attended for cross-examination. After a ruling I made redacting a portion of Mr. Bekesinski's expert report, he was not required to attend for cross-examination.

[54] On the basis of this evidence I am able to make the following findings of fact:

Events Leading Up to the Accident

[55] Mr. Dhillon was driving his ordinary route with his ordinary cargo from the Lower Mainland to Kamloops and back again towing two tractor trailers. He made his deliver in Kamloops on the late afternoon of January 30, 2014, and had a few hours of rest before heading back to the Lower Mainland with two trailers of car parts

at 12:30 in the morning on January 31, 2014. There is no evidence that Mr. Dhillon was negligent in his pre-trip resting time preparations or inspections.

[56] Mr. Dhillon was driving a freightliner truck tractor that was pulling two trailers in what he described as a “B train” configuration. He said the first trailer was 33 feet long and the rear trailer was 28 feet long, although those may be approximate, and Mr. Dinn puts them at 30 and 29 feet respectively. The combined length of the tractor with the two trailers and the bridge that joined them was approximately 76-77 feet by Mr. Dhillon’s count, and approximately 26 metres by Mr. Dinn’s. Each trailer was connected in such a way as to allow it to pivot at its connection point, allowing the tractor-trailer combination to navigate turns. The trailers and tractor were approximately 8 feet or 2.6 metres wide, excluding the tractor’s mirrors.

[57] Mr. Dhillon understood that the trailers he was towing had been checked by the previous driver transferring the trailers in Kamloops. Mr. Dhillon did not open the trailers to check the loads, but trusted the previous driver to have ensured that they were properly loaded. There is no evidence to suggest that they were not properly loaded, although the plaintiffs say that this is because the Defendants failed to comply with their obligations to produce records regarding the loads conveyed in the trailers.

[58] At examination for discovery, Mr. Dhillon said the trailers were approximately 75% loaded, and at trial he said they were fully loaded. In either case, his evidence was consistent that this was a relatively light load for his tractor, which was capable of hauling a load twice as heavy. Mr. Dhillon agreed that a light load has less traction, but was insistent that it would not be more prone to swinging. He agreed that trailer swing might occur, however, as a result of over-steering, which could result in the rear trailer whipping or even overturning. This would not occur if a driver had good driving techniques, which he says he did. He denied his trailers would have experienced any swing while he was driving or during this trip.

[59] Just prior to the accident, Mr. Dhillon had stopped at the Zopkios Brake Check at the top of the highest point of the Coquihalla Highway between Kamloops

and Hope, as he was required to do. He testified that he checked his brakes, his tires and cleaned his mirrors. I accept this evidence.

[60] Mr. Uy was also driving southbound on the Coquihalla with his girlfriend, Ms. De Leon. Ms. De Leon was a sponsored worker from the Philippines at the time working at Tim Hortons in Kelowna. She had started seeing Mr. Uy about four months before the accident. Mr. Uy worked in the Lower Mainland, and would drive to Kelowna to see Ms. De Leon two to three times per month.

[61] On the night in question, Mr. Uy had picked up Ms. De Leon from work at the end of her shift around 11:00 p.m. on January 30th, and they had left Kelowna about an hour later, intending to take part in Chinese New Year celebrations in the Lower Mainland. This was a fairly common trip for the two of them. In the time leading up to the accident, Ms. De Leon recalls telling Mr. Uy funny stories about what had happened at work that day, and they were discussing his plans to find a job in Kelowna so they could be closer. She remembers being very happy.

[62] Although it was early in the morning, and both drivers had also been driving earlier that day, there is no evidence that either of the drivers involved in this collision were impaired or otherwise predisposed to being inattentive on the road prior to the accident.

Location of the Accident

[63] It is formally agreed that the collision occurred just past the Zopkios Brake Check, approximately 2 kilometres north of the Great Bear Snow Shed southbound on the Coquihalla. The photographs and evidence of the scene of the collision show a runaway lane just beyond and down-road from the collision site where Mr. Dhillon pulled over after the collision.

[64] Mr. Jackson in his notes estimated the collision site was half a kilometre past the Zopkios Brake Check.

[65] In his investigation a couple of months later, Mr. Carter drove, videotaped and photographed the route between the brake check and the snow shed and located the collision site on Google Maps satellite imagery as approximately 660 metres from the exit of the brake check area horizontally. In his videos Mr. Carter drove the distance between the brake check and the collision scene in 35 to 45 seconds going approximately 80 kilometres per hour.

[66] I am satisfied that Mr. Carter accurately located the area of the collision site on the basis of the photographs. The distance would be slightly longer than 660 metres in actuality given the angle and curves of the road, and some allowance needs to be made for inaccuracies in scale.

[67] While the evidence is not perfect in this regard, I find that the location of the collision was approximately 750 metres past the Zopkios Brake Check area just prior to the first runaway lane going down what is known as “snowshed hill”. It was certainly less than 1 kilometre from the brake check.

Road Conditions

[68] There was more than one source of information about the road conditions at the time of the collision, including photographs and the accounts of the various officers and other attendees at the accident scene.

[69] On the basis of the evidence I make the following findings regarding the road conditions at the time of the accident:

- a) The stretch of the Coquihalla where the accident occurred is known as Snow Shed Hill. It is known to be particularly dangerous: it is at the highest point of the pass between Kamloops and Hope, and the hill is an 8% grade which is long and steep.
- b) The highway also curves down the hill in an S shape. In the location where the collision occurred, the road was just starting to come out of a curve to the left before straightening out and then curving to the right.

