

CANADA / JUDGMENT

Haczewski v. British Columbia

2012 BCSC 380

COURT

Supreme Court of British Columbia

DECIDED

16 March 2012

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2012 BCSC 380 Haczewski v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Haczewski v. British Columbia,

2012 BCSC 380

Date: 20120316

Docket: S078467

Registry: Vancouver

Between:

Paula Haczewski, Jacek Haczewski and Barbara Haczewski

Plaintiffs

And:

Her Majesty the Queen in Right of the Province of British Columbia, and Minister of Public Safety
and Solicitor General for the Province of British Columbia

Defendants

And:

Paula Haczewski as Representative of the Estate of Albert Haczewski, Deceased

Third Party

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Plaintiffs:

D. M. Mah

Counsel for the Defendants:

S. J. Eustace

T. E. Fairgrieve

Place and Date of Trial:

Vancouver, B.C.

September 12-16, 19 and 21, 2011

Place and Date of Judgment:

Vancouver, B.C.

March 16, 2012

INTRODUCTION

- [1] On October 31, 2007, Albert Haczewski, 27, was driving his friend, Koyo Hara, home. Traveling south on Royal Oak at a speed of 50 km/h, they entered the intersection at Kingsway on a green light at about 1:50 AM. They were fatally injured about a second later when their vehicle was rammed by a police car driven by RCMP Constable Petina Kostiuk traveling northwest on Kingsway at a speed between 80 and 89 km/h.
- [2] Constable Kostiuk was responding to an emergency call. Her emergency lights and siren were on. The intersection has limited visibility. She entered it against the red light at high speed. She thought it was clear. It wasn't.
- [3] After a police investigation, Constable Kostiuk was charged under the Criminal Code of Canada, R.S.C. 1985, c. C-46, with dangerous driving causing death. She subsequently pleaded guilty to the lesser included offence of driving without due care and attention under the Motor Vehicle Act, R.S.B.C. 1996, c. 318.
- [4] Mr. Haczewski's widow and parents now claim against the Crown Provincial and the Minister of Public Safety and Solicitor General for the Province of British Columbia as the parties liable for any tort committed by Constable Kostiuk. They claim damages under the Family Compensation Act, R.S.B.C. 1996, c. 126.
- [5] Although Constable Kostiuk was initially named as a defendant, police officers are protected from direct liability for things done in the performance of their duties by section 21 of the Police Act, R.S.B.C. 1996, c. 367, and the claim against her was dismissed by consent.

- [6] The defendants deny liability on the ground that Mr. Haczewski caused the accident by failing to yield to Constable Kostiuk who, they say, had the right-of-way. Alternatively, the defendants maintain that Mr. Haczewski was contributorily negligent for failing to yield, and also by reason of having smoked marijuana at some point earlier that evening, thereby impairing his ability to react; hence the third party claim against his estate.

LIABILITY

- [7] As a preliminary matter, the defendants maintain that the Minister of Public Safety and Solicitor General (the Minister) is the only proper defendant, as it is only she, and not the Crown Provincial, who is made vicariously liable for any tort of the police officer by section 11 of the Police Act. On this point, the defendants rely on *Hill v. Hurst*, 2001 BCSC 1191, 203 D.L.R. (4th) 749, and *Roy v. British Columbia (Attorney General)*, 2005 BCCA 88, 251 D.L.R. (4th) 233.
- [8] The first of these two cases does not support the defendants' position. Macaulay J. there concluded in para. 71 that the reference in section 11 to "the minister, on behalf of the government" was wide enough to include the Crown, not just the Minister.
- [9] The second does not consider the point as the Crown Provincial had not been sued in that case.
- [10] I decline, therefore, to strike out the claim against the Crown Provincial on this basis. I note, moreover, that the Crown Provincial is sued not only vicariously, but also in its capacity as the owner of the vehicle driven by Constable Kostiuk, which ownership is denied by the defendants. That falls to be resolved on the evidence, not as a preliminary issue.
- [11] I now turn to consider the applicable law before reviewing the evidence.
1. What are the applicable laws and policies?
- [12] No statute need be cited for the general proposition that a vehicle entering a controlled intersection with a green light has the right-of-way over vehicles facing the red light. But is this still the case when the vehicle with the red light is a police car responding to an emergency with its lights flashing and siren sounding? The answer is: it depends.
- [13] The Motor Vehicle Act provides certain privileges to emergency vehicles, including the limited right to proceed through a red light without stopping:

Exemption for emergency vehicles

122 (1) Despite anything in this Part, but subject to subsections (2) and (4), a driver of an emergency vehicle may do the following:

- (a) exceed the speed limit;
- (b) proceed past a red traffic control signal or stop sign without stopping;

...

- (2) The driver of an emergency vehicle must not exercise the privileges granted by subsection (1) except in accordance with the regulations.

...

- (4) The driver of an emergency vehicle exercising a privilege granted by subsection (1) must drive with due regard for safety, having regard to all the circumstances of the case, including the following:
- (a) the nature, condition and use of the highway;
 - (b) the amount of traffic that is on, or might reasonably be expected to be on, the highway;
 - (c) the nature of the use being made of the emergency vehicle at the time.
- [14] The use of those privileges is governed by the Motor Vehicle Act Emergency Vehicle Driving Regulation, B.C. Reg. 133/98, which provides:

Emergency response by peace officer

4 (1) A peace officer operating an emergency vehicle for purposes other than pursuit may exercise the privileges granted by section 122(1) of the Motor Vehicle Act if

- (a) the peace officer has reasonable grounds to believe that the risk of harm to members of the public from the exercise of those privileges is less than the risk of harm to members of the public should those privileges not be exercised, and
- (b) the peace officer operates the following emergency equipment, as applicable:
 - (i) in the exercise of privileges described in section 122 (1) (a) to (c) of the Motor Vehicle Act, an emergency light and siren;
 - (ii) in the exercise of privileges described in section 122 (1) (d) of the Motor Vehicle Act, an emergency light or an emergency light and siren.

...

- (3) In considering whether there are reasonable grounds under subsection (1) ... a peace officer must
- (a) consider the factors described in section 3(2), and
 - (b) weigh the degree of risk of harm to members of the public against the seriousness of the nature and circumstances of the suspected offence or incident.

...

- (6) Factors which will increase the risk of harm to members of the public for purposes of subsection (1) ... include

- (a) attempting to close the distance between a peace officer's vehicle and another vehicle,
- (b) if there is poor visibility,
- (c) if there is pedestrian or other vehicular traffic on the highway, and
- (d) if the peace officer must disregard a yield sign or pass through a crosswalk or uncontrolled intersection.

...

Entering an intersection

6 The driver of an emergency vehicle exercising the privileges granted by section 122 (1) of the Motor Vehicle Act must slow that vehicle to a speed consistent with reasonable care when approaching or entering an intersection.

[15] The factors referred to in section 4(3)(a), as described in section 3(2), are:

- (a) the nature and circumstances of the suspected offence or incident;
- (b) the risk of harm posed by the manner in which the emergency vehicle is being or is likely to be operated;
- (c) the risk of harm posed by the distance, speed or length of time required or likely to be required to exercise the privileges;
- (d) the nature, condition and use of the highway;
- (e) the volume and nature of pedestrian or vehicular traffic that is, or might reasonably be expected to be, in the area.

[16] Thus the statutory privileges granted by the Motor Vehicle Act's section 122 exemption are subject always to balancing the exigencies of the emergency with the risk of harm arising from the operation of the vehicle. In particular, the driver of any emergency vehicle exercising those privileges who approaches or enters an intersection must slow to a speed consistent with reasonable care.

[17] The Motor Vehicle Act deals further with right-of-way in section 177:

177 On the immediate approach of an emergency vehicle giving an audible signal by a bell, siren or exhaust whistle, and showing a visible flashing red light, except when otherwise directed by a peace officer, a driver must yield the right of way, and immediately drive to a position parallel to and as close as possible to the nearest edge or curb of the roadway, clear of an intersection, and stop and remain in that position until the emergency vehicle has passed.

