

CANADA / JUDGMENT

Savaia v. Stellinga

2020 BCSC 156

COURT

Supreme Court of British Columbia

DECIDED

10 February 2020

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2020 BCSC 156 Savaia v. Stellinga

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Savaia v. Stellinga,

2020 BCSC 156

Date: 20200210

Docket: KE M118587

Registry: Kelowna

Between:

Renee Savaia

Plaintiff

And

Ava Stellinga and Rhea Lafferty and Matthew Fortune and

John Doe and the Insurance Corporation of British Columbia

Defendants

And

Insurance Corporation of British Columbia

Third Party

- and -

Docket: KA M55727

Registry: Kamloops

Between:

Riley Gillespie

Plaintiff

And

Ava Stellinga and Rhea Lafferty and Matthew Fortune and

the Insurance Corporation of British Columbia and John Doe

Third Party

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Plaintiff, Renee Savaia:

L. Turner

Counsel for the Plaintiff, Riley Gillespie:

E. Hughes

The Defendants, Ava Stellinga and Rhea Lafferty aka Matthew Fortune, appearing in person:

A. Stellinga

R. Lafferty

Counsel for the Defendant and Third Party, Insurance Corporation of British Columbia:

D. Graves

Place and Dates of Trial:

Kelowna, B.C.

January 13-16, 2020

Place and Date of Judgment:

Kelowna, B.C.

February 10, 2020

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Introduction

- [1] These reasons for judgment concern the liability and insurance coverage issues that arise in two actions that resulted from a motor vehicle accident in Kelowna on February 4, 2017. Pursuant to orders granted in each action, the liability issues were severed from the assessment of the plaintiffs' damages and ordered to be tried together.
- [2] The plaintiffs are Renee Savaia and Riley Gillespie. They were walking south on the west side of Water Street in Kelowna, just past the intersection of Water Street and Bernard Avenue, when they were struck by a Range Rover owned by the defendant, Ava Stellinga. The Range Rover had been travelling south on Water Street. It ran a red light at the Bernard Avenue intersection and collided with a pickup truck owned and operated by Metodi Sariyski. The impact of that collision pushed the Range Rover onto the sidewalk at the southwest corner of the intersection, where it hit the plaintiffs. The driver of the Range Rover fled the scene, on foot.

- [3] There is no dispute that the collision between Ms. Stellinga's Range Rover and Mr. Sariyski's truck occurred, as I have described it. There is no dispute that the force of the impact pushed the Range Rover onto the sidewalk, where it struck Ms. Savaia and Mr. Gillespie. The dispute concerns the identity of the driver of the Range Rover and Ms. Stellinga's knowledge of the identity of the driver.
- [4] There is no suggestion that Ms. Stellinga was driving the Range Rover. The plaintiffs allege that Ms. Stellinga's then common law partner, Rhea Lafferty, was driving, that he is liable for his negligent operation of the Range Rover, and that Ms. Stellinga is vicariously liable pursuant to s. 86(1)(a) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318.
- [5] Mr. Lafferty has used the pseudonym "Matthew Fortune". The plaintiffs named both Mr. Lafferty and Matthew Fortune as defendants, but they are one and the same person.
- [6] Mr. Lafferty denies that he was driving the Range Rover at the time of the accident. Ms. Stellinga says she does not know who was driving the Range Rover at the time of the accident.
- [7] On March 21, 2017, approximately six weeks after the accident, Ms. Stellinga gave a written statement to ICBC. It is ICBC's position that this statement was willfully false and that, as a result, her claim to coverage was forfeited under s. 75(c) of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231.
- [8] Ms. Stellinga commenced a third party claim against ICBC in the Savaia action alleging that ICBC wrongfully refused to provide her with a defence and coverage. She seeks a declaration that ICBC is liable to provide her with a defence and to pay any amount she is found liable to pay as damages and costs. No corresponding third party claim was filed by her in the Gillespie action but all parties agree that the determination of the coverage issues in the Savaia action will apply in the Gillespie action and bind the parties to that action as well.
- [9] Having denied liability to Ms. Stellinga under her plan of insurance, ICBC added itself as a third party in both actions pursuant to s. 77(3) of the Insurance (Vehicle) Act.

Background

- [10] February 3, 2017 was a Friday. It snowed heavily in Kelowna that evening and the roads in and around the scene of the accident were covered in snow.
- [11] After midnight on what was then early Saturday morning, February 4, 2017, Mr. Sariyski, left Dakodas Bar where he had been watching a comedy show with friends. He had not been drinking and he agreed to drive his friends downtown, in his pickup truck. They approached downtown from the east, along Bernard Avenue. Mr. Sariyski pulled over on Bernard, west of Pandosy Street, and his friends got out of the truck. He then continued driving west along Bernard, travelling 30 to 40 kilometres an hour, and taking particular care given the snow on the roads. As he approached Water Street, the traffic light was solid green in his direction. As he entered the intersection, he saw the Range Rover to his right, southbound and travelling

quite fast, on Water Street. The Range Rover proceeded through the light, which was red in its direction. Mr. Sariyski honked his horn and applied his brakes but he was unable to avoid the Range Rover and he struck it on the driver's side.