Although Mr. Dhillon described the curve as very slight, the photographic evidence and the evidence of Mr. Jackson establishes that it is curved enough to reduce sight lines around its corners to a few hundred metres.

- c) Because of its known hazards, highway maintenance has dedicated teams working on this section of the highway, and can bring in an additional truck and crew when required. This extra truck had been added in the 24 hours leading up to the collision due to a snowstorm the previous day.
- d) During the previous day's storm, there were six trucks and crews running continuous loops ploughing and sanding the 30-kilometre stretch of highway from Zopkios to Portia and back for a total of 60 kilometres in 45-minute round trips.
- e) By 5:00 p.m. the previous evening the storm was largely done, but four trucks continued to plough sand and patrol the stretch of highway throughout the night. By 2:30 a.m. the trucks were not necessarily sanding or ploughing, but continued to patrol. It did not snow again that morning.
- f) At the time of the accident, the highway had a light coat of a mixture of compact snow and sand. Mr. Jackson assessed it at the scene as having good traction and as not icy. He explained that the lower temperature at the time (a negative 8 air temperature and a negative 7 road temperature) made ice much less likely as there was no temperature differentials to form ice. The other witnesses who attended the scene in vehicles confirmed in evidence that they did not have any difficulties with traction either.
- g) The snow that had fallen was largely removed toward the left side of the highway, with a slightly thicker and rougher coating of snow and sand on the right side of the highway.

- h) The road lines were not visible on either portion of the road due to the mixture of sand and snow. I reject Mr. Dhillon's evidence that he clearly saw those lanes. As he later admitted, the photographs show that it would have been impossible to see the lane markings in the day, let alone at night.
- i) In the location of the collision there is a concrete barrier on the far right shoulder. This barrier is not continuous and starts in what appears to be a truck pullout shortly before the collision area and then significantly narrows close to the point of impact about 100 metres before widening again into the truck runaway lane.
- j) Mr. Jackson, supervisor of the highway maintenance for this area, testified that the distance from the right fog line or the edge of the right lane to this concrete barrier in the area of impact was only half a metre. A few years later Mr. Dinn's photos and instruments suggest it may have been wider, and Mr. Dinn asserted in cross-examination to a question about whether the shoulder narrowed at this point that the shoulder was 2 1/2 metres. That distance, which would almost be a lane width, cannot be determined from the photographs at the time of the accident because the fog lines are not visible. Mr. Dinn's photographs of the highway three years later also do not appear to show a shoulder that is 2 1/2 metres wide next to the 3.65-metre wide lanes shown. In any event, I find Mr. Jackson's evidence is to be preferred in this regard as he had been involved in the day-to-day maintenance of this particular stretch of the Coquihalla for over 20 years, and he described the paved shoulder as being approximately 2 1/2 metres but as being interrupted by the concrete barriers on the side of the highway in this particular location at the time of the accident.
- k) There was 4 to 5 feet of deeper snow in a bank extending towards the roadway from the concrete barrier. It was Mr. Jackson's evidence reviewing the photographs on the day of the collision, and I accept it, that

this snow bank would have encroached onto the ordinary travelled portion of the road and affected travel. I find this snow bank was encroaching onto the travelled road at the location of the accident by 2 to 3 feet.

Speed

[70] Mr. Dhillon has been consistent in his evidence that he was travelling between 30 to 40 kilometres per hour, passing another slower and longer Super B tractor-trailer combination at the time he felt the impact of Mr. Uy's car on his rear trailer. I accept that evidence. There is no suggestion that this was not an appropriate speed for Mr. Dhillon to be travelling down this stretch of highway in these conditions.

[71] Mr. Dhillon has been much less consistent about what the likely speed of the Super B tractor-trailer combination he was passing was. In his examination for discovery, Mr. Dhillon stated that the combination he was passing was much slower than he was going, 10 to 15 kilometres per hour with its engine brake on. He stated it was still ahead of him at the time of the accident. In direct evidence at trial he said he was beside the tractor-trailer and it was going 20 to 30 kilometres per hour, and in cross he said that the slower Super B kept changing speeds, speeding up as he passed, and that his speed estimates were just estimates and not reliable. Although his evidence was that his speed was 30 to 40 kilometres an hour, he suggests that it could have taken him three to four minutes to pass the Super B and that it was directly beside him at the time of the collision.

[72] Mr. Dhillon also said that he was the last in a train of trucks leaving the Zopkios Brake Check to approach and pass the Super B.

[73] I accept Mr. Dhillon's first estimate of the Super B's speed at 10 to 15 kilometres per hour at examination for discovery as being most consistent with the rest of his evidence that it was very slow, so slow that it was imperative in his mind that he pass it, and that all the other trucks were passing it. I also reject Mr. Dhillon's evidence apparently given for the first time in cross that the Super B was speeding up and slowing down and required minutes to pass. This evidence was inconsistent

with his previous evidence at discovery and in direct, and appeared to be motivated by his desire during trial to establish a lengthy period of time that he had been established in the middle lane prior to the accident. I also note that this was not the only change in Mr. Dhillon's evidence at trial to advance that position.

[74] I also prefer Mr. Dhillon's evidence in examination for discovery that the other Super B tractor-trailer was still ahead of him at the time of the collision for this and other reasons having to do with consistency with other evidence.

