

CANADA / JUDGMENT

Peters v. Bird

2020 BCSC 130

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 130 Peters v. Bird

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Peters v. Bird,

2020 BCSC 130

Date: 20200205

Docket: M163531

Registry: New Westminster

Between:

Patricia Anne Peters

Plaintiff

And

Insurance Corporation of British Columbia, Glen Bird and

T. Clark & Son Trucking Ltd.

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraphs 120 and 122 on June 25, 2020;

Before: The Honourable Mr. Justice Bernard

Reasons for Judgment

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Place and Date of Trial:

New Westminster, B.C.

March 25 - 29, 2019

April 1 - 5, 2019

May 29, 2019

Place and Date of Ruling:

New Westminster, B.C.

February 5, 2020

Table of Contents

A. Overview.. 3

B. Evidentiary Synopsis. 4

Patricia Peters. 4

Brandy Wallace. 5

Lisa Peters. 5

Darlene Leo. 7

Cst. Rattray. 7

Cst. Hoekstra. 8

Cst. Dunlap. 8

Patricia Harris. 8

Frances Deane. 11

David Bunch.	11
Donald McKamey.	12
Glen Bird.	12
Expert Witnesses.	17
Admissions.	19
Exhibits.	20
Examination for Discovery "read-ins"	21
C. Discussion..	22
Was Mr. Bird the driver?.	23
Was Mr. Bird negligent?.	28
To what extent was Ms. Peters contributorily negligent?.	35
D. Disposition..	38

A. Overview

- [1] In the early hours of October 16, 2013, Patricia Peters was struck by a motor vehicle on Highway 99 where it passes through the town of Mt. Currie, B.C. Ms. Peters was a pedestrian, and the driver left the scene without stopping to render assistance or reporting the incident. There were no independent witnesses to the collision and Ms. Peters, who was found prone, semi-conscious, and seriously injured on the roadway, has no recollection of it.
- [2] The plaintiff alleges that the defendant Glen Bird was the driver. On the night in question, Mr. Bird was driving a logging truck between Squamish and a logging area ("cut-block") north of Mt. Currie, for the defendant T. Clark & Son Trucking Ltd. ("Clark").
- [3] By consent order dated November 26, 2018, the issues of liability and damages were severed from one another, and the instant trial was for the purpose of determining liability only.
- [4] In a "no evidence" motion at the close of the plaintiff's case, the claim against the defendant Insurance Corporation of British Columbia ("ICBC") was dismissed.
- [5] By the trial's conclusion the principal live issues were: (a) whether Ms. Peters had proved that the defendant Mr. Bird was the driver of the vehicle that struck her; (b) if Mr. Bird was the driver, whether Ms. Peters had proved that he was negligent; and, (c) to what extent was Ms. Peters contributorily negligent. The liability of the defendant Clark was not in question if Mr. Bird's liability was established.

- [6] Proof of the identity of Mr. Bird as the driver, and his negligence, rested primarily on the evidence of Mr. Bird's former girlfriend Patricia Harris, who testified that on the night in question, Mr. Bird confessed to her that he had killed a man while driving the route from Squamish to the cut-block.
- [7] In closing submissions, Ms. Peters invited the court to find her 25% contributorily negligent. She was very intoxicated on the night in question and has no memory of the collision, where she was, or what she was doing, when she was struck.
- [8] For reasons that follow, I am satisfied that the plaintiff has proved: (a) that the defendant Bird was the driver of the motor vehicle that struck her; and, (b) that the defendants Bird and Clark are 75% liable, in negligence, for the plaintiff's damages.

B. Evidentiary Synopsis

Patricia Peters

- [9] Ms. Peters is a First Nations woman, mother of two, and resident of D'Arcy, B.C. D'Arcy is a small community just north of the town of Mt. Currie. In October 2013, Ms. Peters was 32 years old. In her testimony, she frankly acknowledged a long history of alcohol abuse, albeit with periods of sobriety. In 2013, she was drinking approximately two times a month; the evening of October 25 was one of those times. She added that when she drank she also "dabbled" in cocaine and liked to smoke cigarettes.
- [10] Ms. Peters recalled that on October 25, 2013, she drank at her cousin Margaret's house in D'Arcy, before going to a house party in nearby Mt. Currie. Ms. Peters said she drank, smoked cigarettes, played foosball, and listened to music at the party. She recalled that the cigarettes she smoked were from a red pack of du Maurier cigarettes that Matthew Peters had given to her at the party.
- [11] Ms. Peters described herself as being "pretty intoxicated" that night, and said she does not recall leaving the party. She estimated that she drank at least eight Busch beers and a Smirnoff Ice cooler that night. When questioned as to whether she had cigarettes with her when she left the party, she said she did not know; however, she said that if she did, she would have put them in the pouch pocket of the hoodie-style jacket she was wearing that night.
- [12] Ms. Peters believed she blacked out between 11:45pm and midnight. She cannot recall being on the highway or being struck. She said her next memory after the party was of waking up at Vancouver General Hospital with broken bones on the left side of her body, and an inability to walk. She now uses a wheelchair.
- [13] In the absence of a memory of what she did after she left the party, Ms. Peters said that she had, in the past, walked home from Mt. Currie (north along Pemberton Portage Road/ Highway 99) and been picked up and driven to D'Arcy by a passing northbound driver. For this reason, she thought it was likely she would have been on the east side of the highway

(i.e., walking with, rather than against, northbound vehicular traffic) on the night in question. Ms. Peters also said she was, at the time, very familiar with the junction where Highway 99 becomes Pemberton Portage Road through Mt. Currie, and knew that logging trucks drove through Mt. Currie along this road.

Brandy Wallace

- [14] Ms. Wallace is a close friend of Ms. Peters. She recalled picking up Ms. Peters and Matthew Peters in D'Arcy, on the evening of October 25, 2013, to drive them to a party in Mt. Currie hosted by her. She recalled that at the party Ms. Peters drank beer and went outdoors from time to time to smoke a cigarette from a red pack. She estimated that between 1:45am and 2:15am, Ms. Peters went outside for a smoke and did not return. Ms. Wallace then learned the next day that Ms. Peters had been in an accident.

Lisa Peters

- [15] At approximately 2:30am - 2:40am Lisa Peters was a passenger in a car driven by Darlene Leo, travelling southbound along Highway 99/Pemberton Portage Road in Mt. Currie, when she and Ms. Leo spotted Ms. Peters lying face down in the northbound lane near the bus shelter. She said Darlene Leo stopped the car, and she (Lisa Peters) went up to Ms. Peters, who was conscious but unable to speak. Ms. Peters was wearing blue jeans, a brown and white sweater with the hood up over her head, and one running shoe; Lisa Peters saw the other shoe north of Ms. Peters, on the roadway. Lisa Peters said she immediately called 9-1-1; an ambulance attended and took Ms. Peters away on a stretcher.
- [16] Shortly before encountering Ms. Peters, Lisa Peters and Darlene Leo were westbound on Lillooet Lake Road. Lisa Peters said she recalled that three eastbound vehicles passed them on Lillooet Lake Road: a dark-coloured SUV, a silver grey pick-up truck, and a blue logging truck with the trailer up and a company name that started with the letter "T". Lisa Peters estimated that the logging truck passed them five minutes before she and Ms. Leo came across Ms. Peters on the highway.
- [17] Lisa Peters identified the blue logging truck shown in photograph #4 (Exhibit #1, tab 6) as similar to the logging truck that had passed her on Lillooet Lake Road. She said that she recognized the truck in the photo by its colour and company name. She added that while she was at the hit-and-run scene with the police, another blue logging truck with the same logo passed by.
- [18] Lisa Peters was cross-examined on inconsistencies between her trial testimony and a prior statement given to an ICBC adjuster. The statement had been type-written by the adjuster, and was corrected in several places by Lisa Peters before she signed it on December 13, 2013. One of the non-corrected sentences read as follows:

The logging truck had at least six bright lights shining at the front, making it impossible for me to see it well enough to make any determination of the colour, make, model or any identifying marks, other than I saw a partial name on it, "Thomson".

- [19] Lisa Peters agreed this is what her statement said, but said it was not true that she could not see the colour of the truck. She said the adjuster put words into her mouth. She said that when a similar blue logging truck passed by while she was at the scene, she turned to one of the police officers present and told him that the truck she passed on Lillooet Lake Road looked similar or the same. She added that she did not recall seeing anything more than the letter "T" on the truck that passed her on Lillooet Lake Road, and did not know why she would have said "Thompson" to the adjuster; she could not say anything more about the trucking company's name other than it started with a "T".

