

CANADA / JUDGMENT

Goronzy v. McDonald

2020 BCSC 869

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 869 Goronzy v. McDonald

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Goronzy v. McDonald,

2020 BCSC 869

Date: 20200611

Docket: M151742

Registry: Vancouver

Between:

Stephen Alexander Goronzy

Plaintiff

And

Daryl James McDonald, Rashpal Singh Rai, Royal City Taxi Ltd., and Sandra Mary McComb

Defendants

- and -

Docket: M146875

Registry: Vancouver

Between:

Christopher Tesar

Plaintiff

And

Daryl James McDonald, Stephen Alexander Goronzy, Royal City Taxi Ltd, and Rashpal Singh Rai

Defendants

- and -

Docket: M161031

Registry: Vancouver

Between:

Alia Lecoin

Plaintiff

And

Daryl James McDonald, Rashpal Singh Rai, Royal City Taxi Ltd., and Sandra Mary McComb

Defendants

- and -

Docket: M028889

Registry: Chilliwack

Between:

Rashpal Singh Rai

Plaintiff

And

Daryl McDonald, Stephen Goronzy, and Sandra McComb

Defendants

Correction notice: The front page of the judgment was corrected on June 19, 2020 and on June 29, 2020

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

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No other appearances

Place and Date of Trial

Vancouver, B.C. January 20, 21, 22, 23 and 24, 2020

Written submissions received:

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Place and Date of Judgment:

Vancouver, B.C.

June 11, 2020

Table of Contents

Overview... 4

Issues.. 6

Evidence.. 6

Christopher Tesar 6

Rashpal Rai	7
Alia Lecoin..	9
Sandra McComb.	9
Stephen Goronzy.	10
Daryl McDonald.	11
Dr. Woolfenden.	14
The Accident Reconstructionists.	15
Mr. Heinrichs (called by Mr. Tesar)	16
Mr. Luker (called by the plaintiff Mr. Rai)	18
Mr. Little (called by the defendant Mr. McDonald)	19
Mr. Little's Second Report: Effect of Failure to Wear a Seat Belt	20
Positions of the Parties..	21
Christopher Tesar	21
Mr. Goronzy.	23
Alia LeCoin..	24
Rashpal Rai (plaintiff)	25
Royal City Taxi and Rashpal Rai as defendant	27
Daryl McDonald.	27
Contributory Negligence of Tesar and Rai - Seat Belt Issue.	28
Mr. Tesar's Contributory Negligence.	29
Mr. Rai's Contributory Negligence.	30
Mr. Tesar's Response to Contributory Negligence.	31
Mr. Rai's Response to Contributory Negligence.	31
Conclusions..	32
Liability of Mr. McDonald.	32
Liability of Mr. Rai/Royal City Taxi	32
Discussion.	35
Determination on Contributory Negligence for Mr. Tesar and Mr. Rai	40

Result.. 42

- [1] These actions concern a multi-car motor vehicle accident. Liability is in issue and was severed from the issue of damages, for reasons that are unclear. Insufficient time was allowed for trial, and due to the many counsel involved in this matter, it was perceived to be difficult to arrange more time for oral argument. Written submissions were received. After submissions were received, the Court of Appeal issued reasons in *D'Amici v. Fahey*, 2020 BCCA 89, which touched on some of the issues in this case. Counsel were given an opportunity to comment on that case in writing.
- [2] While the time and effort counsel put into the written submissions is appreciated, this is not a satisfactory replacement for oral argument which would allow the court to engage in discussion with counsel and fully explore the arguments, especially as any difficulties with severing liability from damages would have become clearer during submissions.

Overview

- [3] On March 29, 2014, Mr. Rai, a taxi driver operating a Toyota Prius owned by Royal City Taxi, drove southbound across the Patullo Bridge in New Westminster, B.C., at about 12:30 p.m. on a cloudy but dry day. The Patullo Bridge has two lanes each way, separated by yellow plastic pylons. Mr. Rai was travelling in the left lane. The bridge crests and then curves very slightly to the east near the south end. Neither Mr. Rai nor his passenger, Mr. Tesar, who was seated in the passenger side rear seat, were wearing seat belts.
- [4] Mr. McDonald, who suffers from epilepsy, was driving northbound across the bridge with his friend, Mr. Goronzy, in the front passenger seat of Mr. McDonald's Infiniti. Before reaching the crest of the south side of the bridge, Mr. McDonald suffered a grand mal seizure, crossed through the yellow plastic pylons that separated the north and south bound lanes, and struck the taxi, as it travelled southward in the left lane. The collision occurred at the north end of the curve, near the south end of the bridge.
- [5] Almost immediately, the taxi, which was spun counter-clockwise, was struck from the rear by a Chevrolet Silverado pick-up truck, which was being driven southbound in the right hand lane by Ms. McComb, with Ms. Lecoin as a passenger.
- [6] The driver of the taxi, Mr. Rai, suffered a head injury; his passenger, Mr. Tesar, is now a paraplegic; Mr. Goronzy, the passenger in the Infiniti, suffered a series of injuries; Ms. McComb, the driver of the Chevrolet pick-up truck, and her passenger, Ms. Lecoin, suffered relatively minor injuries.
- [7] All injured parties have sued Mr. McDonald, based on the allegation that he was not taking his medication contrary to medical advice and should have known he should not have been driving and should have foreseen a grand mal seizure. It appears from the written submissions from the plaintiffs that Mr. McDonald raised the defence of inevitable accident in his pleadings but this was not pressed by his counsel in his submissions.

- [8] Mr. McDonald says Mr. Rai and Mr. Tesar are contributorily negligent because they did not wear seat belts.
- [9] Mr. Rai and Royal City Taxi are also defendants on the basis of three allegations made by Mr. McDonald, Mr. Tesar, Mr. Goronzy, and Ms. Lecoin:
- a) Mr. Rai was asked by Mr. Tesar to take the Port Mann Bridge but took the Patullo Bridge instead;
 - b) Mr. Rai drove over the Patullo Bridge in the left hand lane, when a professional driver should know to take the right hand lane if possible, given that the bridge has narrow lanes and is notorious for traffic accidents; and/or
 - c) Mr. Rai was driving over the 50 kph speed limit on the Patullo Bridge.
- [10] Mr. Rai denies he was speeding and contests causation on the bases of remoteness and foreseeability.
- [11] Although originally named in the style of cause, neither Mr. Goronzy nor Ms. McComb are currently defendants.

Issues

- [12] The issues are:
- a) Was Mr. McDonald negligent?
 - b) Was Mr. Rai and thus Royal City Taxi negligent:
 - i. in taking the Patullo rather than the Port Mann Bridge
 - ii. in driving in the left hand lane, and/or
 - iii. in exceeding the speed limit?
 - c) Was Mr. Tesar contributorily negligent in failing to wear a seatbelt?
 - d) Was Mr. Rai contributorily negligent in failing to wear a seatbelt?
 - e) What is the apportionment of liability?

Evidence

Christopher Tesar

- [13] Mr. Tesar hired a taxi in the late morning of March 29, 2014 to take him home to Surrey, which is across the Fraser River from the residence of his friends in New Westminster, B.C. The Royal City taxi driver (Mr. Rai) picked him up. Mr. Tesar got into the rear passenger seat. He did not put on his seat belt, and testified that he usually did not do so in a taxi.

- [14] He testified that he asked Mr. Rai to take him to Surrey, using the Port Mann Bridge rather than the Patullo Bridge because he feels the Patullo Bridge is old, dangerous, and subject to traffic pattern changes. He testified that he was pretty sure he told the driver he would pay for the toll on the Port Mann Bridge.
- [15] Mr. Tesar became absorbed in his phone and realized they were driving onto the Patullo Bridge instead of the Port Mann Bridge. He was annoyed but did not say anything. He said the taxi was in the left inside lane, going at "a good clip".
- [16] He said it was a normal day with smooth traffic. There were multiple vehicles on the bridge, using both lanes, and the taxi driver was going with the flow of traffic in the left lane. There was traffic in the right lane as well.
- [17] Mr. Tesar said he saw a vehicle approaching in the northbound inside lane, although his view was partially obscured by the pylons. The vehicle crossed the center, directly into their lane. He heard the taxi driver say "Oh!" He tried to brace himself. The vehicle made contact with the taxi. He was conscious of a lot of pain, glass and smoke. He was taken to the hospital by ambulance.