- [12] As mentioned, the impact of the collision pushed the Range Rover up on to the sidewalk on the southwest corner of Bernard Avenue and Water Street. Ms. Savaia and Mr. Gillespie were walking on that sidewalk. They were struck by the Range Rover.
- [13] The driver of the Range Rover fled the scene on foot. Sometime later, Ms. Stellinga arrived at the scene.
- [14] Mr. Lafferty and Ms. Stellinga were in a romantic relationship and living together in an apartment on Walnut Street in Kelowna at the time. Their relationship ended in January 2019.
- [15] On the evening of February 3, 2017, Ms. Stellinga and Mr. Lafferty attended a party at the Delta Grand Hotel on Water Street, a couple of blocks north of the intersection where the accident occurred. Ms. Stellinga drove them to the Delta in the Range Rover. She parked the vehicle in the Delta's parkade, locked it with her key fob, and then put the key in her jacket pocket or her purse. She had the only key. Mr. Lafferty did not have a valid driver's licence.
- [16] Mr. Lafferty did not have his own cell phone. Ms. Stellinga had two cell phones. She used one of them and he used the other one. The phone number for the phone he was using had a 250 area code. I will refer to that phone as "Mr. Lafferty's phone" or "his phone". The phone number for the phone that Ms. Stellinga was using had a 778 area code. I will refer to that phone as "Ms. Stellinga's phone" or "her phone". TELUS was the service provider for both phones. Mr. Lafferty admitted that he had his phone with him throughout the evening of February 3, 2017 and the early morning hours of February 4, 2017. Ms. Stellinga admitted that she had her phone with her throughout the evening of February 3, 2017 and the early morning hours of February 4, 2017.
- [17] Ms. Stellinga and Mr. Lafferty left the party at the Delta separately, after arguing. They had both been drinking. Mr. Lafferty says he walked south towards their apartment but stopped at a house party by the Kelowna General Hospital. Ms. Stellinga says she flagged down a cab to take her home, intending to pick up the Range Rover the next day, when she was sober. She says that shortly after getting into the cab, she coincidentally happened upon the scene of the accident and saw her vehicle up on the sidewalk. She told the cab driver to stop and she got out at the scene.
- [18] The key to the Range Rover was found inside the vehicle. There was no damage to the vehicle that might have suggested it had been broken into or that its ignition had been tampered with.

Summary of the evidence

Metodi Sariyski

- [19] Mr. Sariyski testified about the sequence of events that culminated in the Range Rover striking the plaintiffs, as outlined above. He testified that after the collision, his truck came to a stop in the intersection. He then backed up, along Bernard, and parked the truck. While still inside his truck, he saw a male person exit the driver's door of the Range Rover and run in a southeasterly direction across Water Street. He did not get a good look at this person and could not say what the person was wearing. He then walked over to the southwest corner of the intersection, where the plaintiffs were being tended to by others.
- [20] Mr. Sariyski testified that about ten minutes later, Ms. Stellinga arrived at the scene and he heard her say that she had received a phone call advising her that her vehicle had been in an accident.

Kesha Mitchell

- [21] On the evening in question, Kesha Mitchell was at Sergeant O'Flannigan's pub with a friend. They left that pub sometime around midnight and walked south on Water Street towards another bar called Liquid Zoo. They were on the west side of Water Street as they approached the intersection with Bernard Avenue. They crossed over Bernard Avenue and continued heading south.
- [22] Very soon after crossing Bernard Avenue, Ms. Mitchell heard a crash. She turned around and saw a young woman, who turned out to be Ms. Savaia, pinned up by the Range Rover against the wall of the Blenz coffee shop on the southwest corner of the intersection. Ms. Mitchell was about 10 to 12 feet away from the Range Rover when she heard the crash and turned around. She saw a male person exit the Range Rover from the driver's side door. She saw him walk around in a circle, as if taking stock of what had happened, and then he walked towards her. When he was about 3 to 4 feet away from her, she asked him if he was okay. She testified that he did not respond to her question and that he ran off heading east down the alley south of Bernard. This is consistent with Mr. Sariyski's evidence that he saw the driver of the Range Rover run across Water Street in a southeasterly direction.
- [23] Ms. Mitchell testified that the lighting was good and she could see the face of the man she saw leave the Range Rover. She testified that he had dark skin and dark hair. When shown a photograph of Mr. Lafferty that was taken within a couple of months of the accident, she said, "He looks similar to the person I saw getting out of the vehicle - I can't say it's him for sure". When asked if she saw anyone in the courtroom who "may have been the driver", she said "could have been but he was a little bit skinnier then". When prompted to identify the person in the courtroom "who could be that driver", she pointed to Mr. Lafferty.

