

CANADA / JUDGMENT

Doyle v. Hubick

2022 BCSC 309

COURT

Supreme Court of British Columbia

DECIDED

28 February 2022

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2022 BCSC 309 Doyle v. Hubick

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Doyle v. Hubick,

2022 BCSC 309

Date: 20220228

Docket: M175446

Registry: Vancouver

Between:

Sandra Jane Doyle

Plaintiff

And:

Darcy Glenn Hubick

Defendant

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment

Counsel for the Plaintiff:

K. MacWilliam

Counsel for the Defendant:

K. Naish

Place and Dates of Trial:

Vancouver, B.C.

September 13-15, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 28, 2022

I. INTRODUCTION

- [1] This action arises from a motor vehicle collision that occurred on October 11, 2015, which was the Sunday of the Thanksgiving weekend. As liability and quantum have been severed, this trial was to determine liability only.
- [2] The collision occurred at the end of a passing lane on Highway 99 (known as the "Sea to Sky Highway"), south of Pemberton, B.C. and north of Whistler, between two southbound vehicles on their way to Whistler. The distance from Pemberton to Whistler is 32 kilometers.
- [3] The three witnesses at the trial were each of the parties - the plaintiff, Sandra Doyle and the defendant, Darcy Hubick - and one expert witness, Jonathan Lawrence. Mr. Lawrence is an expert in mechanical engineering who was qualified by the Court to provide opinion evidence in accident reconstruction. While the defendant gave fairly specific evidence of the parties' driving leading up to the collision, as the plaintiff suffered head injuries in the collision, her memory of the circumstances of the collision is understandably poor in some respects.
- [4] Evidence of the scene of the collision was also provided by photographs taken from Google Images which the parties agree accurately depict the state of the road and signage at the time of the collision. Other photos taken by a police officer show the post-collision resting place of the plaintiff's vehicle and the damage to each vehicle.
- [5] The layout of the passing lane is not in issue, and the location of the impact can be determined with assistance from the expert engineering evidence. The issue arises from the events which occurred in a few seconds while the parties were driving toward the end of the passing lane and in the 200 meter stretch where the road transitioned back to a two-lane highway. In an analysis of this conduct lies the determination of fault for the collision.
- [6] It is the plaintiff's position that the collision was caused entirely by the negligence of the defendant, and that he ought therefore to be held 100% at fault. The defendant submits that the plaintiff is solely responsible for her injuries and that this action should be dismissed with costs to the defendant.

- [7] The issues are therefore whether the collision occurred as a result of the fault or negligence of one or of both parties. If I find both parties at fault, I must also apportion liability.

II. EVIDENCE

- [8] Much of the evidence is not in dispute. The parties generally agree on the description of Highway 99 in the relevant areas, and the surrounding circumstances of fine weather, good vehicle maintenance, and the time of 7:30 a.m. In order to make the necessary findings of fact regarding the collision, I will set out the evidence in some detail which, if not in dispute, will form the findings of fact. I will note where the evidence will be discussed below to arrive at the findings of fact which are in issue.
- [9] In doing so, I will refer to the portion of the roadway that has three marked lanes - two southbound in the passing lane area and being travelled by the parties, and one northbound - as the passing zone. The 200 meter stretch after the white dotted lines stop, between the end of the two marked southbound lanes (thus ending the three-lane passing zone), and where the roadway is narrowed back to the usual two-lane width, will be referred to as the "transition stretch". The transition stretch commences after three white dashed lines after the second warning sign. It is the opinion of the expert witness that the collision occurred closer to the end of the transition stretch than to its beginning.
- [10] For ease of reference the signs are described here as well as below. There are four types of signs from the start of this passing zone on Highway 99 to its end: the white rectangular "Keep Right Except to Pass" sign at the start; another white "Keep Right Except to Pass" sign about half-way through the passing lane; a yellow diamond sign that visually shows "Right Lane Ends" with a rectangle stating "200 m" affixed below the yellow diamond; and another yellow diamond sign visually showing "Right Lane Ends" just before the white dashed lines stop and the passing zone ends. The two yellow signs, characterised as warning signs, are on both sides of the roadway facing southbound traffic.

A. Agreed Statement of Facts

- [11] The parties filed an agreed statement of facts. With my comments and clarification noted in square brackets, it states:
1. This action involves a motor vehicle collision ("the Collision") that occurred between the Plaintiff's vehicle and the Defendant's vehicle on October 11, 2015.
 2. At all relevant times, Sandra Jane Doyle was the driver and registered owner of a 2000 Jeep Cherokee ("the Jeep").
 3. At all relevant times, Darcy Glenn Hubick was the driver and registered owner of a 2012 Dodge Ram ("the Ram") [or the "Dodge"].
 4. Ms. Doyle was the sole occupant of the Jeep at the time of the collision.

5. Mr. Hubick's wife, Lashakwa Williams, was the front seat passenger in the Ram at the time of the Collision.
6. *** Agreed by counsel to strike out.
7. The Collision occurred at approximately 7:30 am.
8. At the time of the Collision, it was daylight. Visibility was good, it was not raining, and the road was dry.
9. The Collision occurred on Highway 99 between Pemberton and Whistler. Both vehicles were traveling southbound, towards Whistler. The highway between Pemberton and Whistler is generally one lane in each direction, with the exception of a number of areas where it widens into two lanes for some distance. [There are three three-lane passing lane areas, or passing zones, of which this was the second.]
10. The Collision occurred near the end of a stretch of roadway wherein the highway widens to two lanes for southbound traffic. The southbound and northbound traffic are divided by two solid yellow lines and the two southbound lanes of traffic are divided by a dotted white line. The beginning of the two-lane section is depicted in the photo at page 1 of Tab 1(a) of the Book of Documents.
11. Approximately 200 meters from the end of the widened portion of the roadway, there are two roadway signs indicating that the right lane ends in 200 meters. One of the signs is on the right-hand side of the highway, the other on the left-hand side, both facing southbound traffic. The signage is depicted at page 3 of Tab 1(a) of the Book of Documents.
12. At the end of the stretch of southbound roadway [just before] where the dotted white line ends and both lanes merge into one, there are two roadway signs indicating that the right lane is ending. One of the signs is on the right-hand side of the highway, the other on the left-hand side, both facing southbound traffic. The signage is depicted at page 4 of Tab 1(a) of the Book of Documents and indicated as "last yellow warning sign".
13. Beyond the last yellow warning sign, the dashed lines continue for some distance [three more white dashed lines] and then end as the roadway narrows into the width of one lane. The distance between the end of the dashed lines and the point at which the road narrows to the width of one lane is approximately 200 meters. [This is the transition stretch.] This stretch of roadway is depicted in Figure 2 of Jonathan Lawrence's report, which is found at Tab 2 of the Book of Documents.
14. The Collision occurred somewhere south of the end of the dotted white line dividing the two southbound lanes, but north of where the width of the southbound roadway narrowed to the typical width of a single lane. This area is contained within the two lines drawn across the width of the road in Figure 2 of Jonathan Lawrence's report at Tab 2 of the Book of Documents. [Again, this is the transition stretch.]

15. The Collision involved an impact between the front driver's side bumper of the Ram and the passenger's side rear corner of the Jeep. Upon impact, the Jeep spun and then flipped several times, coming to rest in the ditch on the west side of the highway.
16. The Jeep came to rest approximately 245 meters south of the end of the two-lane passing section (indicated by the end of the dotted white lines), and approximately 48 meters south of the point where the southbound roadway narrows into the width of one lane.
17. There were no mechanical or operational issues with either vehicle that caused or contributed to the collision.
18. The parties are not aware of any witnesses to the collision other than Lashakwa Williams.