Darlene Leo

- [20] Ms. Leo said she was with Lisa Peters when they came across Ms. Peters lying on Pemberton Portage Road, adjacent to the bus shelter.
- [21] Prior to encountering Ms. Peters, Ms. Leo said she passed three eastbound vehicles along Lillooet Lake Road: a dark-coloured SUV, a dark coloured pick-up truck, and a logging truck with very bright lights and no load. She said she could not recall anything more about the logging truck, including its colour, but she estimated that she and Lisa Peters came across Ms. Peters three-to-five minutes after they passed the logging truck.

Cst. Rattray

- [22] On October 26, 2013, Cst. Rattray was a member of the Statlin Tribal Police Force, in Mt. Currie. Between 2:40am and 2:43am he was dispatched to attend the scene where Ms. Peters had been found by Lisa Leo and Darlene Yeo. He said he arrived at the scene within five minutes of the call, and found Ms. Peters prone and semi-conscious in the northbound lane of Pemberton Portage Road, in a dark area of the road opposite the bus shelter. Darlene Leo and Patricia Peters were present. Cst. Rattray said an ambulance arrived within four-to-five minutes of his arrival, and transported Patricia Peters to the Pemberton Clinic.
- [23] Cst. Rattray noted that one of Ms. Peters' shoes was 20 feet north of her on the roadway; he seized this shoe after it was photographed by RCMP Cst. Hoekstra. He said he then attended to the Pemberton Clinic where he seized Ms. Peters' jacket and a cell-phone adapter. He said he did not recall seeing a package of cigarettes either at the scene or among Ms. Peters' effects at the clinic.
- [24] Cst. Rattray described the weather and road conditions as clear, cold (two degrees Celsius), and dry. He said he saw no skid marks, vehicular debris, or vehicular fluids on the road. He described the shoulder of the road as gravel, quite wide, and typically used by pedestrians as a walkway. He said the lighting where Ms. Peters was found was poor because of the absence of nearby street-lights.

Cst. Hoekstra

- [25] Cst. Hoekstra is the forensic identification officer who attended the scene to take measurements and photographs. His photographs depict, inter alia, Ms. Peters lying prone in the northbound lane, clad in blue jeans, a brown and white hoodie-style jacket (with the hood up and covering her hair), and one white-soled running shoe. In another photograph, the matching shoe is shown approximately 20 feet north of Ms. Peters, in the northbound lane.
- [26] The scene photographs show the roadway where Ms. Peters was found as a paved two-lane highway with poor street lighting; a yellow double line separates the north and south lanes of travel. Cst. Hoekstra measured the paved part of the shoulder adjacent to the northbound lane as 1.6 metres wide. Photographs show that the shoulder is demarcated by a painted white line and has a flat gravel portion beyond the paving.
- [27] Cst. Hoekstra found no skid marks or vehicle debris at the scene. He said the roadway was dry and the ambient temperature was three degrees Celsius.

Cst. Dunlap

- [28] Cst. Dunlap was the lead RCMP investigator into the hit-and-run of Ms. Peters. He was also an initial responder, arriving at the scene at 2:41am. He assisted with first aid, searched for evidence, and controlled traffic. In his search, he found no evidence of the vehicle that struck Ms. Peters. He set up a by-pass to divert traffic from Pemberton Portage Road while the hit-and-run scene was under investigation.
- [29] Cst. Dunlap said the ensuing police investigation to determine the identity of the driver went nowhere until October 25, 2014, when Ms. Harris informed the police of Mr. Bird's past admissions to her.

Patricia Harris

- [30] Ms. Harris resides in Squamish, B.C., where she works as a house painter and cleaner. In October 2013, she was dating the defendant Glen Bird. This relationship ended on October 25, 2014, when Ms. Harris called the police to report that Mr. Bird had assaulted her that day. During a police interview regarding the alleged assault, she informed the police that a year earlier, Mr. Bird told her that he had run over and killed a man as he was driving his logging truck from Squamish to a cut-block north of Mt. Currie.
- [31] Ms. Harris testified regarding Mr. Bird's alleged confession to her. She said that earlier on the night in question, she had driven Mr. Bird to his truck in Squamish, for the start of his work-shift as a logging truck driver; she then went home and to bed. Ms. Harris said she and Mr. Bird exchanged a series of angry text messages and telephone calls through the night. She estimated that this exchange started at 3:30 - 4:00am, or earlier. Ms. Harris said that at one point in these communications, Mr. Bird said he had just killed a person because of her.

She said he explained that he should not have been "doing 70 in a 30", and provided the following details: that the collision occurred at an intersection; that the man he struck and killed was lying off to the side of the road and sat up just before he ran over him; and, that the man had a package of du Maurier cigarettes in his pocket.

- [32] Ms. Harris said she next heard from Mr. Bird when he called to ask her to pick him up at 8:30am - 9:00am on October 26, at the log sort in Squamish. She said she had never done this before, and when she arrived at the log sort she saw Mr. Bird "washing down the truck like a crazy person, under the front and back". She said when she honked to get Mr. Bird's attention he said "What the fuck are you doing here? I meant for you to pick me up at the shop. I'll be there in ten minutes."
- [33] Ms. Harris testified that she did not know whether to believe Mr. Bird's confession to having killed a man with his truck, or not; thus, she made some inquiries to determine if anyone had, in fact, been struck and killed that night along Mr. Bird's route. She said she was unable to find anything in an online search of the Pemberton newspaper or from her questioning of another driver who had worked the same route on October 26. Thereafter, Ms. Harris said she never discussed the matter with anyone other than her sister. She said that a few months later, Mr. Bird explained to her that on the morning she had come to pick him up at the log sort, he was washing off hair, skin, and bones from under the truck. She added that at this time he deleted text messages of the night in question from her cellphone, because he said it was "bad karma" to keep them.
- [34] In late 2013 or early 2014, Ms. Harris and Mr. Bird moved to Grand Prairie, Alberta. Ms. Harris said that on one occasion while they were together in Grand Prairie, Mr. Bird was so angry with her that he said he was afraid he would kill her. In this context, she said he told her that he was not afraid of killing again, and referred to the "native man" he had killed in D'Arcy. Ms. Harris said she broke up with Mr. Bird after this threat, and returned to Squamish; however, when Mr. Bird subsequently returned to Squamish, she resumed her relationship with him for a short time (until the October 25, 2014 report of assault).
- [35] Ms. Harris said October 25, 2014 was the final time Mr. Bird mentioned killing a "native man" in D'Arcy. She said Mr. Bird had, once again, threatened to kill her and it was in this context that he reminded her of what he claimed to have done.
- [36] Ms. Harris was extensively cross-examined, particularly as to inconsistencies between her trial testimony and her police statement. In relation to the confession, Ms. Harris agreed that in her police statement she said Mr. Bird had told her he had been travelling 70 mph (as opposed to km/h). She also agreed that she had said that it was she who deleted the text messages of the night in question and that this occurred "right away". She explained that she meant to say that it was Mr. Bird who had deleted the messages, and that this occurred a few days after the night in question.

- [37] Ms. Harris agreed that she was very upset with Mr. Bird at the time she told the police of his confession. She said that she had warned Mr. Bird that if he did not stop threatening her, she would tell the police about the incident.
- [38] Ms. Harris agreed that after she gave her police statement, she tried to withdraw it by saying she had been "high" at the time. She explained that while what she said about Mr. Bird to the police was true, she had wanted to recant at that time because she was fearful of Mr. Bird and the consequences of making the disclosure to the police.

Frances Deane

- [39] Ms. Deane is Patricia Harris's sister. She lives in Squamish and is married to David Bunch. She knows Mr. Bird as the man who was in an "on and off" relationship with her sister for several years.
- [40] Ms. Deane testified to recalling a time when her sister was "under a lot of stress" and informed her that Mr. Bird had claimed to have run over and killed someone while he was working. Ms. Deane said Ms. Harris's disclosure was made to her during a dinner at her home. Ms. Deane said she later asked her husband (who also worked in the logging industry) if he had heard of any such deaths "because Glen told Patsy that he killed someone". She said both she and her husband tried, through social media, to determine if a person had been run over and killed, without success.
- [41] Ms. Deane said she does not recall, specifically, the timing of Ms. Harris's disclosure to her, but it was her impression that it was close in time to Mr. Bird's purported confession to Ms. Harris.