Rashpal Rai

- [18] Mr. Rai testified that he has driven in this area for many years, 15 of them with Royal City Taxi. He said a driver from Royal City taxi can pick up anyone in New Westminster, but not in Surrey unless specifically called.
- [19] He said if a passenger requests a particular route, he will take it. At the time of the accident, a toll was required for the Port Mann Bridge but the taxi company had stickers that allowed them onto the bridge. He said a passenger was never required to pay for the toll on the bridge.
- [20] Mr. Rai said he normally started his shifts at 5 a.m or 6 a.m. He did a pre-trip inspection of his vehicle. This included checking that the seat belts were operational.
- [21] He picked up a passenger in New Westminster. All he could recall is the passenger said he wanted to go to Surrey. He testified that he has no memory of any events that day, after entering the Patullo Bridge, until he woke up in the hospital.
- [22] He said it is common for passengers to put on seatbelts and he reminds them to do so if they are under 18, but it is their responsibility if they are over 18.
- [23] Mr. Rai acknowledged that he knows the lanes are narrower on the Patullo Bridge than on other bridges but said he has a small Prius and has driven over the bridge for 20 years. He agreed he has seen trucks straddle the lanes because they are narrow. He agreed that the inner lanes on the bridge are closed from 10 p.m. to 4 a.m.

- [24] Mr. Rai was asked at trial if he knew the south end of the Patullo Bridge is dangerous for head-on collisions. He responded he always drove carefully and was not sure how many accidents happen on the bridge. At his discovery he had agreed that the bridge was "highly prone to head-on collisions", particularly the curve where the accident happened, and said he was careful because of that, usually driving in the right hand lane. He adopted these answers at trial, but repeated several times that he always drives carefully. He agreed the speed limit on the bridge is 50 kph and said he always drives at the speed limit.
- [25] Mr. Rai testified that the traffic was not heavy on the day of the accident and both lanes were open. He agreed that if the right lane is clear, it is safer to drive there. He also knew it would be dangerous to speed, and at discovery, had said he drives less than 50 kph because it is not safe on the bridge. He agreed that it would be unsafe to enter the left lane to pass a vehicle going 60 kph.
- [26] Mr. Rai was questioned extensively about a series of pictures, one second apart, that were taken with the rear-facing camera in his cab, referred to by counsel and the experts as "the video". This camera is focussed on the back seat, but there is a peripheral view out the right rear passenger window. Mr. Rai agreed that there was no vehicle behind him to the right as he drove in the left hand lane.
- [27] He was asked if it would therefore be easy to move into the right hand lane, and why he had not done so. Mr. Rai was somewhat at a disadvantage when these questions were put to him as the camera did not show whether there was a vehicle ahead of him in the right hand lane, and Mr. Rai has no memory of the accident. The presence of a vehicle immediately ahead of the taxi in the right hand lane would obviously be relevant to a decision whether to move over into that lane or not. In fact, the Chevrolet pickup driven by Ms. McComb was in the right hand lane. As the pictures moved forward in time, Mr. Rai agreed he could see the pickup beside him. He was asked to assume the pickup was going 55-60 kph, and agreed it would not be safe to pass it at that speed, and that he could have gone slower and pulled in behind it, into the right hand lane. He agreed it would be dangerous to drive in the left hand lane at 70 kph and pass vehicles.
- [28] Mr. Rai maintained that he always travels at the posted speed limit, and if he interrupts the flow of traffic by doing so, vehicles can pass him on the left. He does not recall passing the pickup, but agreed that it appears he did so, from the pictures.
- [29] Mr. Rai agreed the more trips he makes the more money he makes. He was asked if he took the Patullo Bridge because it was a shorter route. He said it was closest to the destination, but if a customer wants another route, the driver must take it.

Alia Lecoin

- [30] Ms. Lecoin was the passenger in the Chevrolet pickup truck, driven by her co-worker, Ms. McComb. They were on their way to a funeral in Surrey, driving south over the Patullo bridge in the right hand lane (the same direction as the taxi). There was a sedan ahead of

them. Ms. McComb was going with the flow of traffic. Ms. Lecoin was looking out the passenger side window. She saw a red squiggle out of the corner of her eye and felt a massive impact. She did not feel Ms. McComb brake. Her seat belt activated. She did not know what hit them but later saw a white and red Prius.

- [31] Ms. Lecoin testified that she felt they ended up on the sidewalk, and Ms. McComb brought them back into her lane. She looked around and saw car parts everywhere, and cars lined up on the bridge back into Surrey. It was quiet. She called 911 and the police came.

Sandra McComb

- [32] Ms. McComb was the driver of the Chevrolet pickup truck. She said the road was dry. She was driving in the curb lane in medium traffic, maintaining her speed at 50-60 with the flow of traffic, focussed to the front. She is familiar with the bridge and knows it is narrow. However, given their destination it was the best way to go.
- [33] She said she only knew after the fact that she'd been hit as it happened very suddenly. She had no chance to brake. The taxi impacted the front of the truck and pushed her onto the curb. She brought the truck back onto the road and stopped. The truck was a total loss.
- [34] Ms. McComb said she did not think she increased her speed just before the accident but agreed that her truck might have accelerated on the decline after they crested the bridge and headed south toward Surrey. She does not recall the taxi passing her.

Stephen Goronzy

- [35] Mr. Goronzy was the passenger in the Infiniti being driven northbound by Mr. McDonald, who is his best friend. Mr. Goronzy testified that he knew Mr. McDonald suffers from auras, which are like seizures, with a loss of concentration and light-headedness, and a decreased ability to function. He said he understood Mr. McDonald's condition to have resulted from a head injury suffered in a fight ten years ago.
- [36] Mr. Goronzy understood Mr. McDonald regularly took medication, and said Mr. McDonald spoke of the negative effects of that - depression, lethargy, lack of motivation - which had led him to wish to change medications. Mr. Goronzy never saw Mr. McDonald take his medications but he said he assumed Mr. McDonald saw his doctors regularly.
- [37] Mr. Goronzy said he did not understand Mr. McDonald to have epilepsy, but rather something similar. He knew Mr. McDonald had auras but never saw him have a seizure, even though he saw him all the time. He considered Mr. McDonald to be a very good driver and never had any difficulty riding with him.
- [38] Mr. Goronzy suffered a concussion in the motor vehicle accident and does not recall the morning of March 29, 2014 before the accident. He does recall being in Mr. McDonald's Infiniti on the Patullo Bridge, in the left hand lane, but does not remember the direction they were heading. He noticed Mr. McDonald was frozen, "turned off", as they moved to the

center line. Mr. Goronzy grabbed the wheel with two hands but could not move it. They went over the center line and impacted a red and white car. He had a spinning sensation and woke up in the hospital.

- [39] Mr. Goronzy gave a statement to the police, and agreed he was doing his best to be truthful but does not recall what he said. In the statement he said Mr. McDonald was in the curb lane and Mr. Goronzy was alerted when he changed lanes. He realized something was not quite right. He tried to alter the trajectory by grabbing the wheel with both hands as their left wheel crossed the center line but his attempt did next to nothing. The impact was almost instantaneous. He had said in discovery that he thought it was 3 seconds from seeing Mr. McDonald in a "statuesque" state, that is unresponsive, to the time of the impact.
- [40] Mr. Goronzy agreed he said in his statement that Mr. McDonald had told him that morning that he was not feeling well and wanted to be around someone, although Mr. Goronzy does not remember that now. He said it was unusual for Mr. McDonald to say that. He also told the police they had been buying models in Surrey. He does not recall that now.

Daryl McDonald

- [41] Mr. McDonald, almost 33, testified that he has a history of seizure disorders starting in 2012. His memory is not good and has deteriorated over the years. When he has an epileptic episode, he does not remember it.
- [42] He described types of seizures. He described the initial type of seizure he had as a disorienting moment, like a panic attack; this is a "focal seizure". He remains conscious for this type of seizure. He said he has a feeling of déjà vu, like remembering a dream.
- [43] Mr. McDonald testified that he began to experience generalized tonic-clonic seizures ("GTCS"). He has no awareness or memory of these at all. He said he experienced one at a doctor's office in 2012, but has no recollection of it, although he did recall he had gone to the doctor's office because he had had a focal seizure in the morning. He could not recall when the next GTCS occurred (the next one, according to the medical records, was when he crossed the center line on the Patullo Bridge on March 29, 2014).
- [44] Mr. McDonald said his family doctor placed him on medication for the anxiety disorder first; then he was given a different drug (Tegretol) for epilepsy. He did not like the side effects of this medication: a feeling a malaise, disorientation. He told his doctor about this and was switched to Epival. Since the accident he is now on different medications. He said he has had major seizures since the accident, while on the new medications.
- [45] He testified that prior to the accident he was not taking his medication as prescribed, just intermittently. He said he felt he had some control over the symptoms: if he distracted himself and focused the "deja vu" feeling would go away. He said he was not trying not to comply with his doctors; he just fell away from it. He knew he needed to be on medication if he was driving.