[75] Ms. De Leon testified that in the moments leading up to the accident Mr. Uy was travelling at 70 to 80 kilometres an hour. She was generally conscious of the speed he travelled, often checking it, which she says is a habit of hers to this day. She would tell Mr. Uy if she thought he was going too fast, and she did that from time to time. However, in the time leading up to the accident, she was aware of and comfortable with his speed. There is no evidence to contradict her evidence on this point, and I accept it.

[76] In his evidence, Mr. Dhillon speculated that Mr. Uy must have been speeding due to the extent of the damage to his car. However, he admitted both in discovery and at trial that he had no way to gauge Mr. Uy's speed and had not been monitoring his progress as Mr. Uy's vehicle approached from behind (or even that he had specifically seen Mr. Uy's vehicle at all). He was also insistent that the speed limit for passenger vehicles in this area was 60 km/hour, which is incorrect. The defendants do not rely on Mr. Dhillon's speculation as to Mr. Uy's speed in any event.

[77] I therefore find that Mr. Uy was travelling between 70 to 80 kilometres per hour.

[78] The defendants do say that this speed, 70 to 80 kilometres an hour, was still excessive for these conditions. I will address that issue below. However, I note here that Mr. Jackson testified that 80 kilometres per hour was an appropriate speed for these conditions provided that a vehicle had snow tires. He also confirmed that Mr. Uy's Honda had appropriate snow tires. I note also that the emergency vehicles

drove much more quickly than that to arrive on scene, with Constable Verrault stating he had driven the speed limit of 110 kilometres per hour, albeit in an SUV and with the benefit of sirens and flashing lights and the right-of-way.

Post-Accident

[79] Before turning to the accident itself, I will review the evidence of the post-accident scene on the highway, as this provides some insight into the collision itself and is generally less contentious. I rely in this regard on the photographic evidence, much of which was taken by the RCMP or its I-CAR's investigation team. Some of these photographs were taken soon after the accident while it was still dark and some later in the morning once it was daylight.

[80] I pause to note that some photographic evidence was not produced despite requests. Mr. Dhillon states that he took a series of photos and videos with his phone at the scene after the accident. He showed these photos and videos to Mr. Carter, who was retained privately to investigate the accident on behalf of plaintiff's counsel. Mr. Dhillon states that he provided those photos and videos to the adjuster for his employer, Day & Ross. They have not been produced and the representative of Day & Ross states that he personally has no knowledge of them.

[81] The absence of these photographs is of some concern. Mr. Dhillon states that he did not move his truck from the lane it was occupying until he was directed to do so an hour and a half later by the RCMP officer. He states that he was in the middle lane at that time and brought his vehicle to a safe stop in that lane over the course of 20 to 30 seconds. However, there are no photographs that show the tractor trailer in any lane of the highway. In all of the photographs in evidence taken by others, the tractor trailer is pulled well over to the side in a portion of the highway shoulder leading to a runaway lane. There is therefore no video or photographic evidence of the stopping location of the tractor trailer immediately after the accident.

[82] The photographic evidence that is available establishes that Mr. Uy's car had turned 270 degrees clockwise before coming to rest. Mr. Uy's car was stopped well past any identified point of impact, facing perpendicular to the lane of travel with the

damaged driver's side up-road and the passenger side down-road (based on the direction of travel). The car was very heavily impacted along the driver's side, primarily in the front half of the car and particularly in the area where Mr. Uy would have been sitting in the driver's seat.

[83] Also up-road from Mr. Uy's damaged car was scattered debris. This was referred to by the engineering experts as the "debris field." The debris field that can be seen is distributed from about the middle of what is likely the right lane of the highway to the centre of the highway with a fairly abrupt edge on the left side where traffic had been moving through in the hours before the photographs were taken. It is therefore not possible to know how far to the middle or left side of the road the debris might originally have been distributed.

[84] There was also glass on the rear left corner of the rear trailer of Mr. Dhillon's tractor trailer combination. Mr. Dinn described the damage to the trailer, which I accept, as having the "rear underride protection beams bent inward" and "the left vertical member rotated inward and forward." Neither of these indentations appear to have affected the operation of the trailer, and Mr. Dhillon completed towing it to Hope, where he advises that another tractor pulled the trailers the rest of the way to the Lower Mainland.

[85] Mr. Uy was taken to the trauma centre at Royal Jubilee in New Westminster in an ambulance, and Ms. De Leon was taken to the Chilliwack Hospital but then proceeded to Royal Jubilee to be with Mr. Uy.

[86] Approximately two weeks after the accident, Ms. De Leon was interviewed and gave the statement noted above, which she signed. I note that in the police report an officer, who was not called to testify, had made notes of his interview with Ms. De Leon when she first arrived at the Chilliwack Hospital, but Ms. De Leon says those notes are not a correct version of what she said or what happened in significant material respects. I therefore cannot rely upon them.

The Angle of Impact

[87] The evidence establishes, and there is no dispute, that Mr. Uy had lost control of the vehicle prior to impact, and that the vehicle was in yaw, rotating clockwise toward the left corner of Mr. Dhillon's rear trailer just before impact. The engineering evidence is agreed that Mr. Uy's vehicle struck the left corner of Mr. Dhillon's back trailer at an angle of 65 to 70 degrees.