David Bunch

- [42] Mr. Bunch testified that his wife, Frances Deane, reported to him that Mr. Bird had told Ms. Harris that he had run over someone. He said he could not recall when his wife made this disclosure to him, but he thought it was before Mr. Bird and Ms. Harris moved to Alberta.
- [43] Mr. Bunch said he shared a shop with the owner of the defendant Clark; however, he said he never discussed Mr. Bird's disclosure to Ms. Harris with anyone other than his wife. He said "we never heard that anyone got run over, and I assumed it wasn't true".

Donald McKamey

- [44] In October 2013, Mr. McKamey was a supervisor for Southview Forestry Products Ltd., a logging contractor. He said his responsibilities included the removal of logs from a cut-block north of Mt. Currie, and either he or his brother arranged for three trucking companies to transport logs from this cut-block to Squamish on October 26, 2013. Mr. McKamey said he retained only three trucking companies because it was late in the logging season; one of these companies was the defendant Clark.

- [45] One year later, on October 26, 2014, inquiries from the police prompted him to access and review his business records. These records included two load slips dated October 26, 2013, showing the driver as Glen Bird. He said these load slips showed that Mr. Bird picked up two loads of logs on October 26, 2013, from "block W200" and delivered them to "West Barr". The trucking company for both loads was identified on the load slips as "T. Clark and Son", and the specific truck as number "5".
- [46] Mr. McKamey explained that load slips are used to document the movement of timber and to pay trucking companies which, in turn, pay their drivers. Mr. McKamey said that load slips bear no time-of-day entries and no other time records are kept; however, Mr. McKamey said it was likely that the logs for Mr. Bird's first run on October 26, 2013 would have been loaded at approximately 4:00am. Mr. McKamey explained that loading at the cut-block would have begun at 3:30am, but as the order of loading trucks is based on trucker seniority, the Clark truck was likely third in line that night.

Glen Bird

- [47] Mr. Bird is a heavy equipment/truck operator. He is 53 years old and said he has been "hauling" since he was 19 years of age, mostly as a logging-truck driver. He said he suffers from dyslexia and left school after grade six. (He commented that he does not "text" much because of his dyslexia.)
- [48] In October 2013, Mr. Bird was living in Squamish, working for the defendant Clark as a logging-truck driver, and in an "on-and-off" intimate relationship with Ms. Harris. He said this relationship spanned approximately 2.5 years, and ended in October 2014. Mr. Bird described his relationship with Ms. Harris as "toxic, to put it mildly". He elaborated: "We did not get along, at all. We were always arguing about everything. We would argue about me being faithful - she was very insecure - and this was often the subject." When asked why he would have stayed in such a relationship, Mr. Bird described Ms. Harris as "like gum on a suit; she wouldn't go away", although he agreed that it was Ms. Harris who obtained a "no contact" peace bond against him after their break-up in October 2014. He said he moved to Dease Lake, "200 kilometres from the Yukon border" after the break-up.
- [49] Mr. Bird was unsure of the precise dates of his time in Squamish, but said he worked for the defendant Clark for approximately three months before he moved to Grand Prairie, Alberta, where he worked as a heavy equipment operator and truck driver; approximately six months later he returned to Squamish.
- [50] Mr. Bird said he "hailed logs to the Squamish log sort from Pemberton, through the reserve and up Lillooet Lake Road" while he lived in Squamish. He said the drive to the cut-block, once he turned onto Lillooet Lake Road from Highway 99, took approximately 1.5-to-2 hours. Mr. Bird said he worked as a "spare" for Clark and, therefore, he drove various trucks: a blue one, a brown one, and the owner's dark green truck. He said these trucks varied both in configuration and colour, but all bore the same Clark logo. Mr. Bird said the start-times for

his work-shifts ranged from 11pm to 2am, they ended no later than 5pm, and he transported two loads on each shift.

- [51] Mr. Bird said he owned a "flip phone" in October 2013, which he would place in the truck's dashboard holder while he was driving. To communicate by telephone while driving, he said he wore an earpiece with a wireless Bluetooth connection.
- [52] Mr. Bird testified that the only route to the log sort from Squamish was along Highway 99, through Whistler and Pemberton, and then down Lillooet Lake Road. He said he traveled this route twice a day, four or five days per week, for approximately three months. As a result, he said he was very familiar with the intersection north of Pemberton where Highway 99 turns into Pemberton Portage Road through Mt. Currie. He described the intersection as presenting a "hairpin" curve for northbound vehicles continuing along Highway 99 through Mt. Currie, and said that a logging truck with its trailer up (i.e., unloaded) could not negotiate this turn at a speed greater than 30 km/h.
- [53] Mr. Bird said that the speed limit is 30km/h for northbound traffic approaching the intersection, and added that there are traffic signs warning approaching drivers of a sharp curve ahead. He said he was very familiar with the road through Mt. Currie, and agreed that it was common for pedestrians to be on the road during the daytime, and less so at night.
- [54] Mr. Bird testified to having a memory of October 26, 2013, but only because it had been brought to his attention many times as a result of this case. More specifically, he said he recalls driving his boss's new dark green Kenworth truck for his work-shift that day. He said the only memorable event for him during that shift was a traffic back-up on Lillooet Lake Road he encountered as he approached Highway 99, and the detour he, therefore, had to take with his first load of logs from the cut-block. He said he recalled that it was "just before daylight" when he was stopped for 15-30 minutes on Lillooet Lake Road before being re-directed along a back road that circumvented Highway 99 through Mt. Currie.
- [55] As for the drive from Squamish to the cut-block for the first run of his work-shift, Mr. Bird said he could recall nothing of it, including the time he started his shift. More specifically, in relation to the hit-and-run of Ms. Peters, he said: "I absolutely didn't hit anyone or see any pedestrians on Main Street." When asked if it was possible that he could have struck someone and been unaware of it, he said: "No. I am a good driver. I've hit animals, and even hitting a little animal or a bird you can feel it in a logging truck."
- [56] Mr. Bird said that during his wait on Lillooet Lake Road, he learned from a taxicab driver who was also in the line-up, that someone - possibly a man - had been hit and killed approximately 500 yards around the corner from where traffic was stopped. Mr. Bird said he was too far from Highway 99 to see what had happened or the person who had been hit, and was not given any other information. Mr. Bird said his only concern at this time was whether his truck would make it through the detour route, which he described as a "little goat road".

- [57] Mr. Bird said that he "imagined" he talked to Ms. Harris as he waited in the detour line, because she called him constantly. He explained that he had "steady" phone calls from Ms. Harris "all the time, wherever he was"; however, he added that if she called him while he was driving he would, usually, "just hang up". Mr. Bird testified that while he was waiting to take the detour he was in communication with Ms. Harris; he told her that someone had been hit and killed and that she should quit calling him or he could end up in an accident, too.
- [58] Mr. Bird said he was unsure if this communication with Ms. Harris was by text message or telephone conversation, but he thought it was probably by text because "we were fighting and I didn't like to talk to her". When it was suggested that it would have been very onerous for him to send such a lengthy text message on a flip-phone, he said: "I could have phoned - I'm not sure", but whether text or call, Mr. Bird said he would not have said anything about his driving speed to Ms. Harris because he was stopped in a line-up.
- [59] In cross-examination, it was suggested that Mr. Bird said he had texted rather than spoken with Ms. Harris while waiting to take the detour, because he now knew that a Telus printout of October 26, 2013, showed that Ms. Harris neither received nor made any calls on her cellphone from 2:41am to 11:00am. He denied this suggestion, but agreed that at his Examination for Discovery he had said that he remembered, specifically, talking to - not texting - Ms. Harris. In the face of this inconsistency, he said the truth was that he really had no memory of whether he had communicated by text or call, and did not know why he had not simply given that as his answer.
- [60] Mr. Bird said the detour added approximately half an hour to his drive back to Squamish. He said he then returned to the cut-block for a second load, and after delivery of that load he sprayed down the truck with a firehose at the sort yard, as he always did. He said he did not see Ms. Harris after he delivered his first load, and did not ask her to meet him at the log sort that morning.
- [61] Mr. Bird said he does not recall telling anyone about being delayed due to a road death that day, but he said that within days of October 26, a man at the shop next to Clark's shop questioned him as to whether he had run over someone "because Patsy told him" that he had. He said he informed the man that he had not, and then confronted Ms. Harris about the accusation; however, she denied questioning the man or telling him anything, and Mr. Bird left it at that.
- [62] Mr. Bird said that while he and Ms. Harris were in Grand Prairie, he never said anything about a hit-and-run to Ms. Harris, and he denied that he ever used it as a threat against her, on October 25, 2014 or at any other time. He also denied that he ever deleted text messages from Ms. Harris's phone, or that he told Ms. Harris he had hosed down the underside of the truck to get rid of bodily substances such as hair and skin.
- [63] In cross-examination, Mr. Bird was shown the load slips testified to by Mr. McKamey, and said he was unsure if it was he who had filled them out; he said he did not recognize the writing as his, and added that in most places it was the loader operator who filled out the