- [46] He described the accident as "the defining moment". He now understands that he cannot make the symptoms stop once they start.
- [47] Mr. McDonald testified that on the morning of the accident, he was not feeling too well. He had had a minor aura. A few hours later he felt quite normal. He and Mr. Goronzy drove to Surrey to pickup some models. He remembers doing that and beginning to drive back. He remembers being on the bridge and having a "disorienting" feeling. The next thing he knew he was in intensive care in the hospital.
- [48] In cross-examination, Mr. McDonald said he could not recall if he was punched in the head in 2006 and cannot recall if the seizures started very soon after that. His clinical records were put to him, but he was not sure of the date. He said he had no reason to deny the doctor's note that he had a marked increase in auras in 2010. He agreed that some were more intense, and were accompanied by confusion, sweating, and vomiting. He agreed he was told it was imperative to follow his medications. He said he could not disagree that he was told it was extremely dangerous to drive if not on his medication, but he thought he had control. He agreed he told the police he considered driving to be a distraction, although he does not recall the conversation.
- [49] He agreed that he had not taken medication before the accident for at least a couple of months. He was aware of how dangerous a general seizure could be and knew he had to take his medication. He was told in 2012 to take Epival twice a day. The doctor noted that if he got into a therapeutic range he could return to driving but would be off the road if there was any non-compliance. He acknowledged that when he told the doctors he thought he could distract himself, they told him no, he must take the medication. He agreed that two neurologists in one month told him that.
- [50] However, he testified that he never remembers the generalized seizures, only the focal ones, so he thought he had more control than he did.
- [51] Mr. McDonald agreed that his Pharmanet records would show when he refilled prescriptions, and that he was not following the schedule in 2013. He last filled a prescription before the accident in July of 2013. This would provide him with one month of pills. He said he didn't think he went seven months without taking any medication, he just took it more intermittently. He now has his pills prepackaged by the drug store, but prior to the accident he does not recall if he thought of ways to remind himself to take them. He kept them by his toothbrush and would take them when he brushed his teeth.
- [52] Mr. McDonald acknowledged he was also using a lot of cannabis, a practice which had begun in high school, and was told to stop using it gradually when he was referred for psychiatric consultation in February of 2013. He had marijuana in his system at the time of the accident. He said it was very possible he had smoked marijuana the morning of the accident, but could not recall.

- [53] He does not recall telling Mr. Goronzy he did not feel well on the morning of the accident, and said he would never put his friend in danger. He agreed that he knew it was a gamble to drive that day, but he just did not think he was likely to have a seizure.

Dr. Woolfenden

- [54] Dr. Woolfenden is a neurologist who deals with epilepsy. He was called by counsel for Mr. Tesar. He had examined Mr. McDonald's records but did not interview him.
- [55] Dr. Woolfenden said the records indicate that Mr. McDonald suffered a GTCS in 2012 in his doctor's office. Mr. McDonald continued to have occasional focal onset seizures with awareness (the auras) while on a therapeutic dose of Divalproex for the year he took it (it appears this was for part of 2012 and part of 2013); however he did not suffer a GTCS again until the day of the accident. It was not clear when or how often Mr. McDonald had the dreamlike auras, but nothing suggested loss of awareness.
- [56] Dr. Woolfenden said it is clear that Mr. McDonald suffered a GTCS immediately before the accident. He said GTCS are infrequent, and with medication, which was increased in July of 2013, even better control is possible. The large majority of patients who remain seizure free for more than six months on anti-epileptic medication remain seizure free for a longer period of time. Dr. Woolfenden said if Mr. McDonald had continued with his medication, he probably would not have experienced a GTCS while driving on March 29, 2014.
- [57] Dr. Woolfenden said the records show that Dr. Javidan, a neurologist, told Mr. McDonald he had to be seizure free for six months before he could drive. However, he was apparently given different information by another doctor who said he could drive as long as he was within therapeutic compliance. No one had tried to have his licence cancelled. Dr. Woolfenden said that given that Mr. McDonald was non-compliant with his treatment regime and was experiencing episodic auras, he was not in a position to be medically cleared to drive on March 29, 2014, according to the B.C. Guide In Determining Fitness to Drive.
- [58] The records show that the Superintendent of Motor Vehicles was told to cancel Mr. McDonald's licence after the accident, but that was the first time this had been requested

The Accident Reconstructionists

- [59] Three forensic engineers were called: Mr. Heinrichs for the plaintiff Mr. Tesar; Mr. Luker for the plaintiff Mr. Rai; and Mr. Little for the defendant Mr. McDonald. The main issue addressed by these three witnesses was the speed of the taxi prior to and at impact. Mr. Luker also addressed whether, regardless of the speed of the taxi, Mr. Rai had any time to react to the McDonald vehicle crossing the centre pylons.
- [60] Mr. Little was also asked for an opinion on the effect of Mr. Tesar's and Mr. Rai's failure to wear seat belts.

- [61] Each vehicle had an Electronic Data Recorder ("EDR"), but the data from the Infiniti could not be downloaded. The taxi had no pre-crash data. Its records showed 52.7 kph for speed change at impact. This is not the same as impact speed which was not recorded. The duration of impact was 1/10 to 1/5 of a second.
- [62] The Chevrolet had more data than the taxi. The pre-impact speed of the Chevrolet was 59 kph 2.5 seconds before impact (there was a slight variation to 57.6 kph when tested), with some braking in the last second but not enough to change the speed. It recorded a speed change of 23 kph as it collided with the taxi.
- [63] The air bags in all three vehicles deployed.
- [64] There were no gouge or skid marks to assist the analysis for the collision with the taxi and the Infiniti, although the taxi left skid marks after the collision with the Chevrolet. Thus the Point of Impact ("POI") is a matter of dispute.
- [65] All three experts made use of the series of pictures from the dashboard camera on the taxi ("the video"). All of them determined from the video that the taxi passed the Chevrolet pickup 6 to 8 seconds prior to impact, took 3 seconds to pass it, and was going 8 to 9 kph faster than the pickup as it passed it.
- [66] Each expert proceeded on different assumptions as to whether the respective speeds of the Chevrolet and the taxi were consistent throughout the 6 to 8 seconds prior to impact, thus reaching different conclusions on whether the Chevrolet was steady at 59 kph and the taxi steady at 8 to 9 kph faster immediately prior to or at the time of impact.
- [67] The three experts did not differ significantly on collision severity: it was approximately 113 kph for Mr. Little, 117 kph for Mr. Luker, and 101-116 kph for Mr. Heinrichs. However, they differed on the speed of the taxi at impact, and on the POI.

Mr. Heinrichs (called by Mr. Tesar)

- [68] Mr. Heinrichs did not inspect the vehicle. He did simulations using an identical vehicle. He was unable to determine the POI for the Infiniti and the taxi from physical evidence such as gouge marks. Therefore he provided a range of speeds and a range for the POI.
- [69] Mr. Heinrichs said the overtaking manoeuvre took place over the interval from 4-7 seconds before the impact. The only available speed date for the Chevrolet was from 2.5 to .5 seconds before the impact. Therefore there is a possibility that the Chevrolet was travelling slightly slower or faster when it was being overtaken.
- [70] He determined the impact speeds based on the scene evidence and the physics of the collision. He provided the following ranges for impact speed, preferring the middle to upper ranges based on his simulations and the data he had:

Taxi - 50-55 kph (he concluded the taxi was going 68 to 72 kph in the seconds prior to impact but braked before impact; it would take ½ second to reduce speed).

Chevrolet - 50-59 kph (he assumed the Chevrolet slowed to 50 kph with hard braking, whether the driver remembered it or not)

Infiniti - 51-61 kph

- [71] Mr. Heinrichs said these speed ranges indicate that the taxi and the Chevrolet both probably slowed down in response to the Infiniti crossing the center line.
- [72] Mr. Heinrichs said average reaction time is 1.5 seconds. Mr. Luker, in his report, said Mr. Rai, the driver of the taxi, had .6 - .8 seconds to respond between facing hazard to impact. Mr. Heinrichs said that is not enough to slow from 70 kph to 50-55 kph as he had calculated, so the taxi must have had more time to react than Mr. Luker stated. He said a vehicle can lose 30 kph in a second by emergency braking.
- [73] Mr. Heinrichs said if the taxi had been going at 45 - 50 kph, not 70, he could have stopped before the collision with the Infiniti, although the Infiniti would still have hit him. He could not say if the taxi would still have hit the Chevrolet, nor could he say whether, if the taxi had been in the right lane, the Infiniti would have struck the Chevrolet in any event.
- [74] Mr. Heinrichs agreed that, from the video, there was plenty of room for the taxi to drive in the right hand lane. I presume he meant that the taxi could have pulled in behind the Chevrolet, as the video shows no vehicles in the right hand lane until the Chevrolet shows up when the taxi begins to pass it.
- [75] Mr. Heinrichs agreed in cross-examination by counsel for Mr. Rai that if the only cue of a hazard was when the Infiniti crossed the line, Mr. Rai would have had no opportunity to avoid the accident. He also agreed that there is no "keep right except to pass" sign on the Patullo Bridge.
- [76] In cross-examination by counsel for Mr. Goronzy, he agreed that a higher impact speed increases the forces, and provides a greater risk of injury, if all other factors are the same. Seat belt bruising could result; he could not give an opinion on the effect of air bags.
- [77] Mr. Heinrichs' conclusions, reproduced from his report, are:
 - 1. The taxi was driving at 65-72 kph about 4 seconds before impact and slowed to about 50-55 kph at impact.
 - 2. The Chevrolet was travelling at 57-63 kph before impact and slowed down to 50-59 kph at impact.
 - 3. The Infiniti was travelling at 51-61 kph at impact.