[88] The engineers also agree based on the tire tracks that led to Mr. Uy's vehicle and its orientation, that his car must have continued in its rotation after impact and must have been in the bare section, or left side of the road, immediately before moving backwards from that bare section of the road and into the right side of the road facing the centre of the highway.

RESOLUTION OF MORE CONTENTIOUS FACTS

[89] That is the extent of the factual findings I am able to make on the basis of the physical evidence in relation to less contentious matters. I must still go on to consider the more contentious questions that ultimately go to causation, and specifically whether Mr. Uy has established that Mr. Dhillon encroached into Mr. Uy's lane of travel, suddenly and without warning, causing Mr. Uy to take evasive action that led to his loss of control and the collision.

[90] I will first address whether the highway was operating as two lanes or three lanes at the time of the collision and where the parties' vehicles were in relation to those lanes prior to the collision. I will go on to make findings as to where the impact most likely occurred and where the vehicles were at that point.

[91] On the basis of these factual findings, I will go on to make factual findings on the ultimate question of whether Mr. Dhillon was established in his lane at the time of the collision or whether it is more likely that he was moving to the left at the time of just prior to the collision in such a way as to encroach of Mr. Uy's lane of travel suddenly and without warning.

The Lanes of Travel In Effect

[92] The plaintiffs say that at the time of the collision the highway was effectively operating as a two lane highway and that Mr. Dhillon encroached into Mr. Uy's lane of travel when he attempted to overtake the slower moving Super B. Although the plaintiffs' position is not dependent on whether the highway was operating as a two-lane highway, the resolution of this issue will assist in locating each of the vehicles involved in the moments leading up to the collision.

[93] Mr. Dinn is a professional mechanical engineer with expertise in motor vehicle accident reconstruction. He reviewed the photographs of the scene from the RCMP file and came to a number of conclusions, some of which are accepted by the plaintiffs, and some of which are challenged.

[94] His photo modeling of the highway and its configuration were generally accepted by the plaintiff Uy and his responding expert Dr. Toor, including the following findings:

- a) The highway at this point is ordinarily three lanes of 3.65 metres width each, but at the time of the accident the roadway lines were not visible due to winter driving conditions and as such the lanes "differed considerably as compared to bare road conditions."
- b) There were two distinct portions of road at the time of the accident—one a "travelled bare-like road portion on the left hand side of the road, and a more snow covered portion to the right."
- c) The right edge of the travelled portion was located at about the centre of what would ordinarily be the three lanes or the centre of the middle lane.
- d) As a result of the winter conditions, the main travelled portion of the highway "was straddling the marked middle and left lanes."

[95] I have reviewed the RCMP photographs on the day of the accident and agree with this assessment of the lane configuration. In particular, I agree that the main

“bare-like” travelled portion of the highway for passenger vehicles as described by Mr. Dinn straddled the marked middle and left lanes and extended into the centre of the middle lane showing what appeared to be barer tracked areas through the snow. I will refer to this barer more travelled path as the “primary path of travel.”

[96] To the left of this primary path of travel the road was still passable, but no lane was defined and there were snow accumulations against the concrete highway divider encroaching on what would have been the far left lane.

[97] To the right of this primary path of travel the highway was still passable, and despite the encroachment I found to exist on the far right curb lane, there was more than a full lane width available to heavier vehicles, but there were not two full lane widths.

[98] I also conclude from the photographs both of the collision scene and extending back towards the Zopkios Brake Check, that the right edge of the primary path of travel actually denotes the barer road where traffic was physically travelling. It is not a lane divider, which usually provides some buffer from the edge of the vehicle, but a strong indication of where vehicles were physically present while traveling.

[99] I recognize that the daylight photographs were largely taken at a time when the right side of the road had been shut down because of the accident, and the left side of the road continued to have one lane of traffic moving through it, including highway maintenance vehicles that may have sanded or ploughed it further. However, even with the cones and markings that would have moved traffic to the left, these photographs still show that the travelled portion of the road on the left was straddling the centre and far left lane.

[100] I therefore find that the highway at this point was operating as a two-lane highway, one for passenger vehicles in the primary path of travel, and one for trucks to the right. I note that this is also consistent with Ms. De Leon’s unled testimony, and is consistent with independent witnesses familiar with the highway that this

portion of the highway can operate as a two-lane road when the lane markings are obscured.

[101] I specifically reject Mr. Dinn's oral evidence at trial (not stated in his report) that even though his report described two travelled sections of road, the road was actually wider because of the lack of visible lanes and still had three active lanes of traffic. This is contradicted by Mr. Jackson that the snow bank to the right of the highway was encroaching on the right lane of travel. The highway certainly could not have been any wider to the left where the left lane ended with a concrete barrier dividing the directions of traffic.

[102] I find that as cars and trucks passed the Zopkios Brake Check in the early morning of January 31 after the significant snow fall event of the previous day, the lane markings were not visible and passenger cars would have followed the barer primary path of travel straddling the middle and third lanes, while the right lane peeled off into the brake check area for heavy trucks. When the right lane re-established itself emerging from the brake check area, it would have been occupied by the trucks leaving that area in single file.

[103] Prior to the collision area, it may have been possible that a slower truck could have placed itself on the wider paved shoulder, although I have no evidence of how much snow bank encroachment may have existed in this shoulder area.