load slips. When he was shown photograph #4 (tab 6 of Exhibit #2) depicting a blue Clark logging truck, Mr. Bird said the truck in the photo was not the one he drove on the night in question. He added that the number "5" on the load slips was his truck number for payroll purposes; it was not necessarily the truck he drove for any given shift. He said he had driven number "5" until it was either sold or being prepared for sale, but by this point in time he was a "spare" driver who drove various Clark trucks while continuing to use the number "5" for payroll purposes.

- [64] Mr. Bird agreed that he was on the telephone with Ms. Harris as he drove through the Mt. Currie area on the night in question, but he denied that he told her that he had committed a hit-and-run, or any of the particulars of the event she attributed to him. He acknowledged that he was familiar with du Maurier cigarettes and that they came in a red package.
- [65] Finally, Mr. Bird agreed to a record of criminal convictions put to him in cross-examination. The convictions include crimes of dishonesty and deceit. While such a record is admissible for the limited purpose of assessing his credibility as a witness, reliance on it was not needed for that purpose in this case. It was, therefore, neither expressly nor tacitly considered in this judgment.

Expert Witnesses

- [66] Nizar Shajani is a Forensic Toxicologist who was asked to calculate Ms. Peters' blood alcohol level at 2:40am on October 26, 2013, based on the following assumptions: a weight of 110 lbs; an evenly spaced drinking pattern for eight-to-ten cans of Busch beer (4.7 v/v alcohol); and, a drinking pattern that fell between 8:00pm and 11:45pm of October 25, 2013.

- [67] Based on the foregoing, his calculations were as follows:

Elimination rate

mg%/hr

BAC at 2:40 a.m.

(8 cans of beer)

BAC at 2:40 a.m.

(10 cans of beer)

10

307 mg% (0.307%)

400 mg% (0.400%)

15

274 mg% (0.274%)

367 mg% (0.367%)

20

243 mg% (0.243%)

334 mg% (0.334%)

[68] As for the effect upon Ms. Peters', he said, inter alia:

Blackouts or loss of memory can occur at alcohol level of 200 mg% and over. Individual with prior history of blackouts are more likely to suffer from blackouts.

. . .

One aspect of judgement affected by alcohol is risk assessment. Each person has the ability to determine what risks are acceptable to him/her and to understand the consequences of his/her actions. An impaired individual may accept risks which would be unacceptable when alcohol free.

[69] Notably, Ms. Peters' evidence that she was very drunk on the night in question and cannot recall anything from the time she left a party in Mt. Currie to the time she awoke in the hospital, was not challenged.

[70] Kurt Ising is a mechanical engineer with an expertise in accident reconstruction. He was retained by the plaintiff to give opinions regarding stopping distance, visibility, and where Ms. Peters was when she was struck, based upon the distance she was thrown. He was asked to assume, inter alia, that Ms. Peters was "struck squarely"; moreover, in order to reach his opinions, he said he assumed that Ms. Peters was standing when she was struck. Mr. Ising said these two assumptions were essential to his opinions, particularly as they related to the distance Ms. Peters was thrown when she was struck. As there was no evidence that Ms. Peters was struck squarely or on her feet when she was hit, Mr. Ising's opinions regarding how far Ms. Peters had been thrown were of virtually no probative value; no one suggested otherwise.

[71] Mr. Ising said the factors determining "stopping distance" are: (a) driver response time upon detection of a hazard; (b) the lag before applying the brakes; (c) road friction (a function of speed and road conditions); and (d) the vehicle (a logging truck decelerates more slowly than a car). He prepared a table showing a range of stopping distances at various speeds: a logging truck travelling 30 km/h could come to a stop within 14-24 metres, and at 70 km/h that distance would increase to 49-77 metres.

[72] As for drivers' "detection distances", Mr. Ising said these are a function of driver age, pedestrian location, and pedestrians' visibility based upon their clothing. As Mr. Ising was not given the age of Mr. Bird, he elected to consider detection data for young (18-30 year-old) drivers. Similarly, regarding Ms. Peters' clothing, he opted to use the data for darkly clad pedestrians (having mistakenly construed Ms. Peters' clothing as dark jeans and a dark pink

hoodie). As Mr. Ising's factual assumptions were inaccurate, his opinions regarding detection distance were of no probative value; again, no one suggested otherwise.

- [73] In relation to speed, Mr. Ising's report stated that a logging truck could not navigate the curve in Highway 99 onto Pemberton Portage Road at "more than about 60 km/h". In his trial testimony, he qualified this opinion by stating that he meant that if a logging truck were to take the turn at a speed greater than "about 60 km/h" then he would expect there to be some loss of control.
- [74] In cross-examination, Mr. Ising conceded that he could not rule out the possibility that Ms. Peters' was struck by a southbound vehicle and ended up in the northbound lane. He also said it was possible that the shoe on the roadway was the point of impact, but added that "it is hard to make much of the shoe, at all".
- [75] Craig Good was the defendants' expert in relation to accident reconstruction and injury biomechanics. He provided a response to Mr. Ising's report and concluded that the assumptions Mr. Ising was asked to make could not be determined from the available physical, engineering or biomechanical engineering evidence. In particular, assumptions about the direction of the striking vehicle, the type of striking vehicle, and that Ms. Peters was struck squarely and not carried by the vehicle, could not be grounded in the evidence available.

Admissions

- [76] By Reply to a Notice to Admit, the defendants admitted the following:

The plaintiff's injuries are consistent with being struck by one or more unknown vehicles in the early morning hours of October 26, 2013, at or near Main Street, the "Spirit Circle" in the city of Mount Currie, in the Province of British Columbia.

Exhibits

- [77] A large "to scale" map depicts Highway 99 where it passes through Mt. Currie, and various surrounding landmarks. This map was used by witnesses as a testimonial aid and accepted by the parties as an accurate representation of the area where Ms. Peters was hit.
- [78] The map shows Highway 99/Pemberton Portage Road as a two-lane roadway with a yellow painted double line separating northbound and southbound traffic, and a single white painted line separating each lane from its paved shoulder. For traffic travelling northbound through Mt. Currie, the 30 km/h speed limit is posted approximately 400 feet before a junction where Highway 99 meets Main Street, and becomes Pemberton Portage Road through Mt. Currie. (N.B.: Although the map identifies the road through Mt. Currie as Pemberton Portage Road, all witnesses familiar with Mt. Currie and this section of the road referred to it as Main Street.)