B. The Plaintiff's Evidence

- [12] Ms. Doyle is now 57 years old and lives in Pemberton with her spouse. On the morning of the collision, she was on her way to work as a room attendant at a hotel in Whistler. Her route was Highway 99 southbound and her vehicle was a 2000 Jeep Cherokee. Both were familiar to her. Ms. Doyle testified that she had driven the Jeep regularly over the approximately three years that she had owned it and Highway 99 was the road she drove to work every day. The drive usually took 30 to 45 minutes.
- [13] With regard to the reliability of the plaintiff's evidence, I note that the collision occurred almost six years before the trial. It happened very quickly and resulted in the plaintiff losing consciousness and suffering serious head injuries including a concussion. She admittedly and not surprisingly has a poor recollection of the details of the collision including many circumstances leading up to the collision. She has no memory after the impact itself and she continues to have memory problems generally. The plaintiff made an effort to be responsive but had an apparent difficulty in understanding some of the questions. She often hesitated before responding. I attribute some of the hesitations and internal inconsistencies in her evidence to her lack of memory and of understanding. The plaintiff's pattern of driving and her specific actions in the passing lane area and transition stretch are in issue and will be discussed further below.
- [14] The plaintiff's description of the three-lane passing zone was correct in most respects. Southbound, it has an uphill stretch curving to the right with two lanes divided by dashed white lines. The southbound and northbound traffic is divided by double yellow lines, and there is one oncoming northbound lane. However, her evidence that the roadway widened where the two southbound lanes end does not accord with the expert evidence regarding the width of the roadway as it transitioned back from three lanes to two lanes.
- [15] The plaintiff was familiar with the signage along the passing zone to "keep right except to pass" and understood that passing a vehicle safely meant pulling out beside it, passing it and returning to the original lane safely. She did not have any concern or observe any erratic driving by the defendant's vehicle before or while passing.

- [16] The plaintiff was about halfway to Whistler from home when the collision occurred. In cross-examination she agreed with the following summary of her evidence: she came upon the defendant's vehicle, the Dodge, near the beginning or middle of the passing lane area. She started in the right lane, was gaining on the Dodge, made a decision to pass, and moved into the left lane and passed the Dodge. She passed continuously, driving faster the whole time.
- [17] In direct examination her initial description of passing the Dodge and of the collision was that she "ended up passing" the defendant near the top around the yellow merging sign indicating that the right lane was ending in 200 meters. It was wider in that area. The vehicles were beside each other for a little bit. After she passed the defendant's vehicle she was hit from behind on the right side.
- [18] Regarding the location of her passing, after the plaintiff testified first on direct that she passed the Dodge just after the first warning sign indicating the passing zone would end in 200 meters, she then testified that she was not sure whether she passed at this warning sign or at the next yellow warning sign indicating that the passing zone was ending.
- [19] The plaintiff described being in the "widened area" at the point of impact on direct examination. The other vehicle was behind her. She explained on cross-examination that the reference is to the area at the ending of the dashed white lines dividing the two southbound lanes, where it widens then narrows. She testified that the road was wider than it had been with two southbound lanes at this point. She reluctantly agreed in cross-examination that the southbound lane progressively narrows to one lane over the transition stretch beyond the end of the passing lane. She agreed that this narrowing happens over a short stretch of roadway but did not know the distance.
- [20] When questioned about the location of the impact or collision, she testified initially that she could not recall whether it happened on the uphill, on the flat at the crest of the hill, or on the downhill. She then testified that it was sort of on an uphill. On cross-examination, she agreed that she did not know exactly where the impact occurred.
- [21] The plaintiff first described her driving as being in the left lane as they were beside each other. She did not recall if she used the gas or brake at the point of impact, nor did she recall her speed or the speed of the other vehicle. She does not recall what the other vehicle looked like. She did not recall if the other vehicle had its blinker on, but said that hers was on when she passed. There was no evidence as to whether it was the right or left blinker.
- [22] There is little direct evidence of the rate of speed, but comparatively the plaintiff was driving at a faster rate of speed than the defendant as she gained on him as she approached in the passing lane and commenced passing. She testified on direct that she was traveling at around 80 km/h as she drove uphill but had no other specific recollection of her speed. The assumption of the expert witness was that the vehicles were travelling at 80 to 100 km/h.

- [23] With regard to her driving on cross-examination, she fairly admitted that she does not remember what was happening with her blinker as she passed the Dodge. She could not recall whether she looked at the Dodge in her sideview or rearview mirror while passing. She fairly admitted that she did not keep an eye on the Dodge as she passed, but was looking straight ahead. She does not recall seeing the driver or any passenger.
- [24] The plaintiff testified on direct to the impact to the right bumper of her Jeep. On cross-examination, she was shown the vehicle damage. She agreed that if damage was to the right side of the Jeep, the Dodge necessarily had to be to her right when impact happened. She also agreed that the Dodge was not directly behind her.
- [25] She also testified that the impact occurred "a few seconds" after she passed the Dodge. She could not say definitively where she was on the roadway when she started or completed the pass, and frequently referenced the general act of "passing" in her testimony. It was suggested to her that she may not have completed her pass entirely by the time the impact occurred; her evidence was that she "was not sure". As she was passing, she did not notice any changes in the speed of the other vehicle.
- [26] The plaintiff denied crossing over the double yellow center line dividing northbound and southbound traffic on direct examination. She was challenged on this point on cross-examination. It was suggested to her that if the vehicles were side-by-side beyond the end of the passing lane, some portion of her vehicle necessarily had to be over the centre line. She denied initially then stated that she could not recall.
- [27] The plaintiff has little memory of the moments prior to and after impact. At impact, she does not know whether she was braking or accelerating, or whether she was looking straight ahead or in her side or rearview mirror. She also does not know her speed or her location on the roadway. She does not know the movement of the vehicles after impact and recalled feeling a bang, and then blacking out. She does not recall speaking with the defendant or anyone else at the scene of the accident and does not recall giving a statement to the police. She has no memory of being at the collision scene or for some period of time thereafter. Her next memory is waking up in the Lion's Gate Hospital, which was later that same day.

C. The Defendants' Evidence

- [28] Mr. Hubick, 57 years old, lived in Mount Currie at the time of the collision. He retired from the military in August 2014. He took numerous defensive driving courses over the years and at one point he held a Class 2 license, allowing him to drive a bus, and a military driver's license. He held a valid Class 5 license at the time of the collision.

- [29] On the morning of the collision he was driving his 2012 Dodge Ram 1500 and his now estranged wife, Lashatkwa Williams, was sitting in the front passenger seat. They were traveling south from their home in Mount Currie to Squamish to do some shopping. They were not in a rush and there were no distractions as he drove. He does not recall the specific time of the collision but does recall that it was light out, the weather was beautiful, and the road and visibility conditions were very good.
- [30] Mr. Hubick was familiar with Highway 99 southbound between Pemberton and Whistler. He estimated the length of the southbound passing lane area to be 1 to 1.5 kilometres and continuously uphill with a curve to the right until near the top when the highway then curves to the left.
- [31] Mr. Hubick confirmed under cross-examination that he understood that it was the right lane that was ending and merging into the left lane. He also understood that slower traffic is to keep right, and that the left lane is for passing.
- [32] Mr. Hubick's evidence was as follows. He testified that he entered the passing lane, drove in the right-hand lane as is his habit and remained there as he approached the end of the passing lane. He saw the lights of another vehicle (which was the Jeep) coming up behind him, and down the hill, when he was one-quarter up the passing lane and the Jeep was still in the single lane portion of the highway. When he was over half to almost three quarters of the way through the passing lane, he saw the Jeep in the left lane. It was now much closer -- about 500 meters behind him. There were no other vehicles in that area of the roadway.
- [33] When he reached the first warning sign, indicating 200 meters before the right lane ended, Mr. Hubick signalled his intent to go into the left lane and checked his mirrors because his lane was closing. He could see the Jeep coming up on his left side, and estimated the Jeep to be about ten meters behind him on his left, behind him but not on his bumper. He determined that the Jeep was not impairing his ability to move in the left lane.
- [34] At this point, "everything was going good". He was waiting for them to indicate their intent of getting in front of him or letting him in.
- [35] Mr. Hubick described driving in the passing zones on Highway 99 as follows:

Q And so you -- sorry, you were waiting to see whether they would -- what -- whether they would wait for you or whether they were going to pass?

A That's -- well, yeah -- yes, because that's -- have you ever driven Highway 99?

Q Oh --

A It's

Q -- we need to hear it from you.