[18] *Lal v. Lawson*, [1994] B.C.J. No. 273 (Q.L.) (S.C.), concerned an intersection collision between the plaintiff and an RCMP cruiser with all emergency equipment activated. The police car had slowed to a stop before entering the intersection on a red light, and proceeded at a slow and safe speed after all lanes except the lane in which the plaintiff was driving had stopped

to allow him to move ahead. The plaintiff was exceeding the speed limit. In dismissing the action, Vickers J. confirmed that the police officer could only proceed into the intersection with due attention and regard for the traffic present and for traffic he might anticipate at that time of the day. He concluded that the defendant had done so.

- [19] *Frers v. De Moulin*, 2002 BCSC 408, 1 B.C.L.R. (4th) 131, was a claim by a police officer who was injured in an intersection collision while operating a motorcycle with his lights and siren activated. The police officer had entered the intersection against a red light. The defendant failed to see or hear him although cars in the other three lanes of traffic had stopped for the motorcycle.
- [20] L. Smith J. allowed the officer's claim, finding that the defendant had not been paying sufficient attention to the driving conditions, and that the presence of stopped cars in the other lanes ought to have alerted him to the hazard. Madam Justice Smith found the plaintiff contributorily negligent to the extent of 40% for proceeding into the intersection against the red light without first assuring himself that it was safe to do so. In her analysis, Smith J. accepted that section 177 of the Motor Vehicle Act gave the right-of-way to the emergency vehicle giving audible and visible emergency signals, and applied the test of whether the reasonably alert driver would perceive the signals. Her Ladyship concluded on the evidence before her that the plaintiff officer was sounding warnings in such a way that a reasonably alert driver could perceive them, and therefore had the right-of-way pursuant to section 177.
- [21] These principles were incorporated into the RCMP Emergency Vehicle Operation Training Program Participant's Manual (April 2000), a program taken by Constable Kostiuk. In addition, that manual warned trainees of a number of factors including these:
- Drivers are less likely to hear an approaching emergency vehicle due to better insulated vehicles along with improved sound systems and more powerful air-conditioning. Flashing emergency lights compete for drivers' attention with storefronts, billboards, traffic control devices and digital instrumentation as well as other vehicles on the streets.
 - Driving at high speed can impair senses, including peripheral vision, depth perception and night vision.
 - As a police vehicle's speed increases the effectiveness of sirens diminishes as there just may not be enough time for pedestrians or other drivers to react promptly to the sound.
 - The normal perception/reaction time is about 1½ seconds. At 50 mph [80 km/h] you are traveling 73 feet per second. In 1½ seconds the car could travel 110 feet. If perception/reaction time were to double due to the various stress reactions occurring within the body, the vehicle would travel over 200 feet before the driver could apply his brakes.
- [22] An article included as an appendix to the manual, entitled Rules of the Road: Some Perspectives on Emergency Driving, contained this recommendation:

8. Come to a complete stop at all controlled intersections (e.g. red lights, stop signs) where you would not have the right-of-way without warning equipment.

Most accidents of any kind, but especially those involving emergency vehicles on emergency calls, occur at intersections. The practice of stopping at intersections has not appreciably hurt my agency's response times, although it has caused some shortening of brake life. But faithful adherence to it has resulted in countless instances in which vehicles would otherwise have been broadsided by motorists who either insisted on their right-of-way or did not perceive the warning equipment.

[23] As a result of this accident, this recommendation has, as I understand it, now become RCMP policy. At the time of the accident, the policy for an officer approaching a controlled intersection was to slow sufficiently, and to stop if necessary, in order to ensure that it was safe to proceed through the intersection, consistent with section 6 of the Regulation.

2. What was the emergency?

[24] On the night of October 30-31, 2007, Constable Kostiuk was on her first night shift as a member of the Burnaby detachment of the RCMP. A member of the force since 2002, she had been transferred to Burnaby in 2006.

[25] She testified that about 8:00 PM, a call came in reporting a suicidal female. Another officer was dispatched, and Constable Kostiuk attended at the location to back her up. The female in question was pregnant, and threatening to take a meat cleaver to her stomach. Her male roommate was the father of the baby, and had just come back from China having told his wife and parents of his complicated circumstances in Vancouver. On his return, he told the woman that their relationship was over. She was distraught. The police officers dealt with the situation by arresting the woman under the Mental Health Act, R.S.B.C. 1996, c. 288, and taking her to Burnaby Hospital.

[26] Later that same night, at about 1:45 AM, a call came in advising that the woman in question was now back at her home, and had locked herself in her room. Her roommate reported that she expressly did not want the police to attend. Constable Kostiuk left immediately. Shortly after leaving, as she headed up Kingsway, she fully activated her emergency lights and siren. It was a quiet night, with minimal traffic.

[27] It is always difficult for someone who was not there to assess the exigencies of the situation facing Constable Kostiuk. She believed the situation to be emergent, and in the circumstances, I accept that her conclusion was reasonable.

3. How did Cst. Kostiuk approach the intersection, and what did she see?

- [28] Constable Kostiuk turned onto Kingsway, heading northwest. She felt very aware and in control, notwithstanding what she described as the high stress of the situation. She recalls looking down at her speedometer and noting that her speed was about 80 km/h. She had green lights at the intersections, and things were going well. She had been taught to avoid tunnel vision, and to physically turn her head, which she did.
- [29] Constable Kostiuk testified that her emergency lights and siren were fully activated as she turned onto Kingsway. She turned the siren off briefly to get the address again from the dispatcher, and then turned it back on. The lights were kept on throughout.
- [30] As she approached Royal Oak, she remembers seeing that the light was red and observing headlights facing her, stopped at the intersection. On her right she passed a Safeway store, and then passed its parking lot. That parking lot occupied the space between the Safeway store and Royal Oak, and Constable Kostiuk looked through it for any cues indicating a possible threat. She said that the parking lot was empty, and she saw nothing. Slowing (she cannot say how much), she looked left and then quickly back to the right again, still seeing nothing. In doing so, Constable Kostiuk considered that she was acting in accordance with RCMP policy. She then accelerated through the intersection, which she believed to be clear. She testified that suddenly headlights appeared out of nowhere on her right, and then there was a heavy impact; she had no time even to touch the brake pedal. I accept that she did not see that vehicle until a split second before the collision, leaving her no time to react.
- [31] Mr. Dae Bae was the driver of the vehicle stopped at that intersection facing Constable Kostiuk as she approached it. It was his evidence that when he first saw the police car approaching, it was not driving quickly, and had no siren or emergency lights on. When it reached the Safeway store, its lights and siren were turned on, and it sped up. When the cruiser reached the intersection, it did not slow down, but sped up further and hit Mr. Haczewski's Chevrolet Cavalier, which then struck Mr. Bae's vehicle. The Cavalier's lights were on.
- [32] Mr. Jesse Wall was making deliveries to a 7-11 store on the northwest corner of the intersection at the time of the collision. He was inside the store, with the door open, when he heard a police siren, which he believed had just been turned on. I am unable to give any weight to his perception of when the siren was turned on, given that he was inside the store. What I do accept is his description of hearing first the siren, then the police car accelerating as its engine kicked down, followed by the collision a second or two later.
- [33] Two other witnesses gave evidence about the accident: Mr. Steve Cheung and Mr. Christopher Sargent. I did not find their testimony helpful and give little weight to it. Mr. Cheung was not in a position to see anything or hear very much, and Mr. Sargent's evidence was opinionated and conclusory. I prefer the evidence of the other witnesses.