4. If the taxi had been travelling in the curb lane but was otherwise in the same position along the bridge, it would have escaped the collision.

Mr. Luker (called by the plaintiff Mr. Rai)

- [78] Mr. Luker did not inspect the vehicles. He relied on the photographs, and like Mr. Heinrichs, used identical vehicles to do simulations.
- [79] He said the taxi completed the pass of the Chevrolet 4 to 5 seconds before the first collision, and there was about .4 of a second between the first and second collisions. He agreed the taxi was travelling at about 68 kph at impact if the Chevrolet was still going 59 kph at the time of the collision and the taxi continued to travel 9 kph faster, but there is no evidence of the Chevrolet's speed at the time of the collision or when the passing manoeuvre was taking place, only that it was 9 kph slower than the taxi in the six to eight seconds before impact. He said it could not be determined if the Chevrolet accelerated after the taxi passed it.
- [80] In his opinion, there is insufficient evidence to gauge the taxi's speed prior to impact, and there was insufficient reaction time to allow the driver to react. Based on the physics arising from his estimate of the POI, he said the taxi was going 50 kph just prior to impact. He said if the Chevrolet maintained a consistent speed of 59 kph up to the impact, and if the taxi were going 68 kph, as contended by Mr. Heinrichs, then the POI would have to move to an area which is not supported by the evidence.
- [81] He agreed that 2.5 seconds before the accident, it is likely the Chevrolet was going 59 kph and the taxi was travelling faster. However there is no way to know if the truck or the taxi changed speeds prior to the collision. We only know their relative speeds during the initial part of the pass.
- [82] He concluded that Mr. Rai could not brake before the accident because he did not have time.
- [83] Mr. Luker's conclusions are:
1. The impact occurred in the left southbound lane. The taxi was fully in the southbound lane and three-quarters of the Infiniti was over the center into the southbound lane.
 2. The closing speed between the taxi and the Infiniti was 96 to 117 kph. At impact, the taxi was travelling about 50 kph. The Infiniti was travelling 60-65 kph at the time of the collision.
 3. The Chevrolet was travelling 59 to 61 kph at the time of the collision.
 4. Mr. Rai had .6 to .8 seconds from the time of facing hazard until the moment of impact. He would not have been able to start any avoidance action, thus the accident was unavoidable once the Infiniti started to cross the center line.

Mr. Little (called by the defendant Mr. McDonald)

- [84] Mr. Little examined the vehicles. He determined that neither the front nor rear seat belts in the taxi had been used. Both occupants of the Infiniti were belted.
- [85] The taxi recorded a speed change on impact of -52.7 kph. That is the difference in speed that occurs during the collision. This has no direct relation to impact speed or post-impact speed. The higher the speed change, the greater the risk of injury.
- [86] Mr. Little differed from the other experts on the impact speed for the taxi and the POI. Both Mr. Luker and Mr. Heinrichs came up with about 50 kph as the taxi's impact speed. Mr. Little calculated it at 68 kph, based on the Chevrolet's speed of 59 kph 2.5 seconds before the impact and the speed differential of 9 kph 4 to 7 seconds before impact. He assumed both vehicles maintained a constant speed throughout the events. He worked back to get the Infiniti's impact speed of less than 46 kph.
- [87] Mr. Little put the POI just off the right rear tire of the Infiniti at its resting place. Mr. Luker and Mr. Heinrichs put it further east. Mr. Little's POI was based on the deposit of fluid on the surface of the road at the back of the Infiniti, which would have that vehicle spinning in place, rather than pivoting around the POI. Mr. Heinrichs said that was not correct; he said Mr. Little assumed the impact speed was the speed change and did not do any simulations. It was his opinion that Mr. Little's POI is not sustainable.
- [88] Under cross-examination by counsel for Mr. Rai, Mr. Little was asked to assume that the cumulative approach speed was 95 kph, the taxi was travelling at 50 kph when it was 22.7 meters back from the POI (the distance travelled in 1.2 seconds), and had time to react of 1.4 seconds. Mr. Little agreed that Mr. Rai could not have avoided the collision in those circumstances.
- [89] Mr. Little's conclusions on speed, reproduced from his report, are:
1. The taxi had been travelling 68 kph just before the collision
 2. The Chevrolet had been travelling 59 kph before the collision.
 3. The impact speed of the Infiniti was less than 46 kph.

Mr. Little's Second Report: Effect of Failure to Wear a Seat Belt

- [90] Mr. Little provided an addendum report to which objection was taken. This report was on occupant dynamics related to mechanisms of injuries and the assessment of seat belt use. In the interests of time, the trial proceeded on the understanding that admissibility would not be contested and the issue of weight would be addressed in final submissions.

- [91] Mr. Little was questioned extensively on the effects of Mr. Tesar's failure to use a seat belt, with reference to specific injuries. He was also questioned about the danger to Mr. Rai from Mr. Tesar's failure to use a seat belt, as Mr. Tesar flew through the interior of the car, and about Mr. Goronzy's movement on impact.
- [92] In respect of injuries and the use of the seat belt for Mr. Rai and Mr. Tesar, Mr. Little concluded:
1. Had the taxi been travelling 50 kph instead of 68 kph at impact, the probability of serious injury would have been reduced from about 85% to 60% for seat-belted occupants;
 2. Proper seat belt use by Mr. Rai would likely have prevented his head from striking the left A-pillar, but would not have prevented his head from contact with the left B-pillar;
 3. Proper seat belt use would have reduced Mr. Rai's chance for neck and rib fractures;
 4. Proper seat belt use by Mr. Tesar would have prevented his femur and pelvic fractures;
 5. Loading from the seat belt webbing may have prevented Mr. Tesar's sternum fracture but could have replaced it with a right clavicle fracture;
 6. Mr. Tesar's risk of sustain a T-12 burst fracture would have been lower with seat belt use;
 7. Mr. Tesar's exposure to lower right arm/wrist injury would likely have been prevented with seat belt use;
 8. Soft tissue injuries would be expected with seat belt use.

Positions of the Parties

Christopher Tesar

- [93] Mr. Tesar says there is no doubt that Mr. McDonald moved across the center line and is liable for the collision.
- [94] Mr. Tesar says Mr. McDonald was negligent in that he failed to take the necessary precautions to avoid the possibility of having a grand mal seizure at the time of the accident. Mr. McDonald admitted it was a gamble for him to drive, and thus his defence of inevitable accident, which he must establish on the balance of probabilities, must fail.
- [95] Mr. Tesar points to the evidence from Mr. Goronzy and Mr. McDonald himself that Mr. McDonald had had a focal seizure earlier on the day of the accident, wasn't feeling well, and did not want to be alone. Mr. McDonald had testified that his grand mal seizures are always preceded with a focal seizure on the same day. He had been told by Dr. Bozek and Dr. Javidan that it was important to take his medication and if he failed to do so, he would have grand mal seizures. He had been advised of the importance of full compliance with his medications since 2010 and had had a grand mal seizure in February of 2012 when he had not been compliant with his medication for up to a year. He had not been compliant for at least eight months prior to the accident. He knew the risk of driving while not on his

medication. Dr. Woolfenden gave the opinion that if Mr. McDonald had been compliant with his medication regime, the grand mal seizure that occurred moments before the accident would not have happened.

[96] Mr. Tesar refers to *Boomer v. Penn* (1965), 52 D.L.R. (2d) 673 at 679, cited in *Johnson v. Carter*, 2007 BCSC 622 at para 85:

A motorist, who suffers from a disability of which he is aware, is under a very heavy duty to take the necessary precautions to avoid the possibility of his disability causing him to fall into a condition which would make it impossible for him to discharge the duty of care imposed upon him.

[97] Mr. Tesar says the grand mal seizure was foreseeable and preventable. Mr Tesar gambled by driving, and knew he was doing so.

[98] Mr. Tesar says Mr. Rai and Royal City Taxi are also liable. Mr. Rai, an experienced professional driver, acknowledged that the Patullo Bridge is dangerous because of its narrow lanes. In fact, the center lanes are closed at night. Thus Mr. Rai said he avoided the left lane as much as possible, and travelled at a speed no greater than 50 kph, preferring an even lower speed. However, on the day of the accident, despite being requested by Mr. Tesar to take the Port Mann Bridge, Mr. Rai took the Patullo Bridge and drove in the left lane for the entire length of the bridge up to the accident point.