[104] However, I find that at the point of the area of collision, there would have been insufficient room for a commercial truck to pass another commercial truck in the right lane without moving fully into what would ordinarily be the middle lane, and therefore into the primary path of travel of passenger vehicles at that time.

[105] Given the encroachment into the right lane, and Mr. Dhillon's evidence that he would have provided 3 to 4 feet of space between himself and any commercial vehicle he passed, which seems prudent, I also find it more likely than not that had Mr. Dhillon been abreast of the Super B he was passing at the collision point, that he

would have had to have been at least partially in what would ordinarily be the left lane.

The Location of Impact

[106] The parties' experts also differed as to the likely location of impact.

[107] Mr. Dinn placed it at the location of an arced scuff or “scrub mark” near the lines that would ordinarily have separated the right and middle lanes, 25 metres up road from where the Honda came to rest. Mr. Dinn interprets this mark as being made by Mr. Uy's Honda and indicating the most likely point of impact. Mr. Dinn elaborated in cross-examination that, although the tire marks could not be specifically associated with the Honda's tires, the location of the arcing tire marks emerging from the bare section of the road followed shortly thereafter by the scrub mark was most consistent with the tire marks he would expect as a result of a loss of control leading to a collision and not with other vehicles coming and leaving the collision scene.

[108] Dr. Toor says that it is not possible from the photographs available and the physical evidence shown in them to determine the point of impact. Any tire marks that may have been located in the primary path of travel would have been lost as that path continued to be travelled by vehicles throughout the night after the accident. He rejects the relevance of the scrub mark relied upon by Mr. Dinn as one that could have been made by any stopping passenger vehicle. More significantly, he says that the identified point of impact is inconsistent with the location of the debris field commencing a number of metres beyond that mark, and the tire tracks of the Honda leading out from the bare primary path of travel to its final resting position 25 metres further down-road. His oral evidence was that the debris field and not the scrub mark was the best evidence of the general area of impact, and that it was not possible to determine the likely location of the impact based on the photographs and physical evidence alone.

[109] I have seriously considered rejecting Mr. Dinn's opinion of the location of impact, relying as it does upon the location of a tire mark that is not specifically

associated to the Honda, and visible in photographs taken hours after the collision in a scene where two ambulances, at least three police cars, highway maintenance vehicles and good samaritans had stopped and left again. The experts and Mr. Carter, a former police officer; and the private collision investigator, all agreed that the police investigation was seriously deficient for the purposes of reconstructing the accident, containing no measurements between various features still visible.

[110] This could well be a case similar to what was found in *Wellington* where the experts were unable to come to a conclusion and Justice Burnyeat found that it was “impossible to attempt to ascertain what happened by examining marks on the road which may or may not have been present as a result of the accident.”

[111] However, I am prepared to give some weight to the possibility that the impact location is indicated by the scrub mark, and I will consider this evidence in light of all of the other evidence that I find to be credible and reliable.

[112] I will therefore proceed on the basis that there is a possibility, described by Mr. Dinn, that the impact occurred with Mr. Uy's left front tire at the location where the lines would generally have been dividing the right lane from the middle lane, locating his car at a 65- to 70-degree angle to the trailer at impact and mostly in the middle lane, approximately 25 metres up road from where the Honda eventually landed, having spun into the lane of travel and reversed back across the right lane to its final resting place.

The Location of the Vehicles at Impact

[113] Accepting Mr. Dinn's scrub mark as the point of impact, Mr. Dinn's report would then put the left corner of Mr. Dhillon's rearmost trailer in the middle of what would ordinarily be the centre lane of the highway, which at the time of the collision was the edge of the primary path of travel.

[114] The arcing tire marks that Mr. Dinn assigns to Mr. Uy's Honda entering into the collision started at the edge of the primary path of travel and turned sharply to the right.

[115] I have already found that the primary path of travel straddled the left and centre lanes, and I find that Mr. Uy was most likely following these cleared tracks in the sand and snow prior to the collision.

[116] I also find that he must have steered sharply to the right to come to the proposed point of impact. I accept the evidence of Dr. Toor that Mr. Uy was unlikely to move sharply to the right had he just hit a slippery patch or lost control of his vehicle. Both vehicles were navigating a broad left turn, and Mr. Uy's wheels would have propelled him to the left, and not to the right, in the absence of him steering hard in that direction.

[117] The more difficult factual issue is the orientation of Mr. Dhillon's trailer.

[118] Mr. Dinn came to the conclusion, based on the tire marks visible in the RCMP photographs, that he could locate not only the rear left corner of Mr. Dhillon's vehicle, but also the likely location of the tractor and the orientation of the entire 75-foot combination. Specifically he concludes that Mr. Dhillon's entire tractor was in the centre of the southbound lanes (i.e. the middle lane).

[119] The basis of Mr. Dinn's conclusion as to the likely location of the tractor at the point of impact is a set of dual tire marks leading from what would ordinarily be the middle lane to where Mr. Dhillon pulled his truck off to the side of the road. Those marks start approximately 19 metres down road of the resting location of the Honda, and therefore approximately 44 metres down road from the scrub mark potentially indicating impact. They did not run all the way to the back of Mr. Dhillon's tractor-trailer, but were pointed in that direction. Mr. Dinn describes these dual tractor tire marks as travelling briefly in a parallel direction in what would have ordinarily been the centre lane before turning to the side of the road.