- [34] From the evidence of Constable Kostiuk and Mr. Bae, I find that the police cruiser's siren and lights were fully activated at least from the point of the Safeway store as Constable Kostiuk drove along Kingsway.
- [35] David M. Little, P. Eng., of Baker Materials Engineering Ltd., testified for the defence as an expert witness. He prepared two reports reconstructing the accident. The first is dated December 17, 2007, and was prepared for the RCMP as part of their investigation. The second is dated May 10, 2011, and was prepared for counsel for the defendants for use at trial. The second is much the same as the first, except that it expands on the question of the potential for either driver to avoid the collision based on the available site lines.
- [36] Mr. Little noted that the intersection is not at right angles. Because Kingsway runs southeast to northwest, and Royal Oak runs on a north/south axis, they intersect at an oblique angle, and the vehicles would have approached each other at an angle of approximately 120°. Their visibility to each other would have been compromised by a hedge on the Safeway parking lot close to the intersection and also by several poles and a Hydro utility box on that same corner. The hedge was high enough to block Mr. Haczewski's view of the emergency lights on the police cruiser, as well as the police cruiser's view of Mr. Haczewski's headlights.
- [37] With respect to the speed of the two vehicles, Mr. Little concluded, and I accept, that Constable Kostiuk was traveling at a speed of between 80 and 89 km/h at the moment of impact. He could not say at what speed she was traveling when she entered the intersection, except that it could not have been less than 76 km/h.
- [38] From the evidence of Mr. Little, Mr. Bae and Mr. Wall, I find that Constable Kostiuk accelerated into the intersection from a speed that was already high. Thus, to the extent that Constable Kostiuk slowed down before entering the intersection, as she testified, I conclude that she slowed down relatively little before accelerating to the point where she was traveling at about 80 km/h as she entered the intersection, and was still accelerating at the time of impact.
- [39] As far as Mr. Haczewski's vehicle was concerned, Mr. Little put its speed at impact at between 50 and 58 km/h. The download from the car's airbag control module demonstrated that its speed was 50 km/h within a second of the moment of impact, and that its throttle position was 100%. This suggests that immediately before the collision, the driver reacted by flooring the gas pedal, but how much, if at all, the vehicle might have accelerated from 50 km/h before impact could not be demonstrated.
- [40] Based on these speeds, and the limited visibility in the area of the intersection, Mr. Little concluded in his first report that the time for the vehicles to reach impact from the point where they first became visible to each other was between 1.1 and 1.3 seconds. In his opinion, which I accept, this afforded both drivers little or no time to react, although Mr. Little observed that Mr. Haczewski was able to respond before the collision, but with little or no effect.

- [41] This explains why, given the speed she was traveling, it appeared to Constable Kostiuk that Mr. Haczewski's vehicle appeared out of nowhere.
4. Was Constable Kostiuk negligent?
- [42] Much was made during the trial of Constable Kostiuk's plea of guilty to a charge of driving without due care and attention.
- [43] On the evidence, it was clear that there existed a number of reasons for Constable Kostiuk to plead guilty to the lesser charge other than necessarily admitting her guilt - an unfortunate reality of plea-bargaining. Had she not accepted the plea bargain, she faced the potential of a conviction for dangerous driving causing death, a Criminal Code offence. Such a conviction would have cost her her employment, given her a criminal record, and exposed her to a prison term: a particularly unpleasant prospect for a police officer.
- [44] Notwithstanding these circumstances, Constable Kostiuk very forthrightly agreed in her evidence that it was her understanding when she pleaded guilty that she thereby acknowledged that she had not used sufficient care as she approached the intersection that night.
- [45] I agree.
- [46] On all of the evidence, I have no difficulty in concluding that Constable Kostiuk failed to exercise the degree of care required of a reasonable police officer, acting reasonably and within the statutory powers imposed upon her, in the circumstances she faced that night (see *Doern v. Philips Estate* (1994), 2 B.C.L.R. (3d) 349 (S.C.) at para. 69, *aff'd* (1997), 43 B.C.L.R. (3d) 53 (C.A.)).
- [47] As she headed up Kingsway in response to what she reasonably believed to be an emergency, Constable Kostiuk significantly exceeded the speed limit. On a quiet night with little traffic, that was justified. But circumstances changed when she approached the intersection with Royal Oak, a main street, facing a red light. She was not familiar with the intersection, and visibility was limited. She ought not to have entered it against the red light without first taking adequate steps to ensure that she could do so safely. She failed to do so. Reasonable care required her to slow right down before proceeding into that intersection, in order to ensure that it was in fact clear, and that she could enter it without risk of harm to the public. Instead, she accelerated into the intersection from what was already a high speed. In those circumstances, it was impossible for her to have any confidence that she could proceed safely, and the collision was the result. Such action was in no way justified by the exigencies of the emergency to which she was reacting.
5. What could Albert Haczewski see and hear?
- [48] In his second report, Mr. Little revisited this question at the request of counsel for the defendants.

- [49] About one month after the collision, the police re-enacted the accident. They arranged for a police car to approach Royal Oak along Kingsway as Constable Kostiuk had done, at high speed and with lights and siren engaged. They arranged for another vehicle to approach Kingsway along Royal Oak as Mr. Haczewski had done, and the passenger in that vehicle filmed what was visible on the approach to the intersection. Seven such sequences were filmed. Six of the seven sequences were consistent with Mr. Little's original conclusion. But one was different.
- [50] During the six consistent sequences, the videographer kept the camera pointing straight ahead along Royal Oak towards Kingsway. From this position, nothing was visible until the police car cleared the hedge, a second or so before impact would have occurred. During the seventh sequence, the camera operator rotated the camera to her left from her position in the front passenger seat and maintained it at that angle. When she did so, the police vehicle with its emergency lights could briefly be seen across the Safeway parking lot after it cleared the Safeway building, and before it became blocked by the hedge. As noted above, I am satisfied that Constable Kostiuk's emergency lights were on by that point.
- [51] At that same point, Mr. Haczewski's vehicle would have been about 3.6 seconds from impact. Mr. Little concluded, and I accept, that this was enough time for a reasonably attentive driver to avoid the collision if, in fact, he had been able to perceive the police vehicle through the Safeway parking lot at that moment.
- [52] Whether that opportunity of perception had existed for Mr. Haczewski, Mr. Little could not say. He noted that this would depend upon several assumptions, three of which, in my view, are of particular importance, and were not proven.
- [53] The first is that when the collision occurred, the parking lot was empty of any vehicles that could obstruct the site lines, as it was at the time of the re-enactment. The only evidence on this point is that of Constable Kostiuk, who testified that the lot was empty when she looked across it searching for cues. She must have done so before the hedge intervened to block her view of the lot altogether. Although I accept that this is what she now recalls, I am unable to give any weight to that evidence given the darkness, her speed, and the briefness of the glance she would have directed to the parking lot. I also note that although Mr. Haczewski's vehicle must have then been moving on the other side of it, she saw nothing before the hedge blocked her view even though she was specifically looking for cues such as movement.
- [54] The second is that the A-pillar did not obstruct Mr. Haczewski's view of the police vehicle approaching on his left. This is important because in the re-enactment the camera was filming the view from the passenger seat, not the driver's seat. While this would make little difference when filming straight ahead, the difference is significant when filming at an angle given the different positions of driver and passenger. Consequently, on the evidence, we do not know that what the camera saw from the passenger seat is also what the driver could have seen.

- [55] The third is that a flashing strobe light located at the time of the accident on the southeast corner of the intersection (but since removed) did not significantly distract Mr. Haczewski, thereby increasing the time it would take for a normally attentive driver to initiate a response. The evidence is silent on that point.
- [56] To these I would add a fourth factor. What a camera pointed fixedly in a particular direction records is not necessarily helpful in trying to discern what the driver ought to have seen. This is demonstrated by the fact that the camera picked up nothing of significance in six of the seven sequences when it was pointed straight ahead, which is where one would expect most drivers to be looking. Only when the camera was rotated to the left and aimed in the direction where those re-enacting the sequence knew in advance the police cruiser would be, was an earlier sighting obtained. Mr. Haczewski would not have had that advantage.
- [57] Mr. Little described this sequence as demonstrating nothing more than that there could have been an opportunity for Mr. Haczewski to have seen Constable Kostiuk's cruiser at an earlier moment. The onus of proof for this issue is on the defence. I am unable to conclude from the evidence, on a balance of probabilities, that Mr. Haczewski in fact had that opportunity, and that he should have seen Constable Kostiuk's cruiser at any time earlier than that set out by Mr. Little in his first report, being a second or so before impact. In my view, on a balance of probabilities, Mr. Little's first conclusion was the correct one, and I accept it. Mr. Haczewski was not in a position in which an alert driver could reasonably be expected to see the danger until he and Constable Kostiuk had both cleared the hedge. At that point there was nothing he could reasonably have done to avoid the collision.
- [58] In coming to this conclusion, I also accept Mr. Little's opinion on the question of whether Mr. Haczewski could have been alerted to the presence of the police vehicle by a siren, before it became visible. He formed the view that the siren would have provided Mr. Haczewski with little or no warning. Tests undertaken during the night-time re-enactment revealed that the police cruiser's siren generated sound levels within the other vehicle similar to those found in normal conversation, and was not heard in any event until both vehicles were relatively close. Even then, the direction from which the sound came was not immediately apparent. I gather that as a result of these tests, the RCMP have since increased the volume of their sirens.
6. Was Mr. Haczewski contributorily negligent?
- [59] The defendants submit that section 177 of the Motor Vehicle Act applied, and that Mr. Haczewski was therefore negligent in failing to yield the right-of-way to Constable Kostiuk's vehicle. I disagree.
- [60] The requirement that a person in Mr. Haczewski's position yield right-of-way to an emergency vehicle depends upon that vehicle giving an audible signal and showing a visible flashing red light. As Madam Justice Smith noted in *Frers*, the applicable test is whether the reasonably alert driver would perceive the signals. As discussed above, I have already concluded, on a balance of probabilities, that an alert driver in Mr. Haczewski's position

would not have perceived the signals until both vehicles cleared the hedge, approximately one second before the collision. Since it was by then too late for either driver to react to the other, it follows that there was no failure to yield the right-of-way by Mr. Haczewski.