[99] According to Mr. Luker, the taxi was going 50 kph, 1 to 2 seconds prior to impact and thus Mr. Rai had no time to react. However, Mr. Tesar says it is probable the taxi was going 65 to 72 kph, as Mr. Heinrich determined, based on the video which shows the taxi pulling away from the pickup, and the pickup's speed 2.5 seconds before impact at 59 kph. As well, the Infiniti would not have struck the taxi if the taxi had been in the right hand lane.

[100] Mr. Tesar says Mr. Rai was travelling 67 or 68 kph when he passed the Chevrolet; the engineering evidence supports Mr. Rai driving about 18 kph over the speed limit in the moments before the impact. He saw the Infiniti with enough time to start to brake and steer to the right. If he had been travelling at the speed limit, he would have been able to bring the taxi to a complete stop prior to the impact with the Infiniti which would have lessened the severity of the injuries.

[101] Mr. Tesar says Mr. Rai has a duty to exercise reasonable care when driving. He made a decision to pass the pickup at a speed in excess of the posted speed. He knew this was dangerous. He could have adjusted his driving and could have avoided a collision or reduced the effects of one. Therefore Mr. Rai should be found negligent and the taxi's owner, Royal City, vicariously liable.

Mr. Goronzy

- [102] Mr. Goronzy submitted full written argument. In essence, his submissions mirror those of Mr. Tesar in respect of Mr. McDonald. The plaintiffs' written arguments were all filed on the same day so it is not surprising there is duplication in their submissions.
- [103] As for Mr. Goronzy's claim against Mr. Rai, the same points are made as were advanced for Mr. Tesar. Mr. Goronzy submits that if Mr. Rai had been travelling at the speed limit of 50 kph, he would have been able to reduce the speed of the taxi to zero prior to impact, thus reducing significantly the impact speed and speed change. He submits that Mr. Rai was going over 59 kph, as Mr. Little opined, but if his speed at impact was less, it was because he braked. If he had been travelling at the speed limit or below, as he said was his usual practice, then he would have been able to reduce his speed to zero prior to impact. Perhaps a collision could have been avoided entirely, but more likely, the impact severity would have been reduced significantly, thus reducing the risk of serious injury to Mr. Goronzy.
- [104] Mr. Goronzy says Mr. Rai was in breach of s. 144 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 in his failure to drive without due care and attention and without reasonable consideration for other persons using the roadway, taking actions that flew in the face of the danger he knew to exist, and driving at a speed that ignored the danger present on the bridge. The danger of a car crossing the center was foreseeable. If the possibility of the danger which in fact materialized is reasonably apparent, the failure to take precautions is negligence (*Wagstaff et al. v. Johnston et al.*, 2001 BCSC 1375 at para. 40). He says Mr. Rai was obliged to be ready for unforeseen emergencies, and his failure to do was negligent.
- [105] Mr. Goronzy relies on a decision of Stromberg-Stein J., as she then was: *Wilson v. Potter*, 2005 BCSC 807. Ms. Potter was held to be 60% liable when she struck a pedestrian who was crossing Highway 101 on the Sliammon Reserve north of Powell River, B.C. The plaintiff was not in a crosswalk and the defendant did not see him, but the judge determined that it was common knowledge that there was an alcohol and drug problem in the community, that intoxicated persons walk on the roads, and that persons driving through ought to take precautions.
- [106] Stromberg-Stein J. noted that if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions. She quoted from *Currie v. Fitt*, [1996] B.C.J. No. 2882 (S.C.) at para 31:

To fulfil this duty, the user of the road is not bound to guard against every conceivable eventuality, but only such eventualities as a reasonable man ought to foresee as being with the ordinary range of human experience.

- [107] She decided that the presence of an intoxicated pedestrian was an eventuality that a reasonable person ought to have foreseen on the facts of the case.

[108] Mr. Goronzy says Mr. Rai ought to have foreseen the reasonable eventuality of a head-on collision. He breached the standard of care expected of a reasonable driver in the circumstances, especially that expected of a professional taxi driver.

[109] Mr. Goronzy says Mr. McDonald and Mr. Rai, along with Royal City Taxi, are jointly and severally liable.

Alia LeCoin

[110] Ms. LeCoin repeats the arguments made by Mr. Tesar and Mr. Goronzy. She says the two collisions form a single accident with no break in the chain of causation. She submits that Mr. Rai's lane choice is part of his duty as a reasonable driver, and his choice of the left lane, taken together with his speed, constitutes negligence. She takes the position that it is only common sense that the speeds of the taxi and the pickup were constant in the seconds prior to the collision. Therefore Mr. Rai was speeding at the time of the accident.

[111] She says Mr. Rai was a professional driver and knew of the higher-than-normal risk of head-on collisions on the Patullo Bridge; he could safely have switched to the right hand lane in the minutes leading up to the accident. She says that were reasonable alternatives available, and the choice of lane could be a factor going to the standard of care.

Rashpal Rai (plaintiff)

[112] Mr. Rai's submissions are similar to those advanced for Mr. Tesar and Mr. Goronzy, in respect of the negligence of Mr. McDonald: Mr. McDonald admitted to knowing that his epilepsy was a serious medical condition that, if left untreated, would impact his ability to drive safely. He knew he must adhere strictly to his medication regime in order to keep his driver's licence in good stand, but in the eight months immediately preceding the collision, he had essentially stopped taking his medication. As well, he had an aura that morning, which he knew to be a precursor to a potential seizure. In addition, he may have used cannabis despite medical advice not to do so. He took a gamble in driving, and his driving was clearly negligent.

[113] In respect of the allegation that Mr. Rai was himself negligent, Mr. Rai submits that it is not illegal or inappropriate to use the inside lane. To do so was not to take unreasonable risk. Mr. Rai used the roadway as it was designed to be used. He was entitled to assume that other drivers would observe the rules of the road (*Pacheco v. Robinson* (1993), 75 B.C.L.R. (2d) 273 (C.A.)).

[114] In respect of the allegation that his speed was a causative factor in the accident, Mr. Rai says the impact speed for the Toyota was approximately 50 kph. There was no evidence that Mr. Rai braked at any point prior to impact. Once the Infiniti began to cross the center line, Mr. Rai had no opportunity to avoid the collision, regardless of his speed.

- [115] All experts agree that the Chevrolet was travelling 59 kph between 2 and 2.5 seconds prior to impact, and the taxi was travelling 9 kph faster than the pickup 6-8 seconds before impact. Mr. Rai points out that Ms. McComb said she was travelling with the traffic flow, which is not synonymous with constant speed; nor is there evidence to support the taxi travelling at a constant speed. Mr. Rai says neither Mr. Heinrichs nor Mr. Little were asked to consider whether Mr. Rai was precluded from avoiding the collision on account of his speed. They offered no opinion on perception/response time; length of time and distance the Infiniti spent in the southbound inside lane, and how much time would have been available to Mr. Rai to avoid the collision. However, they confirmed during cross-examination at trial that Mr. Rai had no opportunity to avoid the accident. Thus it has not been established that Mr. Rai was precluded from avoiding the accident, whatever his speed.
- [116] Mr. Rai refers to *Ishii v. Wong*, 2015 BCSC 922, where the plaintiff was struck by a vehicle that made a left turn in front of the plaintiff's vehicle:
- [47] Speeding does not, in and of itself, constitute negligence in this context unless by speeding the driver was prevented from acting to avoid the collision.
- [117] Mr. Rai says it is up to those attempting to place blame on him to prove that he had sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself, relying on *Pacheco*, supra.
- [118] The court in *Pacheco* adopted the following statement from *Walker v. Brownlee*, [1952] 2 DLR 450 (S.C.C.) at para. 18 of their decision:

The Plaintiff was not bound to guard against every conceivable eventuality but only against such eventualities as a reasonable person ought to have foreseen as being within the ordinary range of human experience. The Plaintiff was entitled to proceed on the assumption that all other vehicles will do what it is their duty to do, namely observe the rules regulating traffic.

- [119] Mr. Rai submits as well that he is not liable for taking the Patullo Bridge rather than the Port Mann Bridge. Since Mr. Rai has no memory of the accident, he cannot recall the conversation as testified to by Mr. Tesar. However, he could not reasonably foresee that others would suffer harm as a result of not taking the Port Mann. To hold him to account for his choice of route is to ignore the principles of foreseeability and remoteness.

Royal City Taxi and Rashpal Rai as defendant

- [120] Royal City Taxi and Mr. Rai as defendant make the same submissions in respect of Mr. McDonald as the plaintiffs have made. They adopt the submissions of Mr. Rai as plaintiff, and add submissions on the choice of route, which is not seriously pressed as a separate ground of negligence, but rather as a factor to be added into the mix.