- [79] For northbound drivers approaching Mt. Currie on Highway 99, the junction presents a curve (approximately 120 to 140 degree) to the left. Two hundred feet north of the junction is a bus shelter on the west side of Pemberton Portage Road. Lillooet Lake Road is approximately 600 feet north of the bus shelter, and the community of D'Arcy is north of Lillooet Lake Road along Highway 99.
- [80] Telus subscriber information and call detail records show the cell-phone numbers for Ms. Harris and Mr. Bird as of October 26, 2013. The call detail records for Ms. Harris's cellphone show that Ms. Harris made ten calls to Mr. Bird between 23:51:45 on October 25, 2013 and 00:04:27 on October 26, 2013. This was a series of short calls ranging from six to 112 seconds, and corresponds to a period preceding Mr. Bird's October 26, 2013 shift.
- [81] The next series of calls on October 26, 2013 was from Mr. Bird to Ms. Harris: at 01:19:18 for 118 seconds; at 01:27:00 for 9 seconds; at 02:02:38 for 39 seconds; at 02:08:58 for 8 seconds; at 02:09:25 for 43 seconds; and at 02:26:52 for 7 seconds. This series corresponds to a period during Mr. Bird's first run to the cut-block.
- [82] The next call was at 02:40:04: a 43-second call from Ms. Harris to Mr. Bird. This corresponds closely to the time Ms. Peters' was found injured on the roadway by Lisa Peters and Darlene Leo.
- [83] After the 02:40:04 call, the records show there were no incoming or outgoing calls on Ms. Harris's cellphone until a 35-second call from Ms. Harris to Mr. Bird at 11:14:13, on October 26, 2013.
- [84] For the balance of the day, the records show that Ms. Harris and Mr. Bird communicated by telephone nine times. Between 13:03:40 and 14:46:03 Ms. Harris called Mr. Bird four times, and these calls ranged in duration from 41 to 87 seconds. This corresponds to the period of Mr. Bird's second run. Finally, from 20:25:51 to 01:21:28 on October 27, Mr. Bird called Ms. Harris five times, and the duration of these calls was from 10 to 364 seconds. This final series corresponds to a period following the end of Mr. Bird's October 26 work shift.

Examination for Discovery "read-ins"

- [85] Trevor Clark, the owner of the defendant Clark, did not testify at the trial; instead, portions of his Examination for Discovery evidence were "read in" as his trial evidence, by agreement of the parties.
- [86] Mr. Clark said that on October 26, 2013 Mr. Bird was driving one of Clark's trucks, transporting logs from the Southview logging site to the West Barr log drop in Squamish. He identified load slips (subsequently entered as trial exhibits) as showing that on October 26, 2013, operator Glen Bird moved two loads for Clark in truck number 5: a 2007 Kenworth. He identified this truck as the blue truck depicted in a photograph dated April 3, 2011, shown to him at his Examination for Discovery. (At trial, it was agreed this photo is photo #1, at tab 6 of trial Exhibit #2). Mr. Clark distinguished truck number 5 from the one he personally drove, which he described as a pumice-coloured 2011 Kenworth, bearing the number "3".

[87] Mr. Clark said he had no personal recollection of the truck Mr. Bird drove on October 26, 2013. He noted that mistakes are occasionally made on the load slips regarding the truck number; however, he agreed that the load slips indicate that Mr. Bird was operating truck number 5 when he transported two loads on October 26, 2013. Mr. Clark explained that he receives payment from contractors on the basis of load slips provided by the "loader operator" at the logging site.

C. Discussion

[88] By the trial's end, the following was not in dispute:

- a) Ms. Peters was struck and injured by a motor vehicle in a hit-and-run in the early morning hours of October 26, 2013, on Pemberton Portage Road in Mt. Currie, B.C.;
- b) It was a dry, clear, and cool (2-3 degrees Celsius) night;
- c) The northbound lane through Mt. Currie was dry, clearly marked with painted lines, and intermittently lit by overhead street lamps;
- d) At approximately 2:40 AM, Ms. Peters was found prone, seriously injured and semi-conscious in the middle of the northbound lane, in a poorly lit section of Pemberton Portage Road approximately 200 feet north of the junction where Highway 99 turns into Pemberton Portage Road;
- e) The posted speed limit for northbound Highway 99 traffic approaching Mt. Currie drops from 70 km/h to 30 km/h approximately 400 feet before the junction where northbound traffic must negotiate a left-hand curve as Highway 99 becomes Pemberton Portage Road through Mt. Currie, and remains 30 km/h to a point well past where the hit-and-run occurred;
- f) At the time Ms. Peters was struck, she was very intoxicated by alcohol and has no recollection of being struck, of who or what struck her, of where she was when she was struck, and of what she was doing at the time she was struck;
- g) Ms. Peters was wearing jeans, running shoes, and a brown and white "hoodie" style jacket with the hood up and covering her hair at the time of the hit-and-run;
- h) There were no independent eyewitnesses to the hit-and-run and no evidence was found at the scene as to the identity of the driver or the vehicle that struck Ms. Peters, or how the hit-and-run occurred;
- i) In the early morning hours of October 26, 2013, Mr. Bird drove a logging truck for Clark, from Squamish to a cut-block north of Mt. Currie;
- j) Mr. Bird was in an intimate relationship with Patricia Harris on October 26, 2013, and in communication with her by cellphone as he drove to the cut-block to pick up his first load; and,

- k) Soon after Mr. Bird's October 26 shift, Ms. Harris inquired of another driver as to whether he knew anything about a fatal hit-and-run on the road between Squamish and the cut-block, for which Mr. Bird might have been responsible.
- [89] What remained very much in contention by the trial's end was whether the plaintiff had proved that Mr. Bird was the driver of the motor vehicle that struck Ms. Peters, and if so, whether the plaintiff had proved that Mr. Bird was negligent.

Was Mr. Bird the driver?

- [90] On this question, I am satisfied that the plaintiff has proved, on a balance of probabilities, that Mr. Bird was the driver. This conclusion rests principally on Ms. Harris's testimony, as supported in material aspects by other reliable evidence. Where Mr. Bird's evidence differs from Ms. Harris, I prefer the evidence of Ms. Harris.
- [91] Although Ms. Harris's memory was quite poor in relation to dates and times, and there were inconsistencies between her testimony and prior statements, I am satisfied that these shortcomings were not fatal to her credibility. Notably, one year had passed before Ms. Harris related, to the police, the story of Mr. Bird's admissions to her, at which point she was still uncertain as to whether Mr. Bird's disclosure to her was true. In these circumstances, it is not surprising that her memory of dates and times on various matters would have been shaky then, and would not have improved by the time of trial. I also accept, as true, her explanation for attempting to retract her police statement, and I am not persuaded her credibility was undermined by her reference to Mr. Bird's claimed speed as being in "miles per hour". I am satisfied this was an inconsequential slip. There is no question that the posted speed limits were in kilometres per hour; it is the speed numbers ("70 in a 30") attributed to Mr. Bird that are germane.
- [92] Critical to the assessment of Ms. Harris's testimonial credibility and reliability in relation to Mr. Bird's alleged confession to her, is its consistency with reliable evidence from the victim, with the hit-and-run scene, with telephone records, and with the absence of any evidence or suggestion of a source other than Mr. Bird for the details she attributes to him. Moreover, while Ms. Harris's inquiry of another driver concerning Mr. Bird's involvement in a fatal hit-and-run was fruitless, the timing and nature of that inquiry is consistent with Mr. Bird having made admissions to her on the night in question, and inconsistent with fabricating these admissions a year later out of anger, hurt, vengeance, or any other ill motive.
- [93] Ms. Harris testified that after Mr. Bird told her he had killed a man during his October 26 shift, she unsuccessfully searched for any information that might confirm it. Her evidence in this regard was unchallenged, and I accept it as true. Notably, there was no evidence that the hit-and-run of Ms. Peters was ever reported but, even if it had been, such reports would not have stated that a man was killed, as it was known from the moment Ms. Peters was discovered on the road that the victim was a woman and she had not been killed. Moreover, if such reports were Ms. Harris's source, it would make little sense for her to fabricate a confession by Mr. Bird to this hit-and-run and change two salient features of it. These

reports could also not have been the source for details of the event that, in this instance, only the unidentified driver would know.

[94] Accordingly, when Ms. Harris made her disclosure to the police on October 25, 2014, I am satisfied that she had no independent source for any of the following information:

- a) That a hit-and-run of a pedestrian occurred in the early morning hours of October 26, 2013, along the route Mr. Bird drove that night;
- b) That in the hit-and-run, the pedestrian was struck near an intersection;
- c) That the speed limit was 30 km/h where the pedestrian was struck, having dropped from 70 km/h to 30 km/h for northbound traffic approaching the intersection;
- d) That the pedestrian had smoked cigarettes from a red pack, earlier that night; and,
- e) That the identity of the driver remained unknown to the police.

[95] Mr. Bird's version of events is that he knew virtually nothing about the hit-and run other than that the road through Mt. Currie had been closed in the early morning of October 26 due to a person's death; accordingly, if he is being truthful then he could not have been Ms. Harris's information source. He said he informed Ms. Harris of the little he knew in a telephone communication with her, as he waited on Lillooet Road to take the back-road detour. He explained that the incident prompted him to caution Ms. Harris to stop her persistent distractive calling while he was driving. It is significant that Mr. Bird's version of events does not allow for any misunderstanding by Ms. Harris to the effect that Mr. Bird had killed a man and left the scene that night, let alone account for the details Ms. Harris subsequently reported to the police.