- [61] The defendants argued next that Mr. Haczewski was nevertheless contributorily negligent because he had smoked marijuana that evening, which would have impaired his ability to react.
- [62] This argument was premised upon the expert evidence of W. K. Jeffery, B.Sc., M.Sc., a consultant in the area of forensic alcohol and drug toxicology. He was formerly the section head of the Toxicology Services Section of the RCMP Forensic Laboratory in Vancouver. His expertise was not challenged.
- [63] Blood and urine samples were taken from Mr. Haczewski for analysis following his tragic death. According to Mr. Jeffery, the results indicated that Mr. Haczewski had a fairly high concentration of tetrahydrocannabinol (THC) in his blood at the time of his death. The metabolite results suggested that he was but an infrequent user of the drug. In Mr. Jeffery's opinion, the concentrations indicated that Mr. Haczewski had likely smoked the cannabis product at some point between shortly after midnight and the time of the collision, although he conceded that calculating the time of smoking cannabis through post-mortem samples is controversial, and it could have been several hours earlier.
- [64] It was Mr. Jeffery's opinion that it is very likely that Mr. Haczewski was under the influence of marijuana at the time of the accident, and would have been experiencing some of the impairing effects of marijuana at that time. In cross-examination, Mr. Jeffery agreed that while the blood samples indicated how much Mr. Haczewski had smoked, they could not tell us what effect the marijuana had on him. This is because the pharmacological effects of marijuana vary significantly from individual to individual, and the data does not yet allow a correlation to be made between a THC blood level and a known state of intoxication. Mr. Jeffery therefore could not be certain that Mr. Haczewski would have been impaired. Nevertheless, he felt able to conclude that some effects would likely have been present, although he could not say to what extent.
- [65] The standard of proof I must apply, of course, is probability, not certainty. Based upon Mr. Jeffery's opinions, I find it probable that a "naïve user" like Mr. Haczewski, who had smoked the amount of marijuana necessary to yield a THC blood level of 4.4 ng/ml within the past two to four hours, would have been experiencing some of the typical effects of the drug in and around the time of the accident.
- [66] I am unable to come to any conclusion about the extent of impairment. I nevertheless accept that marijuana has been shown to impair driving performance, and that to drive while under the influence of marijuana constitutes a failure to take reasonable care for one's own safety and for the safety of others.

- [67] Before such a breach of the standard of reasonable care can be equated to contributory negligence, however, I must be satisfied on a balance of probabilities that there existed a causal link between that breach and the accident in question: *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333; *Clements (Litigation Guardian of) v. Clements*, 2010 BCCA 581 (leave to appeal to SCC granted, [2011] 2 S.C.R. vi; appeal argued February 17, 2012, judgment reserved).
- [68] In this case, the evidence does not close that gap. It did not establish to what degree Mr. Haczewski's ability to drive would have been impaired. But more importantly, it did establish that Mr. Haczewski had no real opportunity to react, regardless of his ability to do so. On the evidence, a normally alert driver would have fared no better than he did. As a result, it cannot be said that any impairment of Mr. Haczewski's abilities causally contributed to the accident. In fact, ironically, the evidence suggests that he reacted more promptly than Constable Kostiuk, given that he was able to floor the accelerator, while Constable Kostiuk was unable to react in any way at all.
- [69] Counsel for the defendants submits that Mr. Haczewski's apparent decision to floor the gas pedal instead of the brake pedal may have been a "fatal error in judgment", possibly attributable to his marijuana use. There is no evidentiary basis for that submission whatsoever. Nothing in Mr. Little's report suggests that the outcome would have been different in the absence of Mr. Haczewski stepping on the accelerator; indeed, Mr. Little could not even be sure that his vehicle had in fact accelerated. Given Constable Kostiuk's own evidence that she had no time to apply her brake, it is difficult to see on what basis it could be argued that Mr. Haczewski ought to have done so. Moreover, in the face of the imminent catastrophe that confronted both drivers at that fateful moment, the law is clear that we are not to judge their responses too finely.
- [70] In these circumstances, the evidence falls short of establishing any contributory negligence on the part of Mr. Haczewski, and the third party claim against his estate must be dismissed. It follows that Constable Kostiuk was wholly at fault. By section 11 of the Police Act, the Minister is vicariously liable for that fault.
- [71] No evidence was led that would establish liability on the part of the Crown Provincial other than vicarious liability pursuant to the same provision. On the authority of the Hill case, that is sufficient. No contrary authorities were provided. Accordingly, I find that liability has been established against both defendants.

DAMAGES

1. Overview

- [72] Albert Haczewski, who was born in Montréal of Polish parents, died at the age of 27. He was employed by Telus Communications as a customer service representative. His widow, Paula Haczewski, and his parents, Jacek and Barbara Haczewski, all claim damages pursuant to the Family Compensation Act for his wrongful death. These claims consist of:

- a) loss of past and future support, both financial and for household services;
- b) income tax gross up and management fees;
- c) loss of love, guidance and affection;
- d) special damages; and
- e) interest pursuant to the Court Order Interest Act.

[73] Because they all share the same surname, I will refer to the plaintiffs by their first names, meaning no disrespect by doing so.

[74] The defendants maintain that only Paula is entitled to damages in the circumstances of this case, and that any award to her must take into account a number of significant contingencies. They further submit that any award must take into account a reduced life expectancy, because it was discovered during the autopsy performed on Albert Haczewski that there was evidence of a "single focus of moderate to severe atherosclerosis in one of the coronary arteries". The forensic pathologist quantified this as a "60-70% stenosis in the left coronary artery".

[75] The leading case for the assessment of damages in fatal accident cases in this province is *Ruiz v. Bouaziz*, 2001 BCCA 207, where the Court of Appeal said this:

[53] [*Skelding v. Skelding* (1994), 95 B.C.L.R. (2d) 201 (C.A.)] supports the proposition that the normal tort measure of damages is to apply to fatal accident cases as it does to non-fatal accident cases. The basic principle is that the injured person is to be compensated for the full amount of his actual loss and no more, as Gibbs J.A explained at para. 18:

It may be that what has led to confusion in the reported judgments which do not apply the tort principles clarified in *Ratych v. Bloomer* [(1990), 69 D.L.R. (4th) 25 (S.C.C.)] is a failure to distinguish between the right to be compensated for loss and the kind of loss which will be compensable. Where the injured person survives, the loss is customarily classified into the separate heads of non-pecuniary, lost wages past and future, future care and the like. Whereas, when the injured party does not survive, the loss for which the claimants are entitled to be compensated is, as Dickson J. said in *Keizer v. Hanna* the amount which will provide at least the equal of what might have been expected to have been provided by the deceased person but for the accident. The assessment of the appropriate amount is to be "neither punitive nor influenced by sentimentality. It is largely an exercise of business judgment."

[54] In summary, in a family compensation claim, family members may claim damages proportioned to the pecuniary loss they suffered as a result of the loss of a relationship with a loved one. The loss of anticipated benefit that must be compensated has been called globally "dependency" and it must be assessed by the exercise of "business judgment."