[120] Mr. Dinn further opines that given the short stopping distance to these tire tracks in the middle lane (essentially a full length of Mr. Dhillon's tractor-trailer combination) that it is likely that the tractor did not deviate significantly to the right or left of its lateral position between impact and stopping.

[121] I have some difficulty reconciling Mr. Dinn's photo modeling of the tire tracks relied upon with parts of his opinion. For example, he shows the tractor's tire tracks entirely within what would ordinarily be the middle lane of travel, but also shows them to be entirely to the right of the centre of that lane. Mr. Dinn also states, and I have already found this to be correct, that the lanes themselves were ordinarily 3.65 metres wide, and Mr. Dhillon's tractor-trailer combination was 2.6 metres wide. It is not possible that Mr. Dhillon's tractor tires could have been entirely to the right of the centre of the middle lane and still have been entirely in the middle lane. Based on Mr. Dinn's modelling and opinion read as a whole, I find that at the point Mr. Dhillon stopped his tractor after the accident that Mr. Dhillon's tractor would have been fully in the centre lane, and that the left side of his tractor was more likely than not encroaching onto the primary path of travel for other vehicles on the road, including Mr. Uy's path of travel. This is also consistent with Mr. Jackson's brief sketch of the position of the freightliner when he arrived on scene showing the tractor trailer entirely in what would ordinarily be the centre lane.

[122] Finally, Mr. Dinn rests his final conclusions on an opinion that the tractor-trailer combination was most likely aligned in a straight line and parallel with the lanes of travel. I understand that this opinion is largely derived from the tractor tire marks that he locates at the stopping point after the collision and which he says run briefly parallel before moving to the side of the road after impact.

[123] However, this opinion is not consistent with Mr. Dinn's conclusion on the location of the impact and his photo modelling, which shows the back of the rear trailer straddling the lane divider between the centre and right lanes, with the tractor itself in the middle lane.

[124] I have already found that the tractor occupying the middle lane would have been encroaching on the primary path of travel at the time of the accident, which extended to the centre of the middle lane.

[125] I also do not consider that the photographic evidence, or Mr. Dinn's modeling of it, shows the tractor moving in parallel with the left lane for any distance sufficient to establish its path 44 metres or even 25 metres before these marks were made.

[126] I therefore reject Mr. Dinn's conclusion that based on the photographic evidence alone it is more likely than not that Mr. Dhillon was travelling straight and parallel to the lanes of travel at the time of impact.

[127] Rather, I find it more likely on the physical evidence reviewed and relied upon by Mr. Dinn and more supported by Mr. Dinn's conclusions that have greater support in that physical evidence that at the time of impact Mr. Dhillon's tractor was in what is ordinarily the middle lane, while his trailer was still straddling the right and centre lanes, and so was not "parallel" to the lanes of travel. This strongly suggests that Mr. Dhillon was in the process of moving from the right lane to the middle lane at the time of impact.

[128] I must also consider the agreed-upon fact that Mr. Dhillon was in the process of attempting to overtake a Super B tractor-trailer on the right side of the highway at the time of impact.

[129] Mr. Dinn was not advised of this fact and did not factor it into his opinion or photo modeling.

[130] I agree with the plaintiffs that if Mr. Dhillon was actually abreast of that larger Super B at the time of impact, as he stated in his direct evidence, that he would not have been in the middle lane but would have been encroaching on what would ordinarily be the left lane of travel.

[131] However, the physical evidence Mr. Dinn points to suggests strongly that rather than being abreast of that Super B, Mr. Dhillon was in the process of changing

lanes to overtake the Super B at the time of impact and that while his intended position would have been to the left of the Super B with 3 to 4 feet of clearance between himself and that Super B, he was not yet in that position.

[132] This conclusion is also consistent with Mr. Dhillon's evidence in examination for discovery that the Super B was still ahead of him as he was attempting to overtake it at the time of impact.

[133] It is also consistent with the evidence of Ms. De Leon that Mr. Dhillon's tractor trailer combination had encroached partway into their lane of travel immediately prior to the collision.

Suddenly and Without Warning

[134] I turn now to the critical question of whether Mr. Dhillon's lane change was sudden and without warning, or whether Mr. Dhillon had been well established in his lane of travel prior to the impact.

[135] I have said that the physical evidence that I have accepted from Mr. Dinn's report together with the RCMP photographs indicates a possible impact location and final resting place of Mr. Dhillon's tractor-trailer combination with the rear of the trailer straddling the right and middle-lane divider and Mr. Dhillon's tractor entirely in the middle lane. I have also rejected Mr. Dinn's opinion that what may be the tractor's visible tire marks 44 metres from the impact are sufficiently clear and parallel to establish that it is more likely than not that Mr. Dhillon's tractor was entirely aligned with the middle lane as opposed to moving across it in an attempt to pass the Super B (a fact about which he was not informed).

[136] I note that this is one area of uncertainty that Mr. Dhillon's photographs and videos may have been able to assist with.

[137] The next question I must consider is whether the information that can be gleaned from the photographs and physical evidence can be reconciled with the witness evidence at trial and what the evidence as a whole establishes with respect

to the ultimate question of whether Mr. Dhillon was well established in his lane at the time of the collision or whether Mr. Uy has established that Mr. Dhillon had, suddenly and without warning, encroached on Mr. Uy's path of travel.