Daryl McDonald

- [121] Mr. McDonald concedes that he is partially at fault for the accident. However, he says Mr. Rai is also partly at fault. Mr. McDonald says the taxi's speed was a causative factor in the accident, and liability should be apportioned equally between him and Mr. Rai/Royal City Taxi.
- [122] When considering the factors relevant to his own blameworthiness, Mr. McDonald acknowledges that he should have been taking his medication, but for various reasons he decided he had control over his seizures through distraction and marijuana use. However, he had received conflicting advice from doctors about when he was allowed to drive, he had never suffered a seizure while driving prior to the accident, and from 2012 to the date of the accident he had only had auras. On the morning of the accident, he suffered an aura, and waited a few hours before driving. He was not concerned about a grand mal seizure. He was travelling at the speed limit.
- [123] Mr. McDonald says that Mr. Rai, a professional driver, was aware of the dangers of the Patullo Bridge and that it was prone to accidents, particularly head-on collisions; he knew the lanes were narrow; he knew it was safer to drive in the right curb lane, at or less than the speed limit.
- [124] Mr. McDonald says the court ought to find that Mr. Rai was speeding, perceived the hazard, and braked before the accident happened. Had he been travelling the speed limit he would have been able to stop his vehicle and thereby reduce the closing speed, the impact speed, and the risk of serious injuries to the occupants of all three vehicles.
- [125] Mr. McDonald says it is the degree of blameworthiness, not the degree of causation, that is relevant to fault. Mr. Rai fell short of the required standard of care in important respects, and thus created risk. Mr. McDonald repeats the points that have been made by Mr. Tesar and Ms. LeCoin, and adds that, whereas Mr. McDonald did nothing deliberate, Mr. Rai's actions in using the right hand lane and speeding were deliberate. The higher the speed at impact, the greater the injuries. Even if Mr. Rai were justified in using the right hand lane, he should have mitigated the risk that he created, and of which he was aware, by driving more slowly. Thus Mr. Rai's liability should be apportioned equally with Mr. McDonald.

Contributory Negligence of Tesar and Rai - Seat Belt Issue

- [126] Mr. McDonald alleges that Mr. Tesar and Mr. Rai are contributorily negligent for failure to wear their respective seat belts. Although at the time of the accident, taxi drivers would not be fined for not wearing a seatbelt if they were driving under 70 kph, Mr. McDonald says this does not exempt Mr. Rai from civil liability under the Negligence Act, R.S.B.C. 1996, c. 333.

- [127] The issue of whether a biomechanical engineer would have been of more assistance than the forensic engineers who testified on this trial was a general theme in cross-examination. If biomechanical engineers are called on the damages assessment, there is some potential for inconsistent findings in respect of the mechanics of the collisions and how specific injuries were received. Questions relating to the effect of wearing a seat belt in respect of certain injuries were asked of Mr. Little. It is possible that those issues could be the subject of further evidence if biomechanical engineers are called at the next stage of the trial.
- [128] Objection was taken initially to the admissibility of Mr. Little's opinion on: (1) the determination of occupant dynamics related to mechanisms of injuries based on vehicle damage and reported occupant injuries, and (2) the assessment of seat belt use and effectiveness based upon vehicle occupant displacement. However, as already mentioned, those objections were withdrawn and counsel agreed to address those issues as matters of weight only.

Mr. Tesar's Contributory Negligence

- [129] Mr. Little was asked whether, if Mr. Tesar leaned forward to brace himself, it would potentially have brought slack into the seat belt, even if he had been wearing one. He agreed it would; however the video shows Mr. Tesar seated upright and looking to his right out the passenger window so Mr. Little assumed Mr. Tesar was sitting upright at the time of the collision and would have been held firm if he had been wearing a seat belt.
- [130] Mr. Little opined that this would have prevented Mr. Tesar's knees from making significant contact with the back of the driver's seat and center console, thereby preventing the leg and pelvic fractures. It would also have prevented contact between his arm and the driver's seat back, thus averting the forearm fractures.
- [131] Mr. Little said that the seatbelt would also have held Mr. Tesar in place against the seatback and headrest, preventing the cervical fracture.
- [132] Mr. Little said that Mr. Tesar was projected rearward during the second impact, back into the left C-pillar and roof liner and eventually came to rest in the right rear foot well. He suffered a burst fracture at T-12 on his spine, and a sagittal split fracture at T-11. Mr. Little said that a burst fracture is caused by vertical axial loading of the spinal column, but there was no evidence of a vertical load applied to the taxi. Therefore he concluded that, had Mr. Tesar been wearing his seatbelt, the burst fracture would not have occurred because he would not have been in a position to be flung about the interior of the taxi, thus sustaining an axial load.
- [133] Mr. Little gave the opinion that, had Mr. Tesar been wearing a seatbelt, he would have traded his sternum fracture for a clavicle fracture.

- [134] Mr. Little does not say Mr. Tesar would not have been seriously injured, even if he had been wearing a seatbelt. However, relying on Mr. Little's opinion, Mr. McDonald says Mr. Tesar's injuries would have been lessened, although he also says at another point in his written submissions that it is more probable than not that Mr. Tesar's injuries would not have occurred at all.
- [135] Mr. McDonald says he need not prove how much a seatbelt would have reduced the risk of injury. Contributory negligence is based on comparative blameworthiness. Mr. Tesar was not in the habit of wearing a seat belt in taxis; he knew the Patullo Bridge was dangerous; he observed the taxi was travelling "pretty quick" over the bridge; he did not ask Mr. Rai to slow down, nor did he reach for his seat belt at any time.
- [136] Mr. McDonald says Mr. Tesar's damages should be reduced by 25% for his contributory negligence in failing to wear a seat belt.

Mr. Rai's Contributory Negligence

- [137] Mr. McDonald says Mr. Rai would not have struck his head on the A-pillar and would not have sustained the deep scalp laceration, had he been wearing a seat belt.
- [138] Mr. McDonald says Mr. Rai's blameworthiness lies in choosing not to protect himself by wearing a seat belt, even though he was travelling close to 70 kph. Mr. Rai testified his usual practice was to wear his seat belt on the Patullo Bridge but he did not do so. Mr. McDonald says Mr. Rai's damages should be reduced by 25% for contributory negligence.

Mr. Tesar's Response to Contributory Negligence

- [139] Mr. Tesar says it is not sufficient for a defendant to establish that the absence of a seat belt caused an increased risk of injury. Rather the defendant must prove that the seatbelt would have prevented or diminished the extent of injury in the particular circumstances of this case.
- [140] Mr. Tesar says Mr. Little's opinion should be given no weight. He is not a biomechanical engineer and both Mr. Heinrichs and Mr. Luker said they would not venture opinions in this area, given the complexity of this accident
- [141] Mr. Tesar submits that the injuries here are complicated and the deficiencies in Mr. Little's background in respect of his opinion were demonstrated during cross-examination. As well, Mr. Little was missing important data, such as Mr. Tesar's height, weight or body/mass index, and the distance between his knees and the object ahead.
- [142] Mr. Tesar disputes the helpfulness of the underlying material relied upon by Mr. Little to reach his opinions on the T-12 fracture.

- [143] Mr. Tesar provided a long list of cases cited at para. 34 of *Snushall v. Fulsang* [2005] O.J. No. 4069 (Ont. C.A.) (leave to appeal to the Supreme Court of Canada dismissed), in which contributory negligence for failure to wear a seat belt ranged from 5 - 25 % and says the determination here should be no more than 10%.

Mr. Rai's Response to Contributory Negligence

- [144] Mr. Little relied on reference papers to conclude that the probability of serious injury would have been reduced from about 85% to around 60% if the taxi had been travelling 50 kph instead of 68 kph at impact. He agreed in cross examination that the words "and both occupants had been wearing seatbelts" should be included. Mr. Rai says that since neither Mr. Tesar nor Mr. Rai were wearing seatbelts, the reference is of no assistance.
- [145] Mr. Rai notes that the study Mr. Little relied on did not consider a significant frontal impact followed by a significant rear impact, nor an unbelted passenger being flung about the cabin at a high rate of speed.
- [146] Mr. Rai says although a seatbelt may have prevented him from striking his head on one pillar, it would not have prevented him from striking his head on the other. His head injury was inevitable and could not have been reduced or avoided by the use of his seatbelt. He points out that Mr. Little did not know the details of Mr. Rai's neck and rib fractures and offered no opinion on them.