[96] In relation to Mr. Bird's version, it is noteworthy that the telephone records do not support his evidence of a call with Ms. Harris as he waited to take the detour. The records do not show any telephone communication between Mr. Bird and Ms. Harris between 4:41am and 11:00am; moreover, Ms. Harris was not cross-examined on this alleged communication. (In regard to this failure, if this communication were an important aspect of Mr. Bird's case then not confronting Ms. Harris with it would have offended the long-standing rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K.H.L.) and would likely have resulted in affording it little weight; however, as the alleged communication could not have been Ms. Harris's information source, it has virtually no probative value to the live issues, in any event.)

[97] On the other hand, the telephone records are consistent with Ms. Harris's version of events. They show that she was in telephone conversation with Mr. Bird at 2:40am - a time that closely corresponds to reliable evidence of when the injured Ms. Peters was found on the roadway. The duration of this call was 43 seconds - a period sufficient for Mr. Bird to blame Ms. Harris for causing the hit-and-run and provide the particulars Ms. Harris attributes to him.

- [98] If there is relevance to Mr. Bird's evidence of his alleged communication with Ms. Harris as he waited to take the detour, it is to his credibility. When Mr. Bird testified that this communication must have been by text message rather than telephone call, he was cornered by a prior materially inconsistent statement and unable to extricate himself with his credibility intact.
- [99] The telephone records also show a calling pattern that is inconsistent with the "toxic" relationship Mr. Bird described, and with his unflattering characterization of Ms. Harris as a jealous woman who stuck to him "like gum to a suit" and called him incessantly. The accuracy of these records was not in question, and they show that Mr. Bird initiated six of the seven calls between the couple during his first trip to the cut-block. Mr. Bird's six calls fell within the 1:19am to 2:26am period, and Ms. Harris's single call to Mr. Bird followed at 2:40am.
- [100] Mr. Bird's credibility was further compromised by his deliberately misleading description of the curve (where Highway 99 becomes Pemberton Portage Road through Mt. Currie), as "hairpin". His apparent objective was to bolster his evidence that he was neither "doing 70 in a 30" nor would he have ever said such to Ms. Harris. Mr. Bird relied upon his familiarity with the route to the cut-block, but was apparently unaware that the maps and photographs in evidence showed, unequivocally, that the curve did not even approximate a "hairpin" curve.
- [101] I turn next to the plaintiff's evidence tendered to establish that Mr. Bird was driving blue truck number 5 on the night in question, and that he passed Darlene Leo and Lisa Peters on Lillooet Lake Road shortly before they came across Ms. Peters on Pemberton Portage Road. The evidence in this regard was problematic and I am unable to accept this evidence as proof of the facts asserted. The inconsistencies between Lisa Peters' testimony and her ICBC statement were material and undermined her reliability as a witness; moreover, one's ability to discern the colour of a logging truck passing in complete darkness other than the blaze of headlights, is inherently dubious.
- [102] The plaintiff's case regarding the identity of the driver as Mr. Bird does not, however, rest upon whether Mr. Bird was the driver of truck number 5. Similarly, I am satisfied that it does not turn on: (a) the fact that Ms. Peters was neither a man nor killed in the hit-and-run; or, (b) the absence of evidence of a pack of du Maurier cigarettes at the hit-and-run scene or among Ms. Peters' personal effects at the Pemberton Clinic. In relation to the former, given the darkness, Ms. Peters' manner of dress, and Ms. Peters' hoodie covering her hair, the driver might well have mistaken her for a man, and given the force of the collision and Ms. Peters' prone and motionless state on the roadway, the driver might well have believed she had been killed by the impact. As for the latter, given the apparent force with which Ms. Peters was struck, it is likely that she would have been separated from a pack of cigarettes protruding from her pocket. Moreover, the scene investigators would have had no reason to search for a pack of cigarettes, let alone photograph or seize any that might have been off the paved and gravel portions of the road. The strength of the du

Maurier cigarettes as one of the hit-and-run details, is that Ms. Peters testified that she had been smoking from a pack of du Maurier cigarettes she had been given that night. She frankly said that she did not know if she took the pack with her when she left the party, but added that if she did she would have put it into her jacket pocket. Notably, her evidence regarding the cigarettes was not challenged in cross-examination.

[103] In summary, I conclude that the plaintiff has proved, on a balance of probabilities, that Mr. Bird was the driver who struck and injured Ms. Peters on October 26, 2013, in Mt. Currie.

Was Mr. Bird negligent?

[104] It is common ground that the plaintiff must prove that Mr. Bird owed a duty of care to Ms. Peters, that he breached that duty by failing to meet the requisite standard of care, and that his breach caused damage to Ms. Peters. In the case at bar, the live issue is whether the plaintiff has proved on a balance of probabilities, that Mr. Bird breached the duty of care he owed to Ms. Peters.

[105] In negligence cases concerning the operation of a motor vehicle, it is well settled that the Motor Vehicle Act R.S.B.C. 1996, c. 318 ["Act"] is not a complete code; breaches of both statutory and common law duties are considered.

[106] The Act provides as follows:

Rights of way between vehicle and pedestrian

179

...

(2) A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.

...

Crossing at other than crosswalk

180 When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.

Duty of driver

181 Despite sections 178, 179 and 180, a driver of a vehicle must

- (a) exercise due care to avoid colliding with a pedestrian who is on the highway,
- (b) give warning by sounding the horn of the vehicle when necessary, and
- (c) observe proper precaution on observing a child or apparently confused or incapacitated person on the highway.

[107] In *Hmaied (Litigation Guardian of) v. Wilkinson*, 2010 BCSC 1074, Madam Justice Dickson made the following apposite remarks regarding the relationship between provisions under the Act and the common law:

[21] These provisions do not amount to an exclusive code relating to the rights of way between pedestrians and vehicles. Rather, they supplement the common law duty of all highway users to exercise what constitutes, in all of the circumstances, due care: *Cook v. Teh*, [1990] B.C.J. No. 776 (B.C.C.A.). As Anderson J.A. stated in *Cook*, quoting from the judgment of Estey J. in *British Columbia Electric Company v. Ernest Farrer*, [1955] S.C.R. 757:

Legislative bodies have, for many years, been enacting provisions intended to facilitate and make safer the movement of pedestrians and vehicular traffic on the highways and public streets. The general rule is that these provisions and regulations are supplementary, or in addition, to the common law duty that rests upon all persons using the highways to exercise due care. *Swartz Bros. Ltd. v. Wills*, [1935] S.C.R. 628, *Royal Trust Co. v. Toronto Transportation Commssn.*, [1935] S.C.R. 671. In the latter case Mr. Justice Davis, with whom the majority of the court agreed, stated at p. 674:

Generally speaking, a motorman on a street car is entitled to assume that a pedestrian or a motorist approaching the street car tracks will stop to permit the street car to pass by and there was in this case a statutory right of way in favour of the street car. But the existence of a right of way does not entitle the motorman on the street to disregard an apparent danger that confronts him.

[22] When an accident occurs on a highway, the starting point for analysis is a determination of who had the right of way. Generally speaking, the party with the right of way is entitled to assume that other highway users will obey the rules of the road: *Enright v. Marwick*, 2004 BCCA 259 at para. 22. In particular, drivers are ordinarily entitled to expect that adult pedestrians will not jump out directly in front of them as they are proceeding lawfully along their way: *Enright*, supra at para. 35; *Ibaraki v. Bamford*, [1996] B.C.J. No. 724 at para. 12-13.

[23] Regardless of who has the right of way, however, there is a duty upon drivers and pedestrians alike to keep a proper lookout and take reasonable precautions in response to apparent potential hazards: *Nelson (Guardian ad litem of) v. Shinske* (1991), 62 B.C.L.R. (2d) 302 (B.C.S.C.); *Karran v. Anderson*, 2009 BCSC 1105. Depending on the circumstances, from a driver's perspective one such hazard may be a jaywalking pedestrian: *Ashe v. Werstiuk*, 2003 BCSC 184, upheld 2004 BCCA 75; *Claydon v. Insurance Corp. of British Columbia*, 2009 BCSC 1077. If it is reasonably foreseeable or apparent that a pedestrian will disregard the law and thus create a hazardous situation, a driver is obliged to take all reasonable steps to avoid a collision. In such circumstances, if the driver has a sufficient opportunity to avoid the collision, but does not take appropriate evasive action, the driver will be found negligent: *Karran*, supra; *Beauchamp v. Shand*, 2004 BCSC 272.