[138] Mr. Uy was unable to remember any details of the accident as a result of the injuries he sustained. It was apparent through his testimony that his loss of memory was sincere and extends well beyond the accident to other parts of his life.

[139] The extent of Ms. De Leon's injuries were much less, and she has vivid recollections of the accident and the moments before it, although her memory is less certain of the events immediately following.

[140] With respect to the accident itself, Ms. De Leon testified that Mr. Dhillon's tractor-trailer encroached into their lane ahead of them without signals or warning. She says that Mr. Uy steered very hard to the right to try to avoid the trailer, but Mr. Uy's side of the car collided with the rear of the trailer. She gave this evidence without leading and in various different ways throughout her testimony, and it is clear that her recollection has been largely unchanged since giving her first sworn statement to this effect a couple of weeks after the accident.

[141] At trial, Mr. Dhillon's evidence in direct was that he had decided to overtake the longer and heavier Super B, had already made his lane change to do so into the middle lane, that the lane markings were clear, and that he was well established in this middle lane for three to four minutes and abreast of the Super B before he felt the impact from behind. He was adamant that he had not recently changed lanes and was not in the process of changing lanes in the moments leading up to the collision, that he was in the middle lane of traffic, and that faster traffic approaching from behind had access to the third lane to his left.

[142] I must therefore resolve this direct contradiction in the testimony before me.

[143] Ms. De Leon was the only witness to the collision itself that was able to testify as to what happened. Mr. Uy cannot, and Mr. Dhillon did not see Mr. Uy's car before impact.

[144] There are a number of matters upon which I did not find Ms. De Leon's evidence to be reliable, particularly in her cross. She did not accurately remember that there was snow on the road. She was asked what lane she was in and when Mr. Uy moved to the left lane to pass Mr. Dhillon, and she was clearly confused by this and her answers were similarly confusing. Although she used the word "overtake" to describe that Mr. Uy's vehicle was about to pass Mr. Dhillon's tractor-trailer on the right, her evidence overall does not support the suggestion that Mr. Uy was changing lanes in order to pass Mr. Dhillon's tractor-trailer combination, but rather that it remained in its lane of travel in anticipation of passing the tractor trailer in the right lane, and that the tractor-trailer encroached into their lane of travel from the right.

[145] Having considered all of her evidence, I find her evidence that the tractor-trailer appeared without warning to encroach in the lane she and Mr. Uy were travelling in immediately before the accident to be reliable and credible. She was clear and un-shaken in this memory at trial, demonstrating with her hands as well as her words the trailer coming partially into their lane of travel and her recollection of Mr. Uy steering sharply to the right to avoid a collision. There is no inconsistency in her evidence if it understood that her reference to the fact that Mr. Uy was preparing to "overtake" Mr. Dhillon meant passing in the left lane while Mr. Dhillon was in the right. This confusion of language is entirely understandable in the context of English being her second language, and the English language not being abundantly clear in the distinction between these two terms in any event.

[146] In cross-examination other possibilities were put to her, including that Mr. Uy was following directly behind the tractor-trailer, speeding, and simply lost control of the vehicle. These possibilities were hard for her to comprehend, and I accept that this was because they did not accord with her memory of events.

[147] Although Ms. De Leon is a party, her financial interests are not affected by which of Mr. Uy or Mr. Dhillon are held to be responsible for the accident. If Mr. Dhillon is not found to be liable, Mr. Uy concedes that she could likely rely on the

presumption of liability with respect to unprovoked or spontaneous rear-end collisions to establish liability against him.

[148] Ms. De Leon presently lives in Mississauga, Ontario, with her new partner and two young children, and she is no longer connected with Mr. Uy. Mr. Uy remained unconscious for weeks after the accident, and she would not have been able to be influenced by him even if he could remember the accident prior to giving her account to the police. Although she is not an entirely independent witness, her evidence was consistent on all material points, and I give her evidence considerable weight.

[149] On the other hand, Mr. Dhillon was very inconsistent in key aspects of his evidence, changing his evidence on five different material points from his evidence under oath at discovery to trial, and each time in a way that improve his position.

[150] Most significant of these changes in relation to the question of whether he was established in his lane prior to the collision is the changes to his evidence regarding the amount of time that he was in the passing lane attempting to pass the Super B prior to the accident. On that key evidence his estimate increased from one to two minutes at discovery to three to four minutes in direct and then changed again in direct to two to three minutes. In cross he explained these all as estimates, re-estimated the time at two to four minutes, and ultimately said that he was in the passing lane for “a while”.

[151] I find that none of these estimates are reliable. The location of the collision was less than a kilometre from the exit from the Zopkios Brake Check. Based on Mr. Dhillon's speed of 30 to 40 kilometres, which I have accepted, he would have reached the collision point in less than two minutes.

[152] Furthermore, Mr. Dhillon's evidence in both examination for discovery and at trial was that he was behind at least four to five other trucks as they left the brake check (in trial he stated he was behind 11 or 12 trucks) and that they all passed the Super B safely before he began the process of passing the Super B. He also agreed

he would not even begin to overtake another commercial vehicle until there was enough room between the vehicle he was overtaking and the next commercial vehicle ahead to safely fit between them. Even accepting the lower number of trucks ahead of him, he was unlikely to have been in a position to pass the Super B in much less than 2 minutes.

[153] I find his evidence regarding the length of time he was in the passing lane (which he described as the middle lane of the highway as the lanes would have appeared had they been visible) to be entirely unreliable and self-serving. His sense of time is clearly not reliable in any respect.