[55] A precise formula for exercising that business judgment has proven elusive. Innumerable authorities have considered how to approach the assessment of the loss of dependency. Many were cited to us. One of the most succinct statements of the basis for awarding compensation under fatal accident legislation is that of Cartwright J. in *Proctor v. Dyck*, [1953] 1 S.C.R. 244 at 249:

To entitle a claimant to damages under the Fatal Accidents Act it is not essential that he should have been financially dependent upon the deceased or that the deceased should have been under any legal liability to provide for him or that he should have enjoyed any benefits from the deceased in his lifetime. It is sufficient if it is shown that the claimant had a reasonable expectation of deriving pecuniary advantage from the deceased's remaining alive which has been disappointed by his death.

[56] The legal goal, then, is to ascertain the true value of the pecuniary advantage each claimant lost because Mrs. Ruiz did not remain alive.

See also *McVea v. T.B.*, 2002 BCSC 1407 and *James v. Gillis*, 2011 BCSC 826.

[76] With these principles in mind, I turn to review Albert Haczewski's background with a view to ascertaining the value of the pecuniary advantage that each plaintiff claims to have lost.

2. Albert and his family

[77] Jacek was born in Poland on July 26, 1939. He was educated in Poland, earning a Master's degree in Mining Engineering at Kraków University.

[78] Barbara was born in Poland on March 4, 1950. She met Jacek in 1975. She had previously married and divorced, and had a son, Tom Natanek, born in 1969.

[79] Jacek and Barbara married in Paris in 1977, and emigrated to Montréal that same year. Two more sons, John and Albert, were born there: John in 1978, and Albert in 1980. The children were all raised as Roman Catholics, the religion of both parents.

[80] Upon arriving in Canada, Jacek initially worked as a consulting engineer. He was laid off from this employment due to recession in 1979, and thereafter started a plumbing business.

[81] Barbara had been trained in Poland in technical drafting, and worked in Montréal as a draftsman.

[82] In 1988, the family moved to Vancouver. Jacek continued to work in the plumbing business, and Barbara continued working as a draftsman and designer for the Sandwell Engineering firm, having been transferred from the Montréal office to the Vancouver office.

[83] John and Albert attended St. Francis de Sales Catholic Elementary School in Burnaby, where Albert first met his lifelong friend, Koyo Hara.

[84] In 1991, Barbara was laid off by Sandwell Engineering. She worked for smaller firms as a designer in Vancouver and Calgary, and then worked for Fluor Daniel.

- [85] In 1999, Albert graduated from Burnaby South Secondary School. He and his parents then moved to Poland, where Jacek and Barbara had purchased a bed and breakfast property, the Arka Hotel, in Wisla, a recreational area. While they operated the bed and breakfast business, Albert attended Sosnowiec College in Upper Silesia, about 100 km away, where he earned a computer technician/ information technology technician diploma in 2001. On weekends, he would join his parents in Wisla and help run the bed and breakfast. In return, they helped pay for his tuition.
- [86] After earning his diploma, Albert attended Silesia University, but did not finish a degree there. Polish was not his first language, and he concluded that it would be better to finish his education in Canada. In the meantime, he taught English as a second language, and in 2004 he met Paula.
- [87] Paula was born in Lublin, Poland on February 14, 1983, and raised there. Her father is a Mercedes-Benz service manager. Her mother runs an alternative health clinic. Her parents have been married for over 30 years. Paula, too, was raised a Roman Catholic.
- [88] After high school, Paula attended Marie Curie-Sklodowskiej University in Lublin. She graduated in 2006 with a BA in applied linguistics.
- [89] After meeting in 2004, Paula and Albert quickly connected, and they soon began spending their weekends together, alternating between Sosnowiec and Lublin, which were 400 km apart. In June of 2005, Albert moved to Lublin where he worked as an office manager and computer service technician earning about \$1,000 per month, a not inconsiderable income in Poland. This was sufficient to support both Paula and him.
- [90] In the summer of 2006, after Paula graduated with her degree, Albert and Paula moved Canada and settled in a house in Delta that Barbara had bought in 2005. Albert and Paula shared the house with Barbara's eldest son, Tom Natanek, his fiancée and his daughter. Albert and Paula paid no rent the first six months, and all of them shared the household chores.
- [91] In the fall of 2006, Albert was hired by Telus as a customer service representative. Albert and Paula married on December 2, 2006. Paula did not work throughout the time of their relationship.
- [92] Although Jacek remained in Wisla, Poland, Barbara began spending more time in Canada. In the summer of 2007, she purchased another house, in Calgary. Although he contributed nothing to the purchase, Albert was put on title as purchaser along with his mother.

3. Albert's employment prospects

- [93] Albert began his employment with Telus as a customer service representative, tier 1. He initially earned \$17/hour as a temporary employee. I find that by the time of his death, he had advanced to permanent employment, earning just under \$20/hour. His supervisor, Corinne Perrimann, explained that as a tier 1 customer service representative his salary would increase from \$17 to \$24/hour in six month increments, of which he had achieved only the first before his death.
- [94] She described him as someone who, at first, seemed average and struggled a bit, but who enthusiastically took to training, and after a year on the job was exceeding his objectives and earning very positive performance reviews. Ms. Perrimann considered him to be reliable and dependable, with a good work ethic. It was evident to her that he valued his job.
- [95] Albert remained a tier 1 customer support representative at the time of his death, but he had discussed with Ms. Perrimann moving up into a technical support role. She felt that this was a realistic goal and a good choice for him. Telus supports training such as he would have required for this move so long as the training is related to career goals. Thus, for instance, if he had wanted to go to BCIT for training, Telus would pay the tuition, and he would undertake the studies on his own time. Ms. Perrimann would have recommended him for such training had his death not intervened. Albert had in fact discussed undertaking training at BCIT with Paula.
- [96] If he had obtained a position in technical support, his salary would have had an upper range of \$35/hour, as opposed to the \$24/hour for a tier 1 customer service representative.
- [97] On the basis of Ms. Perrimann's evidence, the Telus performance reviews, the evidence of Paula, letters from Albert's previous employers, and the expert vocational opinion of Dr. Dean Powers, I am satisfied that as of the time of his death, Albert was a valued employee of Telus with secure employment, and that he would have undertaken the training necessary to progress to a technical support position with Telus had he survived. His diploma from Sosnowiec College, after all, was in computer and information technology, not sales.
4. The financial consequences of Albert's death
- [98] Mr. Darren Benning, an economist, was accepted as an expert in economics qualified to give opinion evidence with respect to the valuation of the loss to Paula of past and future financial support, household services, and income tax gross up amounts. His report was filed as an exhibit.
- [99] In arriving at his calculations, Mr. Benning relied upon a number of assumptions.

- [100] The first was that in the absence of the accident, and subject to the standard labour market contingencies, Albert would have continued his employment with Telus as a customer service representative for two years following the accident, after which he would have worked with Telus in a technical support position earning \$30/per hour (2011 dollars) through to retirement at age 65. Mr. Benning considered this to be a conservative assumption, given Albert's prospects for earning more than that in his expected lifetime.
- [101] The second is that but for the accident, Paula would not have sought employment outside of the home.
- [102] The third is that but for the accident, Albert and Paula would have had two children.
- [103] The fourth is that but for the accident, Albert and Paula would have performed household services commensurate with the services typically performed by the average Canadian male and female in their employment and domestic circumstances.
- [104] A further assumption made by Mr. Benning was that, in carrying out his calculations, it was appropriate to apply the average life expectancy for Canadian males of Albert's age.
- [105] This last assumption led to the necessity of a pre-trial ruling concerning expert evidence. Counsel for the defendants served an expert report opining on Albert's life expectancy from Dr. Keith Chambers, a consulting clinical epidemiologist. That report was served well outside of the time permitted by the Supreme Court Civil Rules for a primary expert report, although only a day or two past the time permitted for the service of a reply expert report.
- [106] Counsel for the defendants took the position that the report was in reply to Mr. Benning's report, given Mr. Benning's use of an average life expectancy. I ruled that an expert opinion could not be a reply to an assumption, and that Dr. Chambers' report was therefore a primary expert report. I nevertheless allowed it into evidence on the basis that the plaintiffs would be granted whatever extension of time they required to obtain and serve a report in reply to Dr. Chambers' opinion. The plaintiffs duly obtained a report from Dr. Saul Isserow, a cardiologist. I discuss those reports and the issue of Albert's life expectancy below.
- [107] In addition to these assumptions, Mr. Benning considered, with respect to Paula's claim, the average contingency of remarriage applicable to BC females, and the average contingency of divorce applicable to BC males. The results were as follows:

Prior to divorce and remarriage contingencies

After divorce contingency only

After remarriage contingency only

After both divorce and remarriage contingencies

Past loss of financial support

\$79,754

\$76,128

79,754

\$76,128

Future loss of financial support

\$581,523

\$417,523

\$229,685

\$176,675

Past loss of household services

\$14,392

\$13,800

\$14,392

\$13,800

Future loss of household services

\$129,965

\$95,017

\$52,823

\$40,807

5. Contingencies

a) Income

[108] On my view of the evidence, it was a reasonable for Mr. Benning to assume that Albert would have continued his employment with Telus as a customer service representative for a period of approximately two years following the accident, following which he would have worked in a technical support position. The evidence does not, however, support the contention that Mr. Haczewski would have earned a rate of \$30/hour thereafter. The evidence was that a rate of \$30-\$35/hour was the top of the range for that position. It follows that it would have taken Mr. Haczewski a period of time to achieve that peak earning level. The evidence does not indicate what the bottom of the range was, or what the expected progress of promotion would be.

b) Employment for Paula

[109] There is no doubt that during the time that Albert and Paula were together, Paula did not work and was supported entirely by Albert. I accept that they planned a family, and that it is unlikely that Paula would have worked outside the home at least until their children were past school-age. Thereafter, given Paula's education, the fact that her mother was a professional, and the exigencies of modern economic reality, I consider it likely that Paula would have started to work outside of the home at some point after the children had reached an age where this was practicable for them as a family. The proposition advanced by the plaintiffs, that Polish cultural values would have dictated that Albert support Paula entirely throughout their marriage, is significantly weakened by the fact that both their mothers have had independent careers.

c) Divorce

[110] The plaintiffs submit that given their Roman Catholic upbringing and their Polish heritage, there was very little risk of Paula and Albert divorcing in the future. Against this, I note that Albert's mother was divorced, and Paula described herself as not being particularly religious. Her pre-marital relationship with Albert does not appear to have been conducted strictly in accordance with Catholic doctrine. In all of the circumstances, considering the evidence of their family and their background, I conclude that a divorce contingency should indeed be applied, but I would reduce it slightly below that of the average for BC males.

d) Remarriage

[111] To lose Albert was, for Paula, a devastating tragedy. She now finds herself a widow, alone in a new country. After a year of mourning, she resumed dating, and has every intention of staying in Canada. She is 29 years old, and notwithstanding her loss, I can see no reason to vary from Mr. Benning's assumption that the probability that Paula will marry or enter into a common-law relationship is equivalent to the average contingency of remarriage applicable to BC females.

e) Albert's life expectancy

[112] This comes down to a battle of highly qualified and eminent experts.

[113] The defendants argue that Albert's life expectancy must be reduced below the average assumed by Mr. Benning to take into account the increased risk of death arising from the atherosclerosis in his coronary artery found by the pathologist. They rely on the opinion of Dr. Keith Chambers, a family physician and consulting clinical epidemiologist.

[114] The plaintiffs submit that the evidence does not support the existence of an increased risk of mortality for Albert, and that in any event, the average life expectancy already has built into it the risk of death from heart disease. They rely upon the opinion of Dr. Saul Isserow, a prominent cardiologist.

- [115] Not surprisingly, given their different areas of expertise, Dr. Chambers and Dr. Isserow approached the problem from different perspectives.
- [116] Dr. Chambers described coronary artery disease as progressive, so that given that the stenosis in Albert's coronary artery was already at 60-70%, it was just a question of time until the condition became symptomatic: a question not of if, but of when. Unfortunately, with heart disease, the first symptom can also be the last, being sudden death.
- [117] Dr. Chambers did not, however, assume that sudden death would occur. Rather, he assumed that Mr. Haczewski would get treatment, consisting of either surgery (bypass), or medical. Accordingly, he considered it appropriate to rely on a study by Dr. Salim Yusuf et al., which reviewed published data on patients with coronary artery disease who were symptomatic and had undergone coronary artery bypass graft surgery, or medical treatment. Dr. Chambers considered that given Mr. Haczewski's young age, and the progressive nature of his disease, Mr. Haczewski would have become symptomatic at an earlier age than those in the group studied by Dr. Yusuf.
- [118] From Dr. Yusuf's study, Dr. Chambers concluded that if Mr. Haczewski did not become symptomatic until around age 50, the average age of those studied by Dr. Yusuf, then his life expectancy would still be reduced to 80% of normal from age 27. That is, as of age 27, he would be expected to live 40.8 further years, to age 67.8. Given, however, his view that Mr. Haczewski was at increased risk of developing overt heart disease at a younger age, as he already had a 60% to 70% blockage at age 27, Dr. Chambers considered it reasonable to assume that his condition would have progressed to overt disease by no later than age 40, yielding a life expectancy of 67% of normal, to age 61.2.
- [119] According to Dr. Chambers, Mr. Haczewski would have had a significant risk from age 27 to age 40 of progressive and possibly fatal disease, so that his estimate of a life expectancy of 67% of normal from age 27 may underestimate the true risk had he not died at the time of the accident.
- [120] Dr. Isserow came to a different conclusion. He is not an epidemiologist. He is a cardiologist and internist who is the Director of the Vancouver General Hospital Centre for Cardiovascular Health, and Director for Cardiology Services at UBC Hospital. In essence, it was Dr. Isserow's view that the Yusuf study relied upon by Dr. Chambers did not apply to Mr. Haczewski's case.
- [121] From Dr. Isserow's perspective, it is imperative to bear in mind that Mr. Haczewski was entirely asymptomatic, unlike any of the patients whose cases were studied by Dr. Yusuf.
- [122] Whereas Dr. Chambers considered it appropriate to conclude that Mr. Haczewski would ultimately become symptomatic, given the progressive nature of the disease, Dr. Isserow expressed the opinion that although atherosclerosis was indeed a progressive disease, its rate of progression is highly variable, ranging from quick to barely perceptible. He observed that all human beings who survive to adulthood die with atherosclerosis, but only

some die from it. It was impossible to determine Mr. Haczewski's rate of progression because there was only one point on the curve to assess. Dr. Isserow further noted that the degree of stenosis is much more difficult to determine reliably at autopsy when blood is not flowing.

- [123] In Dr. Isserow's view, Dr. Yusuf's 1994 study, reviewing trials over the previous 40 years, is completely irrelevant. Medical treatment and surgical modalities have changed markedly since then, and the cohort studied by Dr. Yusuf was highly symptomatic, and therefore completely different from Mr. Haczewski. That it cannot be assumed that Mr. Haczewski would have become symptomatic is supported, in his view, by a Korean study which discovered, through CT angiography, an unexpectedly high prevalence of coronary artery disease in asymptomatic men. Dr. Isserow would not extrapolate anything from this study, but uses it and others to illustrate that there is a higher prevalence of atherosclerosis in asymptomatic younger men than previously thought, and which otherwise might never have been discovered.
- [124] Dr. Isserow agreed (as did Dr. Chambers) that atherosclerotic disease is the major killer in North American society, and as such is already built into the life expectancy tables. From Dr. Isserow's perspective, the finding on autopsy is not particularly unusual, as a significant number of patients who die of non-cardiac disease, up to 80%, will have coronary artery disease. In the circumstances, Dr. Isserow believes it entirely inappropriate to extrapolate anything from the Yusuf study, which in his view does not at all pertain to Mr. Haczewski's case. Dr. Isserow absolutely disagrees that Mr. Haczewski would have had a shorter than average life expectancy on the basis of that single finding of stenosis.
- [125] Dr. Isserow went on to explain that a stenotic lesion such as was discovered in Mr. Haczewski's left anterior descending coronary artery, is not generally the lesion that causes a heart attack. That heart attack is more likely to occur elsewhere. This is why if a patient who has angina is found to have an 80% lesion, and it is treated medically, then the angina is relieved, but the risk of a heart attack is not reduced. To do that, you have to treat the other lesions. So although the lesion discovered in Mr. Haczewski carries an adverse prognosis in a symptomatic individual, it is not likely to be the cause of a heart attack.
- [126] In these particular circumstances, I prefer the opinion of Dr. Isserow to that of Dr. Chambers, particularly given Dr. Isserow's specific, indeed renowned, expertise in heart disease. I consider, in short, that Dr. Isserow is in a better position than Dr. Chambers to assess the relevance of studies such as the Yusuf study upon which Dr. Chambers relied so heavily, and to comment upon the likelihood that Mr. Haczewski would have progressed to the point of symptomatic disease.
- [127] Both experts agreed that atherosclerotic disease is a major killer, and that, as such, it has already been built into the mortality tables used to assess average life expectancy. The question then becomes, in this case, whether the finding specific to Mr. Haczewski is such as to give rise to a sufficiently greater risk that we should deviate from the average. I found

Dr. Isserow to be convincing in his explanation of why it is not: in essence, that Mr. Haczewski was asymptomatic; that it is impossible to say whether or at what rate his disease would have progressed; that the Yusuf study is irrelevant; and that Mr. Haczewski cannot in the circumstances be differentiated from the many who have been unexpectedly found to be suffering from asymptomatic atherosclerotic disease.