[108] In *McDonald v. Klassen*, 2005 BCSC 1188, Mr. Justice Macaulay said:

- [51] Sections 180 and 181 apply in the case at bar. As well, both the pedestrian and driver owed common law duties: the plaintiff, as a pedestrian had a duty to take reasonable care for her own safety and the defendant, as driver had a duty to exercise due care to avoid a collision with a visible pedestrian. The duties owed by one are not greater than those owed by the other. The question of degrees of fault if these duties are breached can only be resolved based on the evidence as a whole. See *Liston v. Striegler*, [1996] B.C.J. No. 1408 (C.A.), at para. 14.
- [109] To prove Mr. Bird breached his duty of care, the plaintiff relies principally on Mr. Bird's excessive speed and the distraction caused by his "phone fight" with Ms. Harris that night. More specifically, the plaintiff says the evidence establishes: (a) that Mr. Bird was travelling at more than twice the speed limit; (b) that his speed was excessive in all the circumstances, including the driving conditions (limited visibility due to night darkness and poor lighting) and his knowledge that he was entering a community where pedestrians used the road; and, (c) that Mr. Bird was distracted by a "phone fight" and failed to keep a proper lookout for other users of the road.
- [110] In support of its position, the plaintiff quoted extensively from *Wilson v. Potter*, 2005 BCSC 807 [Wilson].
- [111] In *Wilson*, the plaintiff was drunk, darkly clad, and crossing the highway on foot when he was hit by a car driven by the defendant. The plaintiff was struck in the defendant's lane of travel, near the centre line. The two-lane highway where the collision occurred passed through the Sliammon Reserve; there were no sidewalks or marked crosswalks, and the road shoulders were dirt and gravel. The court found that the presence of pedestrian traffic was common knowledge and, therefore, drivers ought to be concerned with pedestrian presence and take the precaution of driving slowly. The speed limit was 30 km/h and the defendant's speed was 35 km/h. Visibility and lighting were poor at the time of the collision. The court said the defendant was "faced with a real difficulty in detecting and avoiding pedestrians, and in observing and reacting to the presence of a darkly clad pedestrian, in particular", but this was "all the more reason" for the defendant to have slowed down and adjusted her speed for the driving conditions. The plaintiff was more than halfway across the highway when he was struck; the court found that "he was there to be seen" and that the defendant's failure to keep a proper look-out was the primary cause of the collision. The court concluded that the defendant breached her duty of care by not seeing the plaintiff, particularly given her special knowledge of an alcohol and drug problem in the community. The court found that a reasonable person in the circumstances of the defendant ought to have kept a better lookout.

- [112] The focus of the defendants' position in the case at bar, was on the alleged absence of evidence of Mr. Bird's driving, and of Ms. Peters' conduct, at the time of the collision. In support, the defendants cited *Miles v. Kumar*, 2013 BCSC 1688 [Miles], at para. 58; *Christensen (Litigation Guardian of) v. Gerber*, 2007 BCSC 1397 [Christensen], at para. 55; and *Finlayson v. ICBC*, [1994] B.C.J. No. 2884 (S.C.), [Finlayson] at para. 17.
- [113] In *Miles*, the court found a virtual absence of evidence of the conduct of the parties:
- [58] Similarly, I am not satisfied that the evidence establishes that Ms Kumar drove without due care and attention, or without reasonable consideration for other persons using the highway, or at a speed that was excessive relative to the road, traffic, visibility or weather conditions. There is virtually no evidence in relation to any of the foregoing. The mere fact of collision with Mr. Miles is neither evidence of a breach of any of these statutory duties nor is it support for a finding of negligence at common law.
- [114] Similarly, in *Finlayson*, the court was faced with a complete absence of evidence as to how the collision occurred:
- [17] There is no evidence at all upon which the court can determine how the accident occurred, nor any evidence from which inferences can be drawn indicating negligence on the part of the unknown driver. Even the point of impact is in doubt considering the fact that the plaintiff was found on the eastern edge of the West Coast Road. He told the attending constable at the time that an eastbound vehicle struck him leading the constable to believe that the plaintiff had been walking west on the eastern edge of the roadway. The plaintiff's evidence that he crawled across the roadway from the west edge to the east edge did not come to light until his examination for discovery two years later. Furthermore, the plaintiff was extremely intoxicated at the time and considering his actions at Buffy's Pub an hour and a half earlier, his actions or movements at the time could have been erratic
- [115] In *Christensen*, the court recognized that evidence of more than a mere failure of a defendant to see the plaintiff before the collision is required to prove the defendant breached the duty of care:
- [55] The fact that he did not see Joshua, however, is not conclusive on the issue of negligence. In *Embury v. Vanderryst*, [1997] B.C.J. No. 1427 (S.C.) at para. 10, Lowry J. as he then was, stated:

Certainly, where as here a pedestrian, who does not have the right of way, ventures on to a street, he and the driver of an approaching vehicle both bear obligations to avoid an accident. Each has a duty to exercise care, and the question of fault where an accident occurs in consequence of a breach of their duties is to be resolved on the evidence as a whole: *Liston v. Striegler* (1996), 25 B.C.L.R. (3d) 57 (B.C.C.A.). But, to establish liability, an injured pedestrian must establish a breach of duty on the part of the driver based on the evidence, and the mere fact that the driver has not seen the pedestrian before striking him is not, without more, sufficient to establish an inadequate lookout attributable to the driver: *Plett v. Insurance Corp of British Columbia* (1987), 12 B.C.L.R.

(2d) 336 (B.C.C.A.).

[116] The principles in these cases are not in question, but the circumstances that trigger their applicability do not exist in the case at bar. Here, there is evidence of the conduct of both Mr. Bird and Ms. Peters, through Mr. Bird's words to Ms. Harris, as well as other evidence informing the question of whether Mr. Bird's speed was excessive in all the circumstances.

[117] Mr. Bird's account to Ms. Harris includes his admissions of how and where the collision occurred, what his speed was ("70 in a 30"), where Ms. Peters was when she came into his view (lying at the side of the road), and what she did just before she was struck (sat up and looked toward his logging truck looming down on her). Mr. Bird testified to his considerable familiarity with the road through Mt. Currie: he knew the speed limit was 30 km/h, that there was a left turn onto Pemberton Portage Road, that the road was used by pedestrians, and that there were no sidewalks for pedestrian traffic. There was also evidence of compromised driver visibility through Mt. Currie from night darkness, poor street lighting, and a curve in the road. Finally, there was evidence from which it may reasonably be inferred that Mr. Bird was agitated and distracted at the time.

[118] I accept the foregoing as evidence establishing: (a) the conduct and knowledge/state of mind of Mr. Bird at the time he collided with Ms. Peters; and, (b) the conduct and positioning of Ms. Peters immediately prior to being struck.

[119] As for Mr. Bird's frank admissions as proof of their assertions, I have taken the following into consideration: (a) the admissions were made very close in time to the event and in the context of blaming Ms. Harris for causing the collision; and (b) the details he provided are consistent with the scene evidence, the telephone records, and Ms. Peters' testimony. Notably, the seemingly irrelevant and innocuous detail of a red cigarette pack protruding from the pocket of the "man" struck, was not something that either Mr. Bird or Ms. Harris would have had any reason to fabricate.