Conclusions

Liability of Mr. McDonald

- [147] There is no question that Mr. McDonald was negligent and is at fault for the collisions. He knew he should be taking his medication. He was warned that he should not be driving if he was not fully compliant with his medication. Yet he drove, particularly on a day when he had already had a focal seizure. It seemed during his testimony that Mr. McDonald was not overly concerned with the accident; it was the effect of the accident on his appreciation of the seriousness of his condition that pre-occupied him.
- [148] It is unnecessary to repeat the arguments made by the plaintiffs. I accept that Mr. McDonald should not have been driving, and knew or should have known he should not have been driving. Had he been compliant with his medication, it is unlikely that he would have had the grand mal seizure. In fact, Dr. Woolfenden was prepared to go further and say he would not have had such a seizure, had he been properly medicated. The accident would not have occurred.
- [149] Mr. McDonald is at fault for both collisions.

Liability of Mr. Rai/Royal City Taxi

[150] The difficult issue in this case is whether Mr. Rai is also at fault for this accident. Within that issue are the subsidiary questions of the taxi's speed and its relevance, if any, to the collision.

[151] In my view, the decision made by Mr. Rai to choose to take the Patullo Bridge was not negligent. There is some doubt as to whether Mr. Tesar actually requested the Port Mann Bridge route, given the conflicting evidence around the tolls, and Mr. Rai's testimony that he would always take a particular route if directed to do so by the passenger. In any event, the choice to take the Patullo Bridge was not negligent. The Patullo Bridge is an acceptable and highly-used route from New Westminster to Surrey.

[152] I am also not persuaded that the choice to drive in the left hand lane was negligent. The bridge has two lanes for southbound travel. There is no restriction in using either lane. There was traffic in both lanes that day as there is every other day.

[153] The next consideration is the taxi's speed. In essence, Mr. Rai is being sued for being in a particular physical position on the bridge, which resulted from his going at a particular speed. It is alleged this speed prevented him from being able to react in a manner that would enable him to have taken reasonable evasive action to avoid the collision.

[154] All three experts reached different conclusions on the speed of the taxi prior to impact.

[155] The three experts agreed on the following:

- 1) The taxi passed the Chevrolet 6-8 seconds before impact, taking 3 seconds to do so. The speed of either vehicle at that time is not known but the taxi was going 9 kph faster than the Chevrolet when it passed the Chevrolet;
- 2) The Chevrolet was going 57.6 to 59 kph 2.5 seconds before the impact, according to its EDR.
- 3) The speed change upon impact for the taxi, according to the airbag control module, was 52.7 kph.
- 4) Normal reaction time is 1.5 seconds.
- 5) The time between the two collisions was .3 - .5 seconds.
- 6) The speed of all three vehicles at the moment of impact is unknown and is a matter of opinion.
- 7) The POI is not known and is a matter of opinion.

[156] Mr. Heinrichs assumed the speeds were constant during the 6 to 8 seconds preceding the collision between the taxi and the Infiniti; he therefore concluded the Chevrolet was going 59 kph throughout these 8 seconds and the taxi was going 68 kph. Mr. Heinrichs says the taxi must have braked before impact to reach the impact speed he decided upon of 50-55 kph, because nothing else makes sense, given his conclusions on the POI. His conclusions

are based on his simulations and on the position of the taxi's tire marks which were laid down from the collision with the Chevrolet. He is of the opinion that, in order to slow to that extent, the taxi driver must have had time to react. However, Mr. Heinrichs agreed that if the only cue was the Infiniti crossing the line, Mr. Rai had no time to react.

- [157] Mr. Luker said that in his opinion, the taxi was travelling around 50 kph at the time of impact. He differed from Mr. Heinrichs in that he did not assume the speeds remained constant after the pass was completed. He said there was no indication of emergency braking by the taxi. In the video, Mr. Tesar does not move, as he would have done, if there had been hard braking. Mr. Rai had no time to react. Even if he had 1.5 seconds, he could move his foot but there would be no time for effect.
- [158] Mr. Luker agreed in cross-examination that the Chevrolet was going 59 kph 2.5 seconds before the accident, and it was likely the taxi was going faster, but said the actual speeds at impact are not known because there is no data.
- [159] Mr. Little took the Chevrolet speed of 59 kph, which is the speed it was going 2.5 seconds prior to the accident, the fact that the taxi was going 9 kph faster than the Chevrolet when it passed the Chevrolet 6 to 8 seconds before the accident, calculated the taxi speed 68 kph, and assumed it never changed in this time period up to the collision.
- [160] Mr. Little agreed that even if Mr. Rai were going 50 kph at impact, he would not have had sufficient time to react to avoid the collision.
- [161] There is no objective evidence (gouge marks etc.) to assist with the POI. Mr. Heinrichs and Mr. Luker agree on the POI. They differ from Mr. Little. Mr. Little assumed the POI was just off the Infiniti's right rear tire, at its resting place, based on leakage of fluids under the car. Mr. Luker and Mr. Heinrichs assumed it was east of that. Mr. Luker said if the taxi had been going almost 70 kph at impact, it would require a POI that is not supportable.
- [162] Mr. Little agreed that the lower the speed change in the accident, the lower the severity of injuries. He said if the taxi had been travelling at 50 kph, the speed change would have been reduced from almost 53 kph (as recorded on the taxi's EDR) to 44 kph, and the severity of injury to seat-belted occupants would be reduced to 60% from 85%. However, neither Mr. Tesar nor Mr. Rai were wearing seatbelts, so this would affect Mr. Goronzy only.

Discussion

- [163] Mr. Rai's own evidence in the present case was not helpful to him. He agreed with any damaging suggestion put to him and was determined to portray himself as an overly cautious driver. His evidence that he never drove over 40 kph on the Patullo Bridge if he could help it, was aware that the south end of the bridge was known for head-on collisions, always drove in the right lane because it is safer, and would consider it unsafe to pass a vehicle going 60 kph is, if taken on its own, a subjective approach to analyzing his alleged negligence. However, he has no memory of the accident and his evidence must be

considered in the context of all of the evidence at trial.

- [164] I will consider first the evidence respecting the taxi's speed. This comes largely from the conclusions reached by the three experts.
- [165] The court in D'Amici referred to the trial judge's finding that the expert's report in that case was of limited value because of the unreliability of the assumptions upon which it was based. The plaintiffs submit that in this case there is more evidence available to help the experts than there was in D'Amici. However, what is missing is any hard evidence to support impact speeds, braking time, response times, and point of impact. These are crucial aspects for the analysis and the numbers arrived at are all a result of the best the experts can do, based on their different assumptions.
- [166] The three experts reach quite different opinions on various aspects of the accident, but two (Mr. Heinrichs and Mr. Luker) agree the taxi was going about 50 to 55 kph at the time of the collision. Whether the taxi slowed from 70 kph to reach that speed is a matter of the different assumptions made by the two experts. Mr. Little, on the other hand, says the taxi's speed can be determined from the fact that the Chevrolet was going 59 kph 2.5 seconds prior to impact, and the taxi had been going 9 kph faster than the Chevrolet as the taxi passed the Chevrolet 6 to 8 seconds prior to impact. He assumes the taxi's speed remained constant in those 6 to 8 seconds and was thus close to 70 kph at impact.
- [167] However, there is no particular reason to assume the speed remained constant at 9 kph faster than the Chevrolet for 6 to 8 seconds. The experts all say the collision between the rear of the taxi and the front of the Chevrolet took place about .3 to .4 seconds after the collision with the Infiniti, that is, virtually immediately. This suggests the two vehicles were travelling along, if not side by side, since the Chevrolet is not visible in the rear-facing video for a time after the taxi passes it, at least in close proximity to each other at the moment of the collision, and could have been for some seconds. This is in line with Ms. LeCoin's evidence that she saw a red squiggle out of the corner of her eye prior to impact. As well, the fact that the collisions were virtually simultaneous is consistent with the vehicles travelling at approximately the same speeds for some seconds after the taxi passed the Chevrolet, with the rear of the taxi even with the front of the Chevrolet. That is, as both Ms. McComb and Mr. Tesar said, each vehicle was travelling with the flow of traffic.
- [168] This is not meant to suggest that there is another way of analyzing the complicated mechanics of this accident, other than that done by the three experts. As I have said, the speed of the taxi is a matter of conjecture upon which three experts made different assumptions and reached different opinions. None of them stands out as obviously right or wrong, but considering all of the evidence, I am unable to conclude that it is more likely than not that Mr. Rai was travelling at around 70 kph. It is more probable that his speed was less than that after the pass was completed and closer to the speed of the Chevrolet, whatever that speed was, likely somewhere in the range of 57 - 59 kph, given the variation in the tested EDR data.

[169] On a consideration of all of the evidence at trial, I conclude that Mr. Little's conclusion that the taxi continued to travel 9 kph faster than the Chevrolet for six to eight seconds prior to the impact is less likely, and that the taxi's speed was closer to that of the Chevrolet after the pass was completed.

[170] I will now turn to the issue of opportunity to avoid the collision. The decision of the Court of Appeal in *D'Amici* is of some assistance here.