A Okay. Highway 99 is one of those places where if they -- they can pass you, they're going to pass you whether, like, they -- they -- at the very last minute, do you know what I mean? Or if they're going to be nice and -- and let you in, and then wait for the next passing lane to -- to go, otherwise, they just like to try and -- I wouldn't say box you in, I don't think anybody does it deliberately, but they -- it does happen.

- [36] As he then progressed through the last 200 meters of the passing lane, he lost track of the Jeep. He described the situation as getting "goofy" when they were down to about 100 meters from where the passing lane ends. He was still in the right lane although he had initially commenced his lane change to the left after signalling and waiting.
- [37] Mr. Hubick testified to a series of steps -- checking all his mirrors including the attached dome mirrors, quickly shoulder checking or glancing, and asking his wife to help locate the Jeep as there was a blind spot beside the Dodge truck box area. He also steered the Dodge to the right of the roadway, to the perforated strip. He made these attempts looking for the Jeep for about 5 seconds.
- [38] When he next saw the Jeep it was beside him to the left. They were traveling side-by-side. As will be discussed below, I find that the vehicles were at the end of the two-lane section where the right lane was merging into the left lane. By reference to the photos he described it as the ending of the dashed white lines. This is the ending of the southbound passing lane area and the beginning of the transition stretch.
- [39] Mr. Hubick steered the Dodge as far to the right as possible. As the highway narrowed, the Dodge was straddling the white fog line. He recalled hearing gravel under the truck. He described this as not being a healthy situation. The Jeep was to Mr. Hubick's left and, he believed, over the double yellow centre line. He observed the plaintiff as being very determined to pass and really holding on to the steering wheel.
- [40] Mr. Hubick described the plaintiff as "passing me". When asked why it took her so long to pass him, he said that he did not know. He could not figure out what she was doing. There was no place for him to pull over or stop along this stretch of highway.
- [41] Mr. Hubick then described some surges between the vehicles in that they were alternating between going fast and slow. He described it as his attempt to make room for the Jeep to enter the lane - she was going at a pretty good clip, and he would slow quite a bit by taking his foot off the accelerator, then she would hesitate and slow so he would resume his speed. There were not significant increases in his speed. In cross-examination he explained that he was not speeding up, but that it was a fluctuation occurring as a result of his efforts to make room for the Jeep to enter the lane. As he did this, he would slow without braking because the uphill grade of the road slowed him naturally. His descriptions of seeing the Jeep and of the surging and his slowing were as follows:

Q And what was your reaction to seeing that vehicle beside you at that point?

A Well, I was -- I was -- I was -- it wasn't healthy. It was more or less just trying to, like -- like, get them either in front of me or slow them down. I mean, like, I had to try and see what they were doing so I could react accordingly, whether that they're going to go faster, I could slow down.

A. there, because the other vehicle, I was trying to stay to the right as much as I could and I was trying to -- to slow -- and they were surging.

I -- I can recall the whole thing because I was sitting there when I was driving and I seen them coming up because they wanted to do the pass and now they're committed so I was -- I was trying to stay to the right so they could do their pass, but -- now, again, I don't know if there was oncoming traffic that would cause the other vehicle to come towards me because I couldn't -- I couldn't go any further to the right.

Q Okay. So let's just stop.

A Okay.

Q When you said, you know, as the road was narrowing, you said you were waiting to let that vehicle either go ahead or let you in?

A Let me in, yes.

Q What was going on with your speed at that point, were you staying the same speed, were you slowing down, were you increasing your speed?

A I -- I remember doing the -- I remember some surging going in there. Now, I don't know if it was because I was trying to -- to slow down so that other vehicle could either pass me or -- or -- or, again, speed up so the other vehicle could come behind me because there -- there's -- on the other side of this, it doesn't show it on -- on your picture, here, on the other side of this, the traffic -- or oncoming traffic, it -- it's at the end of their passing lane. Like, the -- so there's -- and there -- there were cars actually coming that way. I -- again, this is

A a -- I was trying to avoid any -- any collision with the other vehicle and I was trying to allow that other vehicle to either -- again, to either speed up or slow down and -- and it -- well, there was just kind of a -- of a hesitancy, I would say. I don't know if it was on the other driver, or -- or the fact that maybe there was -- I don't remember really seeing any oncoming traffic. Maybe they saw oncoming traffic so that was making them either speed up or slow down, but I -- I -- I don't -- I don't really recall too, too much.

I remember waiting for that vehicle to either pass me, that's what -- and I -- and I remember watching the vehicle pass me.

Q Okay. Why did it take you so long to pass you?

A See, this is where I -- I don't know, because remember I was saying earlier is that it was a surge, that she'd go up and then she'd slow down, and then she'd go up so then I -- I would -- I would -- you know, maybe -- maybe I did apply the brakes because I remember saying something, I did apply the brakes because she would go faster and then she'd go slower. And that was -- I don't

believe that was -- that was after. That was after it became one lane because she was still committed when we were -- when we were over, but it was surging. This is why I couldn't figure out what she was doing, because -- because -- it happened really quickly, to be honest.

Q But you don't remember applying your brakes?

A I don't remember, no.

Q Okay. Okay.

A Because it was surging and, again, we were going -- it was still kind of uphill so, like, even if I took my foot off the accelerator, I'd still -- I'd still slow down quite a bit.

Q Okay. But not enough for her to pass you, obviously?

A Well, she -- she was going -- she was going at a pretty good clip. I mean, I -- I can't speculate how fast she was going, but she -- she -- she passed me. Like -- like -- like, I was slowing down enough that -- that she accelerated and she was -- she was passing me. The -- the problem happened because she -- she turned in too fast. Otherwise, if she would have just kept on going and -- and passed with -- with, I'd say, more care, it would have been fine because I thought she actually missed me.

- [42] When challenged in cross-examination on his lack of braking at any time, he described the risk of braking while the right tires of his vehicle were on gravel and there was a steep ditch on the right side of the highway. He said that maybe he did apply the brakes, although he did not remember doing so. When asked if he was experienced enough to be able to just lightly hit his brakes even though there was gravel, he responded that that would have had the same effect on his decreasing speed as his actions of taking his foot off the accelerator, but without maintaining control of his vehicle.
- [43] Mr. Hubick was as far to the right of the shoulder as possible. He was slowing enough that the Jeep accelerated and passed him. He said that the problem happened because she turned right too fast; the Jeep turned abruptly. He thought that she had made the pass. He estimated the angle of her entry into his lane as "pretty steep", and described seeing along the whole side of the Jeep as she was making this motion. He expected afterwards that she had taken out the driver's door.
- [44] He did not observe any signaling or hear any honking from the Jeep to warn of its intentions prior to the Jeep making the abrupt right turn into the one southbound lane.
- [45] Mr. Hubick estimated the location of the impact at 150 to 200 meters past where the passing lane ended, on a short uphill, but not steep, straightaway before the highway turned to the left. He identified impact to be around where the signs are seen some distance ahead in photo number six.

- [46] Mr. Hubick felt the impact and the Dodge was nudged. He observed the Jeep fishtail and flipping down the highway and into the ditch. Debris spilled out of the Jeep onto the roadway. At this point, he had moved the Dodge fully onto the roadway and was able to brake to avoid the debris.
- [47] After the collision, he brought the Dodge to a stop, put on his 4-way flashers and reversed about 50 meters to get close to the Jeep. As the Jeep was sparking he waited for assistance. Within a minute another vehicle arrived and he and that driver together removed the plaintiff from the Jeep and put her on Mr. Hubick's tailgate. Ms. Doyle asked for her cell phone so the other driver retrieved that, and then Mr. Hubick moved his truck forward about 50 meters to keep her out of harm's way.
- [48] Mr. Hubick described emergency vehicles arriving at the scene very quickly. He assisted in putting the plaintiff on the ambulance stretcher. He also gave a statement to the R.C.M.P before leaving the scene.