[154] He also answered questions with respect to how long he was in the passing lane with the response that Mr. Uy's car was right behind him before it hit him, suggesting that the evidence he gave with respect to his time in the passing lane may have been reasoned backwards from that premise.

[155] Other relevant inconsistencies include changes in his evidence as to how long he was driving from the brake check to the accident location (6-7 minutes), and whether he saw any vehicles behind him on the road between the brake check and the accident. In examination for discovery he said that he saw headlights of a car or truck behind him before the accident, but later in that discovery he said he never saw Mr. Uy's car. At trial the evidence he gave in direct was that he did not see anything behind him before deciding to overtake the Super B, but when confronted with his admission at discovery he suggested that the lights he saw behind him "could have been anything."

[156] He also repeated a number of times that he was certain that he had a clear view of the painted lane dividers on the highway before the collision and did not admit that he could not have had such a view until presented with photographic evidence that this was not possible. This also undermines his certainty that he was established in the middle lane at the time of the collision. Given that Mr. Dhillon was unable to see the line demarcations on the highway, there was no way for him to

confirm with any degree of confidence that his Freightliner was traveling within the marked middle lane.

[157] Mr. Dhillon was also unaware that the right lane was encroached upon by snow and insisted instead that there was a very wide paved shoulder at this point on the highway. In the absence of lane markings, he could not have known if the Super B he was attempting to overtake was in fact on the shoulder, in the right lane, or moving or encroaching into the middle lane at the point of impact where the concrete barriers had significantly narrowed the shoulder.

[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.

CONCLUSION ON LIABILITY OF MR. DHILLON

[173] In conclusion, Mr. Dhillon had a duty to be aware of the traffic around him and to be patient and watch for emerging traffic from his blind spots before commencing or continuing with his lane change. In conditions where the highway lane markings were not visible, I find Mr. Dhillon had a duty to be aware of the actual paths of travel of vehicles in the faster lane to his left, and not to move to overtake another commercial vehicle unless he was sure it was safe to do so.

[174] At the time of the collision Mr. Uy's vehicle was there to be seen. He was established in the primary path of travel and his headlights were on, and Mr. Dhillon had a 300 metre rearward view in his mirrors. Mr. Dhillon's failure to see Mr. Uy and in moving to overtake the Super B without ensuring that he would not encroach on Mr. Uy's path of travel was negligent.

[175] I find that the cause of this collision was the sudden encroachment of Mr. Dhillon's tractor-trailer combination into Mr. Uy's established path of travel.

[176] I therefore find that Mr. Uy has made out all of the elements of negligence in his case against the defendants Dhillon and Day & Ross. Ms. De Leon has also made out those elements.

[177] I turn, then, to whether the defendants have established that Mr. Uy was contributorily negligent in his own case or contributed to the injuries of Ms. De Leon.

CONCLUSION ON CONTRIBUTION OF MR. UY

[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, at paragraphs 14 to 15, 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 at para. 37.

[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 at paras. 39–43 (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), 43 B.C.L.R. (3d) 219, [1998] 6 W.W.R. 233 (C.A.) at para. 13.

[183] The defendants rely upon *Mawani v. Pitcairn*, 2012 BCSC 1288, 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.

CONCLUSION

[188] I want to thank counsel very much for their excellent, organized and focused submissions before me that allowed me to give these reasons today.

[189] I will now hear brief submissions on costs.

(SUBMISSIONS ON COSTS)

[190] THE COURT: All right. Well, let me say that obviously the missing evidence was not critical because I still found in the plaintiff's favour. So it was not critical to the plaintiff's case, and it was not intentional and I do not find any reprehensible conduct to be made out in this case. What did concern me is the possibility that the lack of that production may have caused additional costs in the course of the ordinary discovery, and what I would be willing to consider and I will go on to hear your submissions on this, is whether or not some kind of double costs of discovery or some element of discovery would be warranted.

[191] Special costs are almost more expensive to collect than they are worth in some cases. Also I do not think that special costs are warranted on the law or on the facts of this case, but what I am prepared to consider, as I said, is some sort of additional tariff, doubling of some tariff items having to do with discovery. If there is some submission or evidence before me that discoveries were lengthened or prolonged because of the need to obtain those documents or the attempts to obtain those documents.

(SUBMISSIONS ON COSTS)

[192] THE COURT: I am not prepared to do that, and I am not going to make Mr. Rogers stand up. I am going to say this. So ordinary costs are awardable to both plaintiffs, or each of the plaintiffs in each of their actions, from what I would refer to

as the main defendants, that would be Mr. Dhillon and Day & Ross, and also pursuant to Rule 14-1(18). The defendant Uy is entitled to have his costs or have any costs that would be against him be paid by those main defendants, Mr. Dhillon and Day & Ross.

[193] With respect to the additional costs, with respect to the failure to provide discovery that is, we do not know with certainty whether or not that evidence would have made a difference, and as I said, I am not prepared to give special costs on the basis of reprehensible conduct. I do not think that is made out here, and I am not prepared to give double costs of the trial.

[194] What I am prepared to do, and it is the only thing that was brought to my attention, was an attempted application that did not go ahead. I am prepared to give double costs of that application, and that is the extent of the remedy that I would give for the inability to find and disclose those documents. All right.

“Marzari J.”