- [128] All of these asymptomatic persons would, of course, have been considered as part of the general population but for the serendipitous discovery of their unlooked-for condition. Some would accordingly have been expected, actuarially, to go on to suffer from a reduction of life expectancy due to heart disease, and others would not. I accept Dr. Isserow's view that, on the information that is available to us, it cannot be said that Mr. Haczewski was more probably one of the former than one of the latter.
- [129] It comes down to this. Given my acceptance of Dr. Isserow's opinion, the defendants have failed to prove, on a balance of probabilities, that the findings on autopsy justify a reduction in Mr. Haczewski's life expectancy below the average, which already takes into account the general risk of death from atherosclerotic disease. The circumstances therefore differ from those considered in cases such as *Lewis v. Todd* (1980), 115 D.L.R. (3d) 257 at 272 (S.C.C.), *Frederick v. Ottawa Aero Services Ltd.* (1963), 42 D.L.R. (2d) 122 (Ont. H.C.), *aff'd* (1964), 44 D.L.R. (2d) 628 (Ont. C.A.), *aff'd*, (1965), 48 D.L.R. (2d) 702n (S.C.C.), and *Duruisseau v. Jako*, [1992] B.C.J. No. 2297 (Q.L.) (S.C.).

6. Assessment of Paula's claim

- [130] In assessing the pecuniary advantage that Paula has lost through her husband's untimely death, I follow and accept, as an appropriate guide, the approach taken by Mr. Benning subject to the application of the contingencies I have discussed above. In doing so, I bear in mind that the assessment of damages under the Family Compensation Act is never a matter of mathematical calculation, for "arithmetic is a good servant, but a bad master": *Daniels v. Jones*, [1961] 1 W.L.R. 1103, [1961] 3 All E.R. 24 at 28 (C.A.); *Cox v. Takihashi* (1977), 5 B.C.L.R. 162 (C.A.); *Cox v. Fleming* (1995), 15 B.C.L.R. (3d) 201 (C.A.).

a) Past loss of financial support

- [131] Before the application of any contingencies, Mr. Benning calculated this amount at \$79,754. This assumed, however, that Mr. Haczewski would have begun earning \$30/hour by October of 2009. As discussed, while I accept that Mr. Haczewski would have commenced employment at a higher rate as of October of 2009, I find that the applicable rate would have been less than \$30/hour between then and trial, reducing the amounts used by Mr. Benning for 2009, 2010 and 2011. No remarriage contingency is applicable in the circumstances, and I consider that a very low divorce contingency should be applied.

- [132] Taking all of these factors into account, I assess Paula's loss under this heading at \$70,000.

b) Future loss of financial support

[133] Before applying divorce and remarriage contingencies, Mr. Benning calculated the value of this loss to be \$581,523. In doing so, he employed three assumptions from which I differ. He used a top earning figure of \$30/ hour. I find that the evidence supports a higher top figure, of at least \$35/hour. He assumed earnings of \$30/hour from the time of trial on, whereas I find that Mr. Haczewski would not have reached that level for an unspecified period of time after the trial. Finally, Mr. Benning assumed that Paula would not have worked outside the home. He acknowledged that if she were to earn approximately \$20,000/year, then there would be about a 20% reduction in her dependency upon Albert's income. In my view, it is likely that Paula would have worked outside the home, but not for some years.

[134] Once again taking all of these factors into account, I conclude that an appropriate assessment prior to the application of divorce and remarriage contingencies comes to \$500,000, which I would reduce to \$165,000 after considering the contingencies of divorce and remarriage.

c) Past and future loss of household services

[135] There was nothing in the evidence that persuades me that the assumptions and calculations of Mr. Benning are not appropriate, other than the fact that he has employed, as discussed above, what I consider to be a higher divorce contingency than the evidence warrants. In my view, the appropriate assessment of the past loss of household services is \$14,000, and for future loss of household services, \$45,000.

d) Income tax gross up and management fees

[136] There is no doubt that it would be appropriate to increase the award to Paula to counteract the effect of income tax on the future loss portion. Mr. Benning discussed the difference between a portfolio that earns interest only, and a mixed portfolio which could be managed to reduce tax consequences to the point where no gross up is required after the application of the contingency of remarriage.

[137] On an interest-only portfolio, using the figures set out in the table reproduced above, Mr. Benning estimated a total gross up of \$116,969, reduced to \$3,701 after applying a remarriage contingency.

[138] Mr. Benning agreed that over a longer time horizon, which is what we have here, a mixed portfolio is more likely to be employed. I accept that, but I do not understand why a remarriage or divorce contingency should be applied to any amount found to be necessary to counteract the effect of income tax on awards that have already been reduced by those same contingencies.

[139] Accordingly, I require further submissions from counsel on Paula's claims for income tax gross up and management fees, taking into account my assessment of her future losses of financial support and household services, and my finding that a mixed portfolio will be employed.

e) Loss of guidance

[140] As plaintiffs' counsel concedes, this conventional award is generally reserved for claims by a child for the loss of guidance and direction that a deceased parent would have provided. He submits, however, that an award under this heading to Paula is justified by the fact that she was a person who found herself living in a foreign culture, and who relied on Albert to guide her in bridging that cultural gap.

[141] Counsel was unable to direct me to any case where damages for loss of guidance have been awarded to a spouse under the Family Compensation Act, although section 3(1) of the Act provides that "the action must be for the benefit of the spouse, parent or child of the person whose death has been caused ...". On principle, entitlement should turn not merely on the nature of the relationship so long as it is on behalf of a spouse, parent or child, but rather on the evidence concerning the degree to which the claimant relied upon the deceased for guidance. Clearly, where the claimants are children who have lost a parent, that degree of reliance is likely to be very high. In such circumstances, the upper limit for the award has been set at \$35,000: *Foster v. Perry*, 2005 BCSC 1214; *Stegemann v. Pasemko*, 2007 BCSC 1062.

[142] Awards for loss of guidance were made to parents for the loss of their children in *Lian v. Money* (1994), 3 B.C.L.R. (2d) 16 (S.C.) (rev'd on other grounds (1996), 15 B.C.L.R. (3d) 1 (C.A.) (\$5,000), and *James v. Gillis* (\$7,500).

[143] With respect to the loss of a spouse, the situation is somewhat different because of the very real prospect of remarriage, and this must be taken into account. In the circumstances of this case, I am satisfied that Paula was reliant upon Albert for guidance beyond the degree normally to be expected of a spouse, given his familiarity with Canadian culture, and her lack thereof. I am further satisfied that the loss of that guidance is unlikely to be replaced quickly, and will be most keen during these earlier years when she remains something of a stranger in a strange land. I assess her loss in this regard at \$15,000. I emphasize that the law does not permit me to take into account the extraordinary grief and pain Paula has suffered. I am limited to assessing the loss of Albert's guidance, not the emotional consequences of his death.

f) Special damages

[144] Paula claims special damages in the amount of \$26,005, consisting primarily of funeral expenses. The defendants do not contest the amount, but submit that this claim should be reduced by \$22,580, being the death benefit Paula received under Albert's ICBC policy. This would leave a net claim of \$3,425.