D. Expert evidence - Jonathan Lawrence

- [49] Mr. Lawrence provided an expert report dated June 21, 2021. His report concluded that the collision occurred in the 200 meter transition stretch between the end of the dashed white lines between two southbound lanes and the narrowing of those two lanes into one lane southbound, probably closer to the end of the transition stretch than to the beginning.
- [50] Based on the photos that he analyzed from the police report and the measurements at the scene, he was able to estimate where the collision occurred and the likely trajectory of the plaintiff's vehicle.
- [51] Mr. Lawrence was able to determine that the Jeep was already sliding sideways on the shoulder of the road when the road transitioned fully to a single lane width. Thus he concluded that the impact occurred toward the end of the transition stretch. He has no knowledge of what the vehicles did over this stretch of roadway prior to the collision.
- [52] Mr. Lawrence concluded that there was not much angle between the two vehicles at impact. The impact on the vehicles was depicted in a drawing which shows damage to the defendant's front driver side and the plaintiff's rear passenger side. The black scuffs on the Dodge indicated to the expert witness that there was significant overlap of the vehicles at impact with the tire of the Jeep leaving marks on the left corner of the Dodge.
- [53] Mr. Lawrence confirmed that the plaintiff's vehicle came to rest 48 meters south of the next "passing lane 2 km ahead" sign. The "passing lane 2 km ahead" sign also marks the approximate point where the southbound portion of the roadway narrowed to the width of a standard single lane. The start of this transition from a two-lane width to a one-lane width began at the end of the dashed lines dividing the right and left lanes, which was approximately 200 meters north of the "passing lane 2 km ahead" sign.

- [54] Mr. Lawrence provided calculations of the time it would take to travel the 200 meter transition stretch, or the distance from the end of the dashed lines to the point at which the road narrowed to one-lane width. At 100 km/h it would take 7.2 seconds to travel this distance; at 90 km/h, 8.0 seconds; and at 80 km/h, 9.0 seconds.
- [55] The width of each highway lane is 3.7 meters and the width of each vehicle was approximately 2 meters. The impact occurred near the end of the progression from two lanes to one, so the lane width was closer to 3.7 meters at that point. As each vehicle is about 2 meters wide, totaling 4 meters side by side, he agreed that it is not likely that the two vehicles would have fit within the confines of the one lane at impact or otherwise. Mr. Lawrence also stated that he could not determine where the vehicles were relative to the lines on the road at impact.
- [56] I accept the evidence of Mr. Lawrence in its entirety.

E. Lashatkwa Williams

- [57] Ms. Williams, who did not testify at trial, was Mr. Hubick's wife. She was in the vehicle at the time of the collision and witnessed the collision. Prior to the collision, Mr. Hubick's evidence was that they briefly discussed the location of the plaintiff's vehicle when he was unable to see it.
- [58] The plaintiff seeks that an adverse or unfavourable inference be drawn in the absence of an explanation for the defendant's failure to call a witness who would have knowledge of the facts.
- [59] Mr. Hubick was asked numerous questions on cross-examination about the whereabouts of Ms. Williams, who is the only other witness to the collision. He gave evidence of the difficulties contacting her since their marital breakdown. I accept his explanation and find that it is reasonable in the circumstances.
- [60] Ms. Williams is not a witness in the exclusive control of Mr. Hubick. There is no evidence that she was not equally available, or equally unavailable, to both parties. Further, it does not appear that she was subpoenaed by the plaintiff.
- [61] In the circumstances, I decline to draw an adverse inference from the fact that Ms. Williams did not testify on behalf of the defendant at trial.

III. THE LAW

A. Legislation

- [62] The relevant provisions of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 (the "MVA") are:

Definitions

- 119(1) In this Part:

[]

"laned roadway" means a roadway or the part of a roadway that is divided into 2 or more marked lanes for the movement of vehicular traffic in the same direction

[]

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.

[...]

Driver on right

150(1) The driver of a vehicle 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, except

- (a) when overtaking and passing a vehicle proceeding in the same direction,

[]

Driving on laned roadway

151 A driver who is driving a vehicle on a laned roadway

- (a) must not drive it from one lane to another when a broken line only exists between the lanes, unless the driver has ascertained that movement can be made with safety and will in no way affect the travel of another vehicle,
- (b) must not drive it from one lane to another if that action necessitates crossing a solid line,
- (c) must not drive it from one lane to another without first signalling his or her intention to do so by hand and arm or approved mechanical device in the manner prescribed by sections 171 and 172,
- (f) must not pass a vehicle on the left if that action necessitates driving on that part of the highway designated for travel in the opposite direction

[]

Highway lines

155(1) Despite anything in this Part, if a highway is marked with

- (a) a solid double line, the driver of a vehicle must drive it to the right of the line only

[]

Duty when overtaking

157(1) Except as provided in section 158, the driver of a vehicle overtaking another vehicle

- (a) must cause the vehicle to pass to the left of the other vehicle at a safe distance, and
 - (b) must not cause or permit the vehicle to return to the right side of the highway until safely clear of the overtaken vehicle.
- (2) Except when overtaking and passing on the right is permitted, a driver of an overtaken vehicle,
- (a) on hearing an audible signal given by the driver of the overtaking vehicle, must cause the vehicle to give way to the right in favour of the overtaking vehicle, and
 - (b) must not increase the speed of the vehicle until completely passed by the overtaking vehicle.

Passing on right

158(1) The driver of a vehicle must not cause or permit the vehicle to overtake and pass on the right of another vehicle, except

- (a) when the vehicle overtaken is making a left turn or its driver has signalled his or her intention to make a left turn,
 - (b) when on a laned roadway there is one or more than one unobstructed lane on the side of the roadway on which the driver is permitted to drive, or
 - (c) on a one way street or a highway on which traffic is restricted to one direction of movement, where the roadway is free from obstructions and is of sufficient width for 2 or more lanes of moving vehicles.
- (2) Despite subsection (1), a driver of a vehicle must not cause the vehicle to overtake and pass another vehicle on the right
- (a) when the movement cannot be made safely, or
 - (b) by driving the vehicle off the roadway.

Passing on left

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

Clear view on passing

160 A driver of a vehicle must not drive to or on the left side of the roadway, other than on a one-way highway, unless the driver has a clear view of the roadway for a safe distance, having regard for all the circumstances.

[63] As noted above, there are four types of traffic signs in this passing zone on Highway 99: the white rectangular "Keep Right Except to Pass" sign at the start; a different white "Keep Right Except to Pass" sign about half-way through; a yellow diamond sign that visually shows "Right Lane Ends" with a rectangle reading "200 m" affixed below the yellow diamond; and another yellow diamond sign showing "Right Lane Ends" just before the white dashed lines stop and the transition stretch begins.

[64] The latter two yellow signs are characterised as warning signs and are on both sides of the highway facing oncoming southbound traffic. The Motor Vehicle Act Regulations, B.C. Reg. 26/58 provides in Division 23 at s. 23.01 the definition of "warning" for the purpose of a warning sign:

"warning" means a type of traffic sign which warns a motorist that conditions on or adjacent to a highway are potentially hazardous to pedestrians or to vehicular traffic

[65] The British Columbia Ministry of Transportation and Highways publishes a Manual of Standard Traffic Signs & Pavement Markings (the "Manual"). The description of the signs provided in the Manual is:

The W-61 RIGHT/LEFT LANE ENDS sign indicates a reduction in the number of lanes of pavement ahead either from the right or from the left.

The W-61 sign is only used for the reduction of a group of continuous lanes, and, therefore, should not be used in advance of an acceleration lane.

Pavement markings and/or delineation markers may also be used to mark the transition.

The appropriate version of the sign shall be used for the specific roadway configuration, that is, the W-61 R shall be used when the right lane ends, and the W-61 L when the left lane ends.

[66] Schedule 1 of the Regulations includes images and descriptions of the relevant signs:

KEEP RIGHT EXCEPT TO PASS (Regulatory)

Vehicles must be driven in the right hand lane except when legally passing and overtaking other vehicles.

Colour: Black on white reflectorized background.

WARNING SIGNS

Warning signs have black messages on a diamond shaped, yellow reflectorized background. The minimum size for warning signs is 60 cm x 60 cm.