[171] In their second set of written submissions, some counsel correctly pointed out that *D'Amici* does not change the law. However, it contains recent iterations of the various relevant principles, particularly where the defendant is alleged to be at fault because of excessive speed and lack of avoidance opportunity in a situation where the plaintiff's own driving behaviour is obviously faulty. In *D'Amici*, the plaintiff had begun to venture across six lanes of traffic at an intersection, appeared to have stopped midway, and then as the defendant approached, travelling above the speed limit (but with the flow of traffic) and speaking on a hands free phone, the plaintiff darted across into the defendant's lane and was struck. The plaintiff was held to be solely responsible for the collision, and this finding was upheld on appeal.

[172] At paras. 49 and 50 of the decision, the Court of Appeal adopted the following statements from *Santos (Guardian ad litem of) v. Raes*, [1998] B.C.J. No. 389:

While travelling with other traffic over the speed limit does not itself constitute negligence in this case, it will constitute contributory negligence if excessive speed probably prevented the defendant from taking reasonable measures to avoid the accident.

All drivers who exceed the speed limit run the risk of being found liable if their speed has prevented them from taking reasonable evasive action to avoid an accident.

[173] The Court went on to say:

[50] The jurisprudence does not, however, and should not go so far as to say that proof of causation in fact establishes fault. The standard of care enquiry should not be conflated with factual causation. A rule that a driver exceeding the speed limit is liable in negligence if it can be established that speed caused or contributed to a collision would impose strict liability upon drivers exceeding the speed limit. As the appellant acknowledges, and the trial judge correctly observed, while the relevant legislative standards inform the negligence analysis, a breach of a statutory provision does not in and of itself give rise to a cause of action (cites omitted).

[174] Earlier, at para. 45, the court discussed the extent to which the prospect of accident avoidance should be used to determine fault. The court stated that excessive speed, even if blameworthy, does not lead to liability in negligence unless the speed prevented the driver from taking reasonable steps to avoid the collision.

- [175] Thus, even though it is probable that Mr. Rai was travelling with the traffic flow, and above the posted speed of 50 kph, likely somewhere around 60 kph, he is not liable in negligence unless his speed probably prevented him from taking reasonable measures to avoid the accident.
- [176] As counsel for Mr. Rai points out, neither Mr. Heinrichs nor Mr. Little were asked to address whether Mr. Rai had any time to react to the hazard presented to him. When cross-examined on this point, both said Mr. Rai had no time to react, if the cue for a hazard was the Infiniti crossing through the yellow pylons into his lane. Only Mr. Heinrich said that if Mr. Rai had time to slow from 70 kph to 50 kph before impact, he had time to stop, if he had been travelling at the speed limit. However, this is based on his assumption that Mr. Rai slowed from 70 to 50 kph, an assumption not made by the other two experts. For the reasons already stated, I do not accept that Mr. Rai continued to travel at 70 kph for the 6 - 8 seconds after the pass was completed.
- [177] I have accepted as more likely the estimates of Mr. Luker and Mr. Heinrich of the impact speed of the taxi, and thus of POI, upon which both agree, but it is clear from the above discussion that none of the essential information can be determined with precise accuracy. It seems that there may have been a loss of a few kph just prior to the impact to bring the taxi's speed down from around 60 to around 55, but this is a very small speed change. As well, no one addressed the nuances of reaction times or reaction mechanisms, for instance, would a person faced with a vehicle heading straight at him, if given time to react, slow to a stop, as Mr. Heinrichs suggests, or would he veer out of the path of the oncoming vehicle, or both. All of the scene diagrams show the taxi pointed straight ahead at the time of impact.
- [178] The only non-expert evidence respecting time to react came from Mr. Goronzy, who said there were perhaps three seconds from the time he was alerted to Mr. McDonald changing from the outside to the inside lane to the actual collision, and from Mr. Tesar who said he braced himself for the collision when he saw the Infiniti come through the pylons, and heard the taxi driver say "oh". However, the video does not support any change in position by Mr. Tesar.
- [179] According to Mr. Luker and Mr. Heinrichs, the Infiniti was travelling at least 50 kph and as much as 65 kph at the time of the collision. A lane change by the Infiniti in itself would not necessarily be cause for alarm, even if it were visible through the pylons, but in any event, I conclude that the entry by the Infiniti into the oncoming lane at a speed of 50 - 60 kph presented an immediate hazard to Mr. Rai. I am unable to conclude that Mr. Rai was given any cue to the hazard beyond the entrance of the Infiniti through the pylons and into his lane. He had no opportunity to avoid this collision, regardless of his speed.
- [180] I next turn to the issue of the effect of the taxi's speed on the severity of the impact.

- [181] The speed of any moving vehicle that is struck by another moving vehicle will increase the impact severity. Liability does not flow from that unless the relevant driving is negligent. The speed at which Mr. Rai was travelling was not excessively fast. It was not negligent to travel at that speed in those circumstances and his speed did not prevent him from taking reasonable evasive action. Given the precipitous entry of the Infiniti into his lane, he was given no opportunity to take such action.
- [182] In short, it has not been established that Mr. Rai's driving was negligent in any respect, even if one accepts heightened responsibility for a professional driver, and if the choice of bridge and choice of lane are factored in. The Infiniti crossed the center line and Mr. Rai was in the wrong place at the wrong time. I am satisfied that he had no time to react in a manner that could have avoided the collision.
- [183] For all these reasons, I am unable to conclude that Mr. Rai and Royal City Taxi, are liable merely for being in the physical place that made a collision inevitable. The plaintiffs have not demonstrated that choice of bridge, choice of lane, and/or excessive speed prevented Mr. Rai from taking reasonable evasive action to avoid the accident. The claims against Mr. Rai and Royal City Taxi are therefore dismissed.

Determination on Contributory Negligence for Mr. Tesar and Mr. Rai

- [184] The issue is: did each of these plaintiffs fail to take reasonable precautions to protect himself from the consequences of the defendant's negligence?
- [185] While all counsel have provided detailed submissions on the significance of Mr. Little's opinion, I do not think it appropriate to delve into a quasi-medical analysis of the use of a seat belt, the nuances of occupant movement, and the effect on the ultimate injuries, since the evidence I have on the latter point is quite limited. If liability had not been severed from damages in this case, an approach that is always troublesome for the trier of fact, I might feel more comfortable looking at the specific injuries, but even there, it is difficult to see why it matters in this case.
- [186] The important factors are those that relate to comparative blameworthiness, and a global assessment of whether the blameworthiness of the respective plaintiff would have prevented or lessened his injuries. It would not be appropriate to set a percentage per injury.
- [187] The Ontario Court of Appeal in *Snushall* cautioned against a prolonged inquiry into blameworthiness unless the factors going into the inquiry were fairly obvious. Otherwise, the approach should be practical and the apportionment of responsibility just and equitable.
- [188] Both Mr. Tesar and Mr. Rai took a risk by not wearing a seat belt, which a reasonably prudent person would do, even if, in the case of Mr. Rai, he would not be fined for not doing so.

- [189] In the circumstances of this case, I take into account the blameworthiness associated with Mr. McDonald, whose failure to consider the danger he put himself and others in by driving while consistently failing to take his medication, which was further exacerbated by his failure to consider the aura he experienced the morning of the accident, resulted in the head-on collision.
- [190] For Mr. Tesar, it was not seriously contested that significant injuries would have occurred, even if seat belts had been worn. I do not see how it could be otherwise. On the other hand, it is conceded that there is some contributory negligence. Again, I do not see how it could be otherwise. Mr. Tesar was flung, unrestrained, about the back seat, coming into contact with surfaces he would not have come in contact with had he been wearing a seat belt.
- [191] For Mr. Rai, I accept that he would have suffered injuries in this collision even if he had worn a seatbelt. On the other hand, all three experts agreed that the use of a seatbelt, except in rare cases, reduces or prevents injury. Mr. Rai, who had an airbag, would have protected himself further from some of the injuries he suffered by wearing a seatbelt. However, considering the evidence that he would have suffered a head injury, regardless of whether or not he wore a seatbelt, the failure to use a seatbelt in his case is not as serious as it is for Mr. Tesar.
- [192] I set the degree of contributory negligence for Mr. Tesar for failing to wear a seatbelt at 15%, and to Mr. Rai for failing to wear a seatbelt at 10%.

Result

- [193] Mr. McDonald is solely liable in all the actions.
- [194] Mr. Tesar is 15% contributorily negligent for failing to wear a seatbelt.
- [195] Mr. Rai is 10% contributorily negligent for failing to wear a seatbelt.
- [196] The actions against Mr. Rai and Royal City Taxi are dismissed.
- [197] If counsel cannot agree on costs, they may address them through a request made to the Registry within 30 days of these reasons.

"Humphries J."

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