[120] I find that the whole of the evidence establishes the following:

- a) Mr. Bird was operating a heavy logging truck on Highway 99 as he approached the community of Mt. Currie on the night of October 26, 2013;
- b) Mr. Bird was in a "phone fight" with Ms. Harris that night and in an agitated state as he approached Mt. Currie from Squamish;
- c) As Mr. Bird neared the community of Mt. Currie, he ignored the posted 40 km/h reduction in the speed limit and continued at approximately 70 km/h, despite: (i) the need to negotiate a left turn onto Pemberton Portage Road; (ii) limited visibility due to night darkness, poor artificial lighting and the curve in the road, and (iii) his knowledge that pedestrians might well be present on or near the roadway beyond the curve;
- d) Mr. Bird could not negotiate the left turn safely (i.e., without some loss of control) at a speed at or near 70 km/h;

- e) Mr. Bird's view down Pemberton Portage Road was restricted by the road's curve and the darkness;
- f) Mr. Bird's excessive speed in the turn caused his truck to pull wide to the right;
- g) The headlights of Mr. Bird's truck caught Ms. Peters off to the side of the road, in the truck's widened path. Mr. Bird saw Ms. Peters sit up and look in his direction;
- h) Mr. Bird's speed was too great, and his observation of Ms. Peters too late, for him to take any evasive action. Similarly, the truck's excessive speed deprived Ms. Peters (who was conscious and responsive to Mr. Bird's looming truck) of any opportunity to move out of its path; and,
- i) Ms. Peters was struck and thrown or carried northward along Pemberton Portage Road, where she was left semi-conscious and seriously injured in the middle of the northbound lane as Mr. Bird drove off.

[121] I am satisfied the foregoing proves, on a balance of probabilities, Mr. Bird's negligence. Mr. Bird breached the duty of care he owed to Ms. Peters, as a user of the road, when he negotiated the turn onto Pemberton Portage Road in the dark at more than twice the speed limit, and struck her as she sat at the side of the road.

[122] I conclude that Mr. Bird's conduct was both a serious breach of his statutory duties under s. 181 of the Act, and of his common law duty as a driver to keep a proper lookout and take reasonable precautions in response to apparent potential hazards (see Hmaied, supra, para. 22). More specifically, by driving a logging truck at a speed well in excess of what was safe in all the circumstances - including visibility limited by darkness and a curve in the road - Mr. Bird failed in his duty: (a) to exercise due care to avoid colliding with Ms. Peters as a pedestrian on the highway; and, (b) to observe proper precaution upon observing Ms. Peters as an incapacitated person on the highway. The presence of a pedestrian as Mr. Bird turned onto Pemberton Portage Road in the community of Mt. Currie, was reasonably foreseeable. The significantly reduced speed limit (from "70 to 30") through the community of Mt. Currie was well marked and well known to Mr. Bird. It was in place to give some measure of protection to the lives and safety of all users of the road, particularly given the poor lighting at night and an absence of sidewalks to separate pedestrians from vehicular traffic. At a vehicular speed of 30 km/h both drivers and pedestrians are relatively well-positioned to take measures to avoid colliding. Mr. Bird's excessive speed effectively eliminated his ability to take evasive action when he encountered Ms. Peters, and deprived her of any opportunity to do the same.

[123] In summary, I am satisfied that the plaintiff has proved that Mr. Bird breached the duty of care he owed to Ms. Peters when he struck and injured her with his logging truck.

To what extent was Ms. Peters contributorily negligent?

- [124] The plaintiff has conceded her contributory negligence; she submits that she should be found 25% at fault. In support of this position, the plaintiff relies upon *Wilson*, *supra*, and submits that Mr. Bird's fault should be assessed as greater than that of the defendant in *Wilson*.
- [125] In *Wilson*, the court found that both parties breached duties of care they owed to one another, and attributed 40% of the fault to the plaintiff and 60% to the defendant. As in the case at bar, in *Wilson* the plaintiff was intoxicated by alcohol and had no memory of the event; however, unlike the instant case, the defendant driver was travelling only 5 km/h in excess of the speed limit and Mr. Wilson stepped unexpectedly into her path, in the dark. The court concluded that the defendant failed to keep an adequate lookout in circumstances where it was reasonably foreseeable that intoxicated pedestrians might be on the road; but, in finding Mr. Wilson 40% liable, the court noted that the defendant's car was "there to be seen and avoided" by Mr. Wilson. He had placed himself in a perilous position by crossing the road in the dark, while he was drunk and wearing dark clothing.
- [126] In the case at bar, the defendants' position is that Ms. Peters' conduct was the primary cause of her injuries, and she should be found 90% at fault. In support of this position, the defendants cite, *inter alia*, *Iannone v. Hoogenraad* (1990), 50 B.C.L.R. (2d) 390 (S.C.); *O'Connor v. James*, [2009] B.C.J. No. 1639 (S.C.), and *Liston v. Striegler* [1996] B.C.J. No. 1408.
- [127] In *Iannone*, the court identified two elements a defendant must prove to establish contributory negligence:
- In order to establish contributory negligence the defendant must prove two elements: first, that the plaintiff's conduct showed a want of reasonable care for his own safety which caused or rendered the injuries more serious and, secondly, that had he conducted himself in a reasonable manner his injuries would have been avoided or lessened (see *Irene Humphrey v. Lance Rancier*, [1985] B.C.J. No. 835, No. B823071 Vancouver Registry, S.C.B.C. September 18, 1985 *McLachlin J.* p. 1.)
- [128] In *O'Connor*, the plaintiff was drunk and dressed entirely in non-reflective black clothing as he walked on a darkened roadway with his back to vehicular traffic. The court found that Mr. O'Connor breached several provisions of the Act, and that the defendant was driving only slightly over the speed limit when he struck Mr. O'Connor, who was "difficult, if not impossible to see". The court found the plaintiff 90% at fault. The court cited the above excerpt from *Iannone*, and then said:
- [39] It is clear that the judgment of Mr. O'Connor was somewhat impaired by alcohol. As well, he was dressed entirely in black without reflective clothing. His clothing made it difficult if not impossible for drivers to see him. Contrary to s. 182(2) of the Motor (Vehicle) Act, Mr. O'Connor was not walking facing traffic, and was not walking on the shoulder of No. 6 Road. Mr. James has shown that the conduct of Mr. O'Connor that evening showed a want of reasonable care for his own safety and that this contributed to causing his injuries. Mr. James has proven that Mr. O'Connor did not conduct himself in a reasonable manner so that

his injuries could have been avoided or, at least, diminished. In the circumstances, I assess liability at 90% against Mr. O'Connor and 10% against Mr. James.

- [129] In Liston, the drunk and darkly clad plaintiff ran into the path of the defendant's motor cycle, in an attempt to cross the street outside of a crosswalk and in a poorly lit area. The defendant driver was travelling at, or close to, the speed limit of 50 km/h and did not see Ms. Liston until she was 20-30 feet away; he braked but was unable to avoid colliding with her. On appeal, the court said:
- [19] The trial judge's findings regarding the negligence of each of the parties which contributed to the accident lead inexorably to the conclusion that Ms. Liston was more at fault for the accident than was Mr. Striegler. While it is always difficult to apportion degrees of negligence where the evidence suffers from the frailties to which I have referred, I conclude that an appropriate apportionment of liability in this case would be 60/40 against Ms. Liston.
- [130] Turning to the case at bar, Ms. Peters' concession of negligence arises from the very vulnerable position in which she placed herself due to her high degree of alcohol intoxication. Ms. Peters acknowledged that she showed a want of reasonable care for her own safety. The only live issue is the apportionment of liability between Mr. Bird and Ms. Peters.
- [131] Having due regard for the case law cited and the respective negligent conduct of the parties, I conclude that Ms. Peters' liability should be assessed at 25%.
- [132] The conduct of Mr. Bird and Ms. Peters is materially distinguishable from the parties in O'Connor, Liston, and Wilson. In each of these cases, a darkly-clad and intoxicated plaintiff either ran or walked into the path of a defendant whose negligent conduct was far from egregious. In contrast, Ms. Peters was simply lying or sitting on the side of the road when she was struck by Mr. Bird. She was not dressed in black; her jeans were medium blue in colour, her jacket was light brown and white, and her running shoes were white-soled with white toe caps. Ms. Peters would not have been difficult to see in the headlights of an approaching driver; indeed, Mr. Bird did see her but he was travelling at too great a speed to avoid hitting her. I am satisfied it is very likely that an attentive driver travelling at or near 30 km/h would not have struck her. There is no question that Mr. Bird's negligent conduct in driving more than twice the speed limit in all the circumstances identified herein, was a serious breach of his duty of care, and that he should be held primarily responsible for the collision with Ms. Peters. Ms. Peters' concession of 25% fault is more than fair and reasonable.

D. Disposition

- [133] The defendants Glen Bird and T. Clark & Son Trucking Ltd. are 75% liable, in negligence, for the damages caused to the plaintiff Patricia Peters.

"Bernard J."

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