B. Case Law

- [67] Determining fault in motor vehicle litigation engages both the MVA and the common law. In determining whether parties met their duties of care to fellow road-users, the court will be informed by the rules of the road, but must also consider the reasonableness of the parties' actions: *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21.
- [68] Another frequently cited principle relevant here is that "[a] driver will not be held to have breached the standard of care simply because he or she failed to take extraordinary steps to avoid an accident or to show exceptional proficiency in the operation of a motor vehicle": *Salaam* at para. 25. Relatedly, drivers are "not required to anticipate another driver's negligent manoeuvre": *Ali v. Fineblit*, 2015 BCSC 1494 at para. 20.
- [69] The common law that has developed regarding liability in circumstances where one vehicle is passing another is also relevant here. That being said, the cases discussed each turn on their own facts. They are helpful principally for how they discuss and apply the relevant legal principles, but they do not dictate a result.
- [70] The key legal principle in passing scenarios comes from *Samograd v. Collison* (1995), 17 B.C.L.R. (3d) 51 (C.A.). At paras. 62-63, Finch J.A. made clear that there was no rule of law imposing a greater obligation on the vehicle making the pass. Rather, the drivers' obligations are entirely dependent on the facts; the driver with the better opportunity to see the potential collision before it happens has a correspondingly greater duty to avoid the collision: see also *Eccleston v. Dresen*, 2009 BCSC 332 at para. 26; *Shallow v. Dyksterhuis*, 2013 BCSC 1761 at para. 16; *Postic v. Demarco*, 2020 BCSC 1950 at para. 33.
- [71] In *Brook v. Tod Estate*, 2012 BCSC 1947, aff'd 2013 BCCA 503, the plaintiff was proceeding in a single westbound lane down a hill. Eastbound traffic was divided into two lanes, separated by a dashed white line. One of the defendants was travelling in the right eastbound lane, proceeding uphill behind a slow van. Wanting to move around the van, this vehicle began to move into the left lane to pass but, in doing so, cut off a driver (the other defendant, Mr. Tod) who was approaching from behind. Mr. Tod reacted by swerving into oncoming traffic, at which point his vehicle was struck by the plaintiff's vehicle. In finding that the first defendant failed to take reasonable care when changing lanes, Affleck J. held that even if s. 151(a) did not enshrine a duty not to change lanes unless it was safe to do so, the common law duty of care would apply to similar effect: at para. 22. Justice Affleck held that it was negligent of the first defendant not to have seen Mr. Tod approaching from behind, notwithstanding that he may have been in their blind spot: at para. 23. Mr. Tod's attempt to take evasive action upon being cut off was, given the "agony of the collision," not found to be negligent. The first defendant's negligence was the sole cause of the accident.
- [72] *Postic* involved the plaintiff's westbound motorcycle passing a line of stationary vehicles by moving into the eastbound lane of traffic. The evidence established that the plaintiff, once in the eastbound lane, accelerated to 35 or 40 km/h. The eastbound lane was not totally free of traffic; there was an oncoming truck, visible in the distance. The plaintiff proceeded

forward, staying closer to the centre line than the middle of the eastbound lane. The defendant was stationary in the westbound lane, but in an attempt to see why the line of vehicles was stopped, he proceeded to inch slowly into the eastbound lane. He did so without shoulder checking or signalling. At this point, approaching from behind, the plaintiff collided with the front driver's side of the defendant's vehicle.

- [73] In *Postic*, MacDonald J. found the defendant committed statutory breaches by failing to shoulder check and signal. These breaches were negligent in the circumstances: at paras. 55 and 59. Justice MacDonald reiterated the principle from *Brook* at para. 23 that "[a] failure to see a vehicle does not excuse a driver from the obligation to be aware of vehicles around him": at para. 56.
- [74] The plaintiff in *Postic* also committed multiple breaches of the Act and was negligent. In failing to take sufficient time and care to observe oncoming traffic before making his pass, the plaintiff breached ss. 159-160: at para. 51. In failing to give the stationary vehicles in the westbound lane a wide enough berth, he breached s. 157(1); he additionally breached his common law duty of care by failing to anticipate that other drivers in the gridlocked westbound lane might attempt to pass, just as he himself was doing: at para. 52. Even so, the defendant's failure to shoulder check and signal were more dramatic departures from the standard of care than those committed by the plaintiff and, as a result, liability was apportioned 70% to the defendant: at para. 65.
- [75] In *Varga v. Kondola*, 2016 BCSC 2406, both the plaintiff and the defendant were travelling westbound on a four lane, single-direction highway. As the plaintiff was in an area she was unfamiliar with, she was using a GPS device for directions. She had merged onto the highway in the far-right lane, but needed to get over to the far-left lane in order to make a turn. The defendant was travelling in the middle-right lane and gave evidence that the plaintiff was driving erratically, shifting back and forth between the far-right and middle-right lanes. As they were approaching an intersection, the plaintiff's vehicle was directly in front of the defendant's vehicle, but in a separate lane. She suddenly signalled and shifted to the left and, in doing so, the rear of her vehicle collided with the front of the defendant's vehicle.
- [76] Justice Griffin found that, in failing to meet her obligations regarding changing lanes on a laned roadway, the plaintiff breached s. 151(a) of the Act. In doing so, she negligently caused the accident: at para. 117. However, the defendant also bore some of the liability because of his failure to give the plaintiff a wide berth, given his acknowledgment that the plaintiff was driving erratically: at para. 123. Liability was apportioned at 75% to the plaintiff and 25% to the defendant: at para. 127.
- [77] In *Ali*, the plaintiff was traveling on his motorcycle in front of the defendant's vehicle. He came to a stop at an intersection and the defendant tried to pass him on the left, but struck his motorcycle as he attempted to make a left turn. Gerow J. inferred that the defendant was impatient: at para. 28. The evidence supported that the plaintiff had signalled, checked

behind him to ensure he could turn left safely, and was in the middle of the road, not to the right as the defendant had suggested: at para. 33. In failing to wait for the plaintiff to make his turn or, alternatively, failing to signal her intent to pass, the defendant was 100% liable for the collision: at para. 34.

- [78] Finally, in *Link v. Insurance Corporation of British Columbia*, 2014 BCSC 1765, aff'd 2015 BCCA 509, the plaintiff was driving in the right lane on a snowy evening. Visibility was poor and he was following a set of tire tracks in the snow. The defendant's SUV "blew by" the plaintiff in the left lane and immediately shifted back into the right lane, spraying the plaintiff's windshield with snow in the process. The plaintiff tapped his brakes, causing his vehicle to slide out into the highway barriers. At trial, Ball J. applied ss. 157-159 of the Act. He held that, given the conditions, the defendant ought to have known the effect that a sudden shift back into the right lane would have had: at para. 19. In holding that the defendant breached the standard of care, Ball J. commented that "[t]here is, in my view, a very heavy onus on the driver of an overtaking vehicle to make sure that passing can be done in safety; particularly in poor road and weather conditions": at para. 20.
- [79] On appeal, ICBC argued that ss. 157-159 do not apply where the vehicles are travelling in the same direction on a "laned roadway", and that the trial judge had erred by applying a heightened standard of care as a result of applying those sections. Justice Lowry rejected that argument, holding that there is "little distinction" between the standard of care applicable to passing under ss. 157(1) and 159 and that applicable on a "laned roadway" under s. 151(a). The "overriding burden" is to pass a vehicle and return to the original lane of travel only where it can be done safely, without affecting the travel of the overtaken vehicle: at para. 8.

IV. POSITIONS OF THE PARTIES

A. Plaintiff

- [80] The plaintiff states in her submissions:
33. In applying the legislation and cases to the facts of the case at bar, the plaintiff submits that the defendant was clearly negligent in his continuing to move into the left lane of traffic as his lane was ending despite the fact that the plaintiff's vehicle was there to be seen and created an immediate hazard. He had a legal obligation to be aware of the traffic near him.
34. The fact that he was unable to locate her vehicle until just before the end of the lane does not excuse his failure to see her. She was there to be seen, and in fact he testified that he had seen her coming up behind him prior to that. Since she had not moved in front of him, the only logical conclusion was that she was next to him, which he indeed eventually confirmed when he performed a shoulder check.