[145] The defendants' position is supported by *Gurniak v. Nordquist*, 2003 SCC 59, [2003] 2 S.C.R. 652, and what is now section 83(2) of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, and I accept it. Accordingly, I award special damages in the sum of \$3,425.

7. Assessment of the claims of Jacek and Barbara Haczewski

a) Past and future loss of financial support

- [146] These plaintiffs ground a claim for past and future financial support upon the concept of filial piety. Counsel for the plaintiffs asserts that this concept has been recognized as common and prominent in Asian cultures (*Sum Estate v. Kan* (1997), 44 B.C.L.R. (3d) 250 (C.A.)) but is equally so among Polish families, and that an award of \$200,000 to Jacek and Barbara is justified. He made no submission concerning the impact of such an award on the amount of Paula's dependency, which would presumably have to be reduced to reflect income made available to the parents instead of to her.
- [147] In the *Sum Estate* case, a considerable amount of evidence was adduced concerning the traditional Confucian concept of filial piety, and the expectation of a symbolic financial contribution to the parents of between 10% and 20% of a child's gross income, regardless of the parents' need. The evidence further demonstrated that the deceased son had been following that doctrine at the time of his death at the age of 23. While working as a waiter, he paid his parents \$300/month out of respect.
- [148] The case of *Ayeras et al. v. Front Runner Freight Ltd. et al.*, 1998 CarswellBC 1644 (WL Can) (S.C.), was to like effect. The evidence established a cultural expectation of filial piety (the family was from the Philippines) as well as an expectation in the deceased's family of children supporting their parents.
- [149] The evidence in this case was much more limited. The only evidence of a cultural or familial expectation was Jacek's testimony that in Poland, there is a cultural "rule" that children will help their parents. He further testified that he invariably sent parcels and as much money as he could to his own parents when they were in Poland and he was in Canada. Barbara Haczewski candidly explained that while she hoped that Albert would contribute to her support later in life, she did not expect him to do so.
- [150] In fact, Albert had not contributed anything to the support of his parents other than assisting them with the running of their hotel in Poland in return for their support of his education. He sent no money to them while he was employed by Telus. His parents are not in any particular need of support (unlike Jacek's parents), and given that Albert and Paula were looking forward to raising a family supported entirely by Albert's income, I consider it unlikely that he would have set any significant amount aside for his parents in these circumstances. Although I do not doubt that he would have been prepared to assist his parents to some extent once he was established in a successful career, I am satisfied that his priority would have been his wife and children.
- [151] In my view, the evidence before me does not support more than a modest award to Albert's parents for the loss of his future financial support, and I assess that award at \$20,000.

b) Loss of guidance

- [152] On the basis of the principles I reviewed above in considering Paula's claim under this heading, I am unable to find any basis for an award to Jacek Haczewski, who has resided principally in Poland, and who spoke to his son approximately monthly. While I have no doubt that they had a close relationship, the loss of which Jacek feels keenly, the necessary element of guidance is missing from the evidence.
- [153] Barbara Haczewski spent a good deal more time in Canada and, with her husband in Poland, was more reliant upon Albert for assistance, including his willingness to go on title with her when she purchased her house in Calgary, allowing her to reduce the down payment that was required. In all of the circumstances, I conclude on the evidence that she has suffered a loss of guidance, and I assess that loss at \$7,000.

COSTS

- [154] The plaintiffs submit that they are entitled to an award of special costs by reason of what they assert was an abuse of process by the defendants in refusing to admit liability notwithstanding Constable Kostiuk's guilty plea to the Motor Vehicle Act charge of driving without due care and attention. They rely on the decision of Mr. Justice Truscott in *Ulmer v. Weidmann*, 2011 BCSC 130, where His Lordship considered a claim of damages for abuse of process arising from the defendant's failure to admit liability in a civil case arising from a motor vehicle accident for which he had been convicted of driving without due care and attention.
- [155] In that case, Truscott J. concluded that the conviction for driving without due care and attention amounted to a finding of negligence against the defendant because his manner of driving was found to have departed from the standard of a reasonable man. The judge accordingly agreed that it was an abuse of process for the defendant to deny full liability as this constituted an attempt to relitigate the findings of the Provincial Court that were necessary for his conviction, thereby undermining the integrity of the judicial process. Mr. Justice Truscott found it was not an abuse of process, however, for the defendant to allege contributory negligence against the plaintiff. In all of the circumstances, although he concluded that there was an abuse of process, Truscott J. declined to award any damages for it and denied the claim. He made no award of special costs.
- [156] As I understand the plaintiffs' submission (although it was not articulated in this way), it was similarly an abuse of process for the defendants to deny liability in this case, and this undermining of the integrity of the judicial process amounted to reprehensible conduct. Reprehensible conduct is the single standard required to support an award of special costs, and consists of conduct that is scandalous, outrageous, or constitutes misbehaviour, as well as milder forms of misconduct conduct worthy of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 at 745-747 (B.C.C.A.); *Leung v. Leung* (1993), 77 B.C.L.R. (2d) 314 (S.C.), *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724.

- [157] In my view, the circumstances of this case are quite different from those considered by Truscott J. Constable Kostiuk was not found guilty, but rather entered into a plea agreement which resulted in a guilty plea to a lesser included charge. In these circumstances, it cannot be said that the defendants were attempting to relitigate findings already made via the judicial process. As I noted above, there were certainly reasons for entering into the plea other than admitting guilt, although, to her credit, Constable Kostiuk did not attempt to resile from the admission.
- [158] As a matter of law, Constable Kostiuk's guilty plea was admissible into evidence as an admission that gave rise to a strong but rebuttable presumption that she in fact committed the offence: *Wagstaff v. Johnson*, 2001 BCSC 1375 at para. 36; *D.L.M. v. Battle*, 2005 BCSC 1502; *Cromarty v. Monteith* (1957), 8 D.L.R. (2d) 112 (B.C.S.C.).
- [159] As it turned out, although there were grounds for arguing that the presumption ought to be rebutted in this case, the evidence to support that argument did not materialize. As such, it might indeed be suggested that the defendants ought to have admitted liability, leaving for determination the question of whether Albert Haczewski was contributorily negligent.
- [160] Given the issues raised by the particular circumstances of this case, however, in terms of the emergency response and the applicable statutory provisions and regulations, as well as the plea bargain arrangement into which Constable Kostiuk entered, I am unable to conclude that the defendants' approach constituted reprehensible conduct that would justify an award of special costs. This is not a case like *Plishka-Humphreys (Guardian ad litem of) v. Bolen*, 2012 BCSC 235, where the facts read into the record by Crown Counsel in the defendant's presence at the time of the sentencing hearing made nonsense of any attempt to rebut the presumption of an admission of fault.
- [161] I observe as well that an admission would have made little difference to the conduct of the trial given the issue raised as to whether there was contributory negligence on the part of Albert Haczewski, and whether liability ought therefore to be apportioned. Although the defendants did not succeed on that issue, they cannot be criticized for raising it given the state of the evidence.
- [162] Subject, then, to any circumstances such as Offers to Settle of which I am presently unaware, the plaintiffs are entitled to ordinary costs at Scale B.

CONCLUSION

- [163] I find the defendants liable for the wrongful death of Albert Haczewski. Their third party claim against his estate is dismissed.
- [164] Pursuant to her claim under the Family Compensation Act, I award the following damages to Paula Haczewski:

Loss of past financial support:

\$70,000

Loss of future financial support:

\$165,000

Loss of past household services

\$14,000

Loss of future household services

\$45,000

Loss of guidance

\$15,000

Special damages

\$3,425

TOTAL

\$312,425

Plus pre-judgment interest on the past losses pursuant to the provisions of the Court Order Interest Act, R.S.B.C. 1996, c.79.

[165] The parties are to make further submissions on the appropriate amount, if any, to be awarded to Paula for income tax gross-up and management fees, based upon my findings. They should contact the registry to arrange for a one hour hearing for this purpose.

[166] With respect to their Family Compensation Act claims, I award the following damages to Jacek and Barbara Haczewski:

Loss of future financial support:

\$20,000

Loss of guidance (Barbara):

\$7,000

[167] The plaintiffs are entitled to their ordinary costs at Scale B unless it is necessary for the parties to raise matters of which I am presently unaware. In that event, appropriate arrangements should be made with the registry.

"GRAUER, J."

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