35. By trying to move ahead of her as opposed to allowing her to pass at that point, where it was still two lanes, the defendant was essentially trying to pass the plaintiff on the right, contrary to the Motor Vehicle Act. He knew that his lane was ending, and he continued to attempt to get ahead of the vehicle in the left lane, despite his knowledge that she was beside him. Even before he became fully aware of her being beside him, he ought to have known she was there
36. The defendant could have braked at any time, but he chose not to. He blamed it on the fact that there was gravel on the side of the road, but he agreed that there was approximately a meter of paved shoulder before it turned to gravel. And we know from Mr. Lawrence's evidence there was a considerable distance before the width of the road would have become too narrow for both vehicles in any event. The plaintiff submits that the defendant's explanation for not braking is not reasonable.
37. In the alternative, if the Court does not find that the defendant was attempting to pass on the right, the defendant's evidence makes it clear that he prevented the plaintiff's path of travel by accelerating while she was trying to pass him, which is also contrary to the Motor Vehicle Act.
38. The plaintiff was in the fast lane of travel, the defendant in the slow lane. The slow lane was ending, as is clear from the legislation, and Mr. Hubick saw the warning signs and was aware of it. He owed a duty of care to Ms. Doyle and he failed to discharge that duty by continuing into her lane of travel when it was clearly unsafe for him to do so
39. The plaintiff submits that the defendant was negligent in his actions and ought to be held at fault for the ensuing collision.

B. Defendant

[81] In his submissions, the defendant states:

- The parties had an obligation to stay in the right lane except when passing by virtue of the signage and s. 151(a). It is submitted that it therefore cannot be said that the defendant owed a heightened duty of care to the plaintiff at the end of the passing lane. Rather, the plaintiff had the duty of care to ascertain that the pass, whether along a laned roadway per s. 151(a) or along a highway with only one lane in each direction per ss. 157 and 159, could be made with safety and without affecting the vehicle to be overtaken (the Dodge).
- Her obligations to make the pass safely and only so long as she in no way affected the travel of Mr. Hubick is set out in ss. 151(1), 157 and 159 of the Act. This onus was very heavy per Link, supra.
- That the plaintiff owed Mr. Hubick a duty to pass without interference is the crux of this matter.

- The plaintiff chose to pass Mr. Hubick at the end of the passing lane. There were warning signs advising that the lane was ending and that the roadway would be transitioning from two lanes to one. The MVA occurred near the end of the transition from two lanes to one, so after the end of the passing lane. The nature of the damage necessitates that the vehicles were beside each other still to some degree, and it is submitted that it is likely that some portion of the plaintiff's vehicle was over the double yellow centre line, contrary to s. 151(b) of the Act. The engineering evidence does not support that she had completed her pass of Mr. Hubick when impact occurred.
- The plaintiff breached her duty to Mr. Hubick when she decided to pass him at the end of the passing lane. As the overtaking driver, she was in a better position to measure the risk and should have seen and been alert to the potentially hazardous conditions ahead, being the end of the passing lane, curves in the road and oncoming traffic (per Postic, supra).
- Mr. Hubick described attempting to try and let the plaintiff complete her pass and re-establish herself in the quickly narrowing southbound lane by surging back and forth to try to create space for her.
- That he was aware of the presence of the plaintiff's vehicle and tried to keep a regular lookout reflects his obligations to drive with due care and attention per s. 144 of the Act.

V. ANALYSIS

- [82] The collision occurred on southbound Highway 99, the Sea-to-Sky Highway, between Pemberton and Whistler. There is generally one lane of travel in each direction except for the three passing zones. The plaintiff and defendant were driving their vehicles (respectively the Jeep and the Dodge) southbound in the second passing zone which had two lanes in their direction. The collision occurred after the south end of the passing zone, in the transition stretch which is the 200 meters after the dashed white lines dividing the southbound lanes ends and where the southbound lane narrows back to one lane. The plaintiff says the collision occurred at the beginning of the transition stretch while the defendant says it was between three-quarters of the way through to the end of the transition stretch. The expert witness opined that the collision probably occurred closer to the end.
- [83] The collision occurred at approximately 7:30 a.m. on a clear morning. No mechanical issues with either vehicle caused or contributed to the collision. There is no evidence that any environmental or personal health factors, distractions, or other vehicles caused or contributed to the collision.
- [84] From the Agreed Statement of Facts and the evidence of the expert witness, Mr. Lawrence, there is no dispute concerning the description of the roadway and signage on the approximately two kilometer section of Highway 99 which includes the passing zone and 200 meter transition stretch. For ease of reference I set out here those descriptions together with some of the facts not in issue. I will next discuss the passing of the defendant's Dodge by the plaintiff's Jeep since it is there that the collision occurred. In doing so I will make findings of

fact and refer to the legislation.

- [85] The findings of fact and determination of liability rest on an examination of the parties' driving over approximately 400 meters and 14.4 to 18 seconds.
- [86] The defence submits that Mr. Hubick presented as a reliable and credible witness. I agree. He was thoughtful in his testimony and took time considering the details of the events surrounding the collision. He gave detailed evidence about his movements and observations throughout his driving, including details such as the sound of gravel. When challenged on propositions, he appeared to listen carefully and explained in detail what he did and what he observed. He fairly admitted matters not in his favour, such as the brief glance rather than a complete shoulder check when he lost sight of the Jeep. His evidence also harmonizes with the engineering evidence which I accept. He testified in a genuine, forthright manner. His evidence regarding the circumstances leading up to the collision and the collision is accepted.
- [87] At the beginning of the two lane passing lane area there is a white rectangle "Keep Right Except to Pass" sign. Mr. Hubick entered and remained established in the right lane as the passing lane continued uphill and curved to the right. I find that Ms. Doyle also entered the right lane and changed lanes about halfway through in order to pass the Dodge.
- [88] At about halfway through the passing lane area, there is another white "Keep Right Except to Pass" sign. The highway continues to curve uphill to the right. The defendant was aware of the Jeep behind him -- first by observing its lights, then he saw the vehicle about 500 meters behind him.
- [89] The first yellow warning sign with the "200 meter" attachment indicates that the passing zone will end in 200 meters. The defendant testified that this is where he signalled his intent to merge left at the time that the plaintiff's Jeep was coming up behind him in the left lane. It appeared to him that the Jeep would let him change lanes when it was approximately 10 meters behind him in the left lane.
- [90] The last yellow warning sign visually indicates the end of the passing zone with a direction to merge to the left. After this sign, there are three more white dashed lines between the southbound lanes before the southbound lane begins to narrow again to 3.7 meters along the 200 meter transition stretch.
- [91] The distance between the two yellow warning signs in the passing zone is 200 meters. At about the halfway point between these two signs, with roughly 100 meters remaining in the left passing lane, the defendant in the right lane, signalling his intent to merge left, lost sight of the plaintiff's vehicle for about five seconds of travel time. When he saw it next, it was beside him. At that point, the left passing lane was ending.

- [92] There was an issue in the testimony of the defendant regarding where on the highway he regained sight of the plaintiff's vehicle and saw her beside him to his left. As set out at para. 38 above, I found that it was as the white dashed lines were ending that he saw the vehicles side by side.
- [93] That finding of fact is made after considering that the defendant's evidence first indicated that he regained sight of the plaintiff's vehicle, now directly beside him, 100 meters after the passing lane ended. However, in cross-examination he agreed that the vehicles were side by side before the end of the two-lane section, and added that it was right at the end of the two-lane section, or passing lane. He also confirmed his Examination for Discovery evidence where he described that event similarly - the other vehicle was parallel to his truck box when there were still two lanes, and at the very end of the two lanes. He then stated: "at the point the lanes merged and became one, that's where this started." Ms. Doyle also described driving side by side in that location.
- [94] This description accords with the expert evidence. Based on a speed of 90 km/h (the average speed assumed by the expert witness), it would have taken Mr. Hubick 4 seconds to travel the final 100 meters of the passing lane area, or on his evidence of 5 seconds he would have travelled about 125 meters. In other words, he lost sight of the plaintiff's vehicle for 4 to 5 seconds, or about 100 to 125 meters. He regained sight of the plaintiff's vehicle at the beginning of the transition stretch. He agreed in cross-examination that a more thorough shoulder check likely would have assisted him to see the plaintiff's vehicle in his blind spot, even with the use of his convex dome mirror enhancements. If his speed was 80 km/h at that time, those last 100 meters would be travelled in 4.5 seconds.
- [95] At the end of the white dashed lines, after the warning sign for the end of the passing zone, is where Ms. Doyle also said that she passed Mr. Hubick. Ms. Doyle testified that the road narrows then widened at the end of the dashed white lines. It does not. The evidence of the expert witness is determinative that the highway begins to, and continues to, narrow in the transition stretch commencing at the end of the white dashed lines.
- [96] Mr. Hubick in observing the plaintiff now alongside him, saw that she was determined to pass. He moved over as far as possible to the right side of the highway and could hear the gravel under his Dodge as the right side of the vehicle was on the gravel shoulder next to the ditch. As the plaintiff sped up and slowed down, so too did Mr. Hubick, by applying and releasing the gas. On an uphill, Mr. Hubick decreased his speed by letting up on the gas. The defendant referred to this, where each vehicle was possibly trying to anticipate and accommodate the response of the other, as "surging." I find that Mr. Hubick did not apply his brakes at any time after seeing the Jeep beside him.

- [97] In passing the defendant, I find that the plaintiff veered from the left side of the narrowing southbound lane to the right of that one lane. In doing so, she struck the Dodge. Contact was between the right rear corner of the plaintiff's Jeep and the left front corner of the defendant's Dodge. The Jeep came to rest approximately 245 meters south of the end of the dashed white lines and approximately 48 meters south of the point at which the two lanes narrowed back to one lane.
- [98] It was Mr. Hubick's evidence that the collision occurred 150 to 200 meters into the transition stretch. The expert witness's evidence also places the location of the collision in the transition stretch, closer to the end of the transition stretch than the beginning. I reject the evidence of the plaintiff as to the location and nature of the collision being at the beginning of the transition stretch in the widened area. She described both her pass and the collision occurring at this point. It is not possible on the evidence that I accept, that of the expert witness and the defendant, to find that a rear-end collision ensued in that manner.
- [99] On the evidence of the expert witness and the defendant, with regard to his identification of the road signs in photo number six (which are the "winding road" signs shown in the expert's diagram), I find that the collision occurred at slightly more than three-quarters of the way through the transition stretch. This is approximately 160 meters past the end of the white dashed lines, where the defendant first saw the vehicles side by side. At speeds of between 80 to 100 km/h, and taking the median speed of 90 km/h, the time to drive 160 meters would be approximately 6.5 seconds. If the speed was 80 km/h, the time elapsed would be 7.2 seconds. If the distance was 150 meters, the time at these speeds would be between 6 and 6.75 seconds. Thus the time that the vehicles were driving on the transition stretch beside each other before the collision was between 6 and 7.2 seconds.
- [100] For this 6 to 7.2 seconds on the transition stretch, the road was narrowing from two lanes back to one lane, or back to 3.7 meters wide. I accept the defendant's evidence that during this time he was driving with his right wheels on the gravel shoulder. I also find that it is more likely than not that for some of this time, the plaintiff was driving over the yellow centre line into oncoming traffic. Approaching the end of the transition stretch, two vehicles at that speed would have difficulty to fit into the narrowing lane even with the defendant's use of some of the gravel shoulder.
- [101] During this time in the transition stretch, the surging described by the defendant occurred. I accept his evidence that he was slowing by taking his foot off the accelerator on the uphill to allow the plaintiff to pass him. When she hesitated and did not then pass, he would resume his speed. I accept his evidence that his slowing and resuming his speed was sequentially in reaction to the plaintiff's speeding up and slowing down and her hesitancy to complete her pass. I also accept his evidence of his intent being to allow her to complete her pass, or to move left if she allowed him to. The two warning signs had directed his vehicle to merge to the left.

- [102] Eventually, the plaintiff did pass the defendant. I do not, however, accept the plaintiff's evidence of the location of the passing being at the end of the two southbound lanes. What occurred at the end of the passing lane area is that she was beside the defendant in an attempt to pass. She did not then complete the pass, although she had the opportunity to do so as the defendant moved to the far right of the transition stretch and slowed by releasing the accelerator on an uphill grade.
- [103] After approximately 160 meters of driving in the transition stretch, where there was one narrowing southbound lane, the plaintiff passed the Dodge and veered abruptly to the right. In doing so she collided with the front left side of the Dodge as also indicated by the damage to the vehicles. Mr. Hubick thought she had made it and completed her pass without hitting him.

A. Liability of the Plaintiff

- [104] The application of the statutory provisions to these facts has two possibilities. It is clear that the passing zone, where the sequence of events began, was a "laned roadway," to which the duties in s. 151 would apply. However, the dashed lines stop before the transition stretch. This was the area in which the surging and eventual pass occurred. The facts engage the "laned roadway" provisions and the passing rules in ss. 157 and 159. Ultimately, I rely on the reasoning of Justice Lowry in *Link* at para. 8, where he confirms that, regardless of whether s. 151 or ss. 157 and 159 govern, the "overriding burden" is to pass a vehicle and return to the original lane of travel only where it can be done safely, without affecting the travel of the overtaken vehicle.
- [105] I note here that there has been no judicial commentary on whether "overtaking" in the legislation is equivalent to "passing" another vehicle. For the purposes of these Reasons I will use the words interchangeably.
- [106] Ms. Doyle did not complete her pass when she had an opportunity to do so before the end of the passing zone. She then failed to accurately assess the safety of making her pass after the end of the passing zone and the beginning of the transition lane. In doing so, she breached ss. 151(a) and 159 of the Act. This breach was negligent having regard to the following circumstances, which indicated that such a manoeuvre was unsafe: the two warning signs indicating that the two southbound lanes would merge; the actual fact of the lanes narrowing, which ought to have been apparent to the plaintiff at the start of the transition stretch after the second warning sign; and the fact that Mr. Hubick had signalled his intent to change lanes about 200 meters before the passing lane ended, in clear view of the plaintiff who was still behind him at that point. She should have seen this and completed her pass in the last 100 meters of the passing zone, or declined to carry out her pass.

- [107] I conclude that she continued her attempt to pass after the passing zone and dashed white lines ended erroneously thinking that she still had enough roadway because she thought that the road widened after the dashed white lines ended. The road does not widen at that place. The road narrows and was continuously narrowing as she continued to attempt to pass. It was not reasonable to continue the attempt to pass in these circumstances.
- [108] Ms. Doyle had an obligation to wait until she was reasonably certain she could pass with safety and if there was uncertainty, she ought to have waited: *Ali* para. 21. I note that approximately 2 kilometers after the end of the transition stretch, there was another passing lane ahead.
- [109] Ms. Doyle also breached s. 157(1)(b) of the Act by causing her vehicle to abruptly return to the right side of the highway when she was not safely clear of the overtaken vehicle, the defendant's Dodge. She veered into the defendant's vehicle before she completed the pass. It is the defendant's speculation that the abrupt turn was to avoid a collision with an oncoming vehicle, but I make no finding of fact as to the reason that the plaintiff turned abruptly at that point. This was negligent given that it came after between 6 and 7.2 seconds of jockeying for position, during which time the plaintiff was slowing down and speeding up. However, she returned to the right lane too abruptly, causing the front of the defendant's vehicle to collide with her rear passenger side. I reject her evidence that she was hit from behind. I rely on the evidence of the expert witness and the defendant as to the nature of the collision.
- [110] Ms. Doyle testified that she was unaware of the circumstances of the Dodge. She was looking straight ahead and did not see the driver or passenger in the Dodge. While other details regarding her driving may be memories lost, she recalled that she did not look to see the other driver. The evidence therefore indicates that she was not paying attention to her surroundings or driving with reasonable consideration for others using the highway, either the defendant travelling in the same direction or the oncoming traffic. This was contrary to s. 144 and, in the circumstances, negligent.
- [111] The concept of "right of way" is not of assistance in this analysis. There is authority for the proposition that there is no "dominant" vehicle in passing scenarios such as these, such that a "servient" vehicle would have to give way: *Samograd v. Collison*, [1993] B.C.J. No. 2950 at para. 17 (S.C.). I accept the defendant's evidence that he slowed to allow the plaintiff to complete her pass, and attempted himself to merge left only to be met with her speed increasing. I find that the plaintiff was hesitant and undecided on how to proceed. For 6 to 7.2 seconds her pass was incomplete notwithstanding the opportunities to pass or allow the defendant to merge in an increasingly dangerous situation as the one-lane road narrowed.
- [112] In all of the circumstances, the plaintiff had the better opportunity to foresee the potential collision both in the passing zone and in the transition stretch. Mr. Hubick's vehicle would have been directly in her field of vision as the passing zone came to an end. There is no evidence that she lost sight of the Dodge for the last 100 meters of the passing zone. In order

to observe the plaintiff's vehicle, Mr. Hubick would have needed to look in his rear-view mirrors and complete a thorough shoulder check; this can only be done periodically, every few seconds. While he had an obligation to carry out those checks and to be aware of surrounding traffic, Mr. Hubick's opportunity to foresee a potential accident was comparatively diminished. Ms. Doyle saw, or ought to have seen, the warning signs and the defendant's signal. As stated in *Samograd*, she bears a greater responsibility for avoiding the collision. That responsibility continued in the transition stretch as the plaintiff could see the Dodge on her right and any oncoming traffic.

- [113] I cannot accept the plaintiff's suggestion that Mr. Hubick was attempting to pass her on the right. There was no evidence that Mr. Hubick was intending to do so. He was not asked that question in cross-examination. Mr. Hubick's evidence, which I accept, is that any increase in his speed while the vehicles were side by side in the transition stretch was an attempt to respond to or accommodate a perceived decrease in the plaintiff's speed with the goal of the vehicles both proceeding safely and completing his required merge left.
- [114] I conclude that Ms. Doyle did not meet her obligations under ss. 144, 151, 157 and 159 of the Act. While she may have commenced her pass in the passing lane where it was safe to do so, as the passing lane ended with her pass incomplete it was incumbent upon her to reassess and ascertain that she could do so safely and without affecting the travel of the other vehicle. She drove without regard for the other vehicles on the road.
- [115] In the circumstances, I find that she breached the standard of care and negligently caused the collision to occur. However, her negligence was not the sole cause of the collision.

B. Liability of the Defendant

- [116] Having considered the passing undertaken by the plaintiff, the question remaining is whether Mr. Hubick negligently contributed to the collision by losing sight of the Jeep in the passing zone and by not driving more cautiously when Ms. Doyle continued to proceed with her pass in the transition stretch: *Varga* at para. 118.
- [117] With regard to the transition stretch, although the factual circumstances are not similar, the principle that applied in *Varga* at paras. 120-124, which grounded a finding of negligence on the part of the defendant, is likewise applicable here. There, the defendant was found partially liable because he had noted the plaintiff's erratic driving and not taken sufficient steps to steer clear of her. The driver's duty of care includes "a responsibility to be on the lookout for unsafe and unexpected events on the road, including unsafe manoeuvres by other drivers": *Varga* at para. 89; see also *Power v. White*, 2010 BCSC 1084 at para. 28.

- [118] The defendant gave evidence that, when their vehicles were alongside one another, he could see the plaintiff who appeared determined to make the pass despite the danger of proceeding with such a manoeuvre. Although he took some evasive action in the 6 to 7.2 seconds in the transition stretch, he could have taken additional steps by slowing more, either by applying the brakes, even slightly, or completely releasing the gas and not resuming his speed.
- [119] I have reached this conclusion notwithstanding the principle that a driver will not be found negligent simply because that driver failed to take extraordinary steps to avoid an accident: Salaam at para. 25. I do not find the step of either applying the brakes or increasingly releasing the gas to slow down more to be an extraordinary step. In this case, having approximately 6 to 7.2 seconds gave him the opportunity to take considered evasive actions. In this respect, I do not accept his evidence that his degree of slowing by releasing the gas was the only option available.
- [120] With regard to losing sight of the Jeep, the case law is clear that the fact that a vehicle making a pass was in the overtaken driver's blind spot does not necessarily excuse the overtaken driver from their obligation to be aware of the surrounding vehicles: Brook at para. 23; Postic at para. 56. Here, the defendant had earlier observed that Ms. Doyle was 500 meters behind him. By the time he was 200 meters from the end of the passing zone and began to signal, his evidence was that she was 10 meters behind him. It appeared to Mr. Hubick that she was letting him in. Over the next approximately 100 meters and 5 seconds, until the end of the passing zone, Mr. Hubick lost sight of the plaintiff in his blind spot. But there were few places her vehicle could have been. Mr. Hubick ought to have understood that her vehicle had not disappeared and that she was not, in fact, letting him in but rather proceeding with a pass. In failing to recognize this, and in losing those 5 seconds to deal with a potentially dangerous situation, he breached his duty to drive with due care and attention and was negligent. This negligence was also a cause of the collision.

C. Apportionment

- [121] Where, as here, both parties have been found to be at fault, the court must apportion liability between them in accordance with s. 1 of the Negligence Act, R.S.B.C. 1996, c. 333, which reads as follows:

Apportionment of liability for damages

- 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.
- [122] The fundamental principles when apportioning fault pursuant to s. 1 of the Negligence Act were summarized in *Pereira v. Jory*, 2020 BCCA 318 at paras. 31 to 34:
- [32] In *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 (C.A.), this Court emphasized that the inquiry under s. 1 is focused exclusively on the degree to which each party's conduct represented a departure from the expected standard of care. It is not an inquiry into other considerations that might connect the actions of one party more closely than the other with the damage that occurred. Mr. Justice Lambert, for the majority, said:
- [19] The Negligence Act requires that the apportionment must be made on the basis of "the degree to which each person was at fault". In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.
- ...
- [24] In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties.
- [33] In *Alberta Wheat Pool v. Northwest Pile*, 2000 BCCA 505, Finch J.A. (as then he was) explained that fault or blameworthiness covers a continuum of conduct:
- [46] Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.
- [34] In *Salaam v. Abramovic*, 2010 BCCA 212, Justice Groberman set out the Court's task in apportioning liability in a motor vehicle case:
- [21] In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. While s. 175 of the Motor Vehicle Act and other rules of

the road are important in determining whether the standard of care was met, they are not the exclusive measures of that standard.

See also *Randhawa v. Evans*, 2020 BCCA 292 at paras. 22-23.

[123] The conduct of the plaintiff was more blameworthy than that of the defendant. She could have prevented the collision if she had completed her pass in the passing zone, or if she had aborted her attempt to pass at the start of the transition stretch after the final warning sign indicated the road was narrowing and the end of the white dashed lines. The plaintiff was the driver with the better opportunity to see the potential for the collision before it occurred in both areas of the road. She should have been able to see that the road was narrowing and that the defendant was signalling his intent to change lanes. Thus, she had a greater obligation to avoid the collision: *Samograd* at paras. 62- 63. In continuing with her pass after the end of the passing lane despite the fact that doing so was manifestly unsafe, the plaintiff committed several statutory breaches and was negligent. As a result, she ought to bear a greater portion of the liability.

[124] Mr. Hubick's conduct likewise departed from the standard of care, but not to the same extent as that of the plaintiff. He breached his duty of care by failing to drive with due care and attention. However, these breaches were largely the result of his inadequate response to the plaintiff's prior negligent acts. Until he lost sight of the Jeep, Mr. Hubick was keeping a proper lookout and obeying the rules of the road. As a result, he ought to bear a lesser share of the liability.

VI. CONCLUSION

[125] I find that Ms. Doyle clearly bears greater responsibility for the collision. I therefore apportion liability 65% to the plaintiff and 35% to the defendant.

[126] If the parties cannot agree on costs, they are at liberty to make written submissions regarding costs within 30 days of the date of these Reasons with Reply submissions 21 days thereafter.

"The Honourable Madam Justice Watchuk"

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