Renee Savaia

- [24] Ms. Savaia testified that she and Mr. Gillespie left the Cactus Club, which is a couple of blocks north of the scene of the accident and just south of the Delta, at about 12:30 a.m. They were walking to Liquid Zoo. She does not recall the Range Rover actually hitting her. She heard the crash from the impact of the Range Rover and Mr. Sariyski's truck, she turned and saw headlights coming towards her, and the next thing she remembers she was sitting on the sidewalk in the snow. She saw Mr. Gillespie laying in the street with quite a few people around him. She testified that she managed to get herself over to where Mr. Gillespie was laying and was relieved to hear him breathing.
- [25] Ms. Savaia testified that she saw Ms. Stellinga at the scene and she heard Ms. Stellinga say, "My vehicle was stolen".

Riley Gillespie

- [26] Mr. Gillespie testified that he does not recall the Range Rover actually hitting him. After hearing a loud bang and seeing headlights coming towards him, his next memory is laying in the street with people around him. He does not know how much time passed between the impact and his next recollection. He testified that he does not recall seeing the driver of the Range Rover and he does not recall anyone at the scene identifying himself or herself as the owner of the Range Rover. He placed the time of the accident at between 12:30 a.m. and 1:00 a.m.

Harpreet Singh Gill

- [27] On the evening in question, Mr. Gill was driving a cab for Kelowna Cabs. He testified that he did not witness the accident occur but he came upon the scene soon after. He saw ambulances and police at the intersection, and then turned north on Water Street to avoid the area. He drove a little more than a block down Water Street. Around the north side of the Queensway roundabout, he was flagged down by a young woman.
- [28] Mr. Gill testified that the young woman was crying when she got into his cab. He said he asked her why she was crying and she responded that her car had just been in an accident, that her boyfriend drove the car, and that they had had a fight. Later, he phrased her response as: her boyfriend had a fight and then he drove her car and he then got into an accident. Mr. Gill testified that the young woman did not say how she knew that her boyfriend had been in an accident with her vehicle. Mr. Gill concluded that her vehicle had likely been involved in the accident at Water Street and Bernard Avenue. He told her he knew where it was and would take her there. When they arrived at the intersection, moments later, she asked him to stop and she jumped out of the cab. She did not pay him for the ride and he did not pursue her for payment.

- [29] Mr. Gill testified that the young woman did not appear to be intoxicated, she made sense, and he had no trouble understanding her.

Constable Nadine Ricioppo

- [30] Constable Ricioppo is a police officer with the RCMP. In February 2017, she was posted to the Kelowna detachment. She was on duty during the evening of February 3, 2017 and into the morning of February 4, 2017.
- [31] Constable Ricioppo testified that she was driving her marked police car when she was dispatched to the accident scene. She said she arrived at the intersection between 1:05 a.m. and 1:10 a.m. She said she was one of the first to arrive and she does not believe the paramedics had arrived yet. She characterized the scene as chaotic with several emotional people around. She saw the Range Rover up on the sidewalk. She inspected it for occupants and evidence. She testified that there was no evidence, such as a broken window, to suggest the Range Rover had been broken into. She said the Range Rover was an older model and did not have a pushbutton ignition. She testified that there was no evidence, such as a screwdriver shoved into the ignition or wiring dangling from the dashboard, to suggest that the ignition had been tampered with.
- [32] Constable Ricioppo received a description of the driver of the Range Rover. She ran the license plate number of the Range Rover and discovered that Ms. Stellinga was the registered owner. She obtained Ms. Stellinga's address on Walnut Street from the registration. She then slowly patrolled the downtown area in her police car looking for anyone matching the description she had received of the driver. She made her way south, towards the Walnut Street apartment.
- [33] Constable Ricioppo testified that she arrived at the Walnut Street apartment between 1:30 a.m. and 2:00 a.m. She radioed for backup and, when some colleagues arrived, they entered the apartment building. She testified that Ms. Stellinga was in her apartment. She said she asked Ms. Stellinga if she was aware that her vehicle had been involved in an accident. She testified that Ms. Stellinga's response was that she was at a party earlier in the evening, with her boyfriend, and that she believed he was in possession of her vehicle because, after an argument, she looked for her keys and they were missing. Constable Ricioppo also said that, during this initial conversation, she asked Ms. Stellinga if she had spoken to her boyfriend and Ms. Stellinga responded that she had tried to phone him but he was not answering his phone. Constable Ricioppo characterized Ms. Stellinga as defensive and said she formed the impression Ms. Stellinga was holding back information. For example, she said when she asked what Ms. Stellinga's boyfriend's name was, Ms. Stellinga initially only provided a first name, and that she provided a surname only after being cautioned about the seriousness of the situation.

[34] After her initial conversation with Ms. Stellinga, Constable Ricioppo returned to her police car and started making notes while waiting to see if Ms. Stellinga's boyfriend would return to the apartment. She testified that about 30 to 45 minutes later, she saw a male, who matched the description she had been given of the driver, walking casually up the driveway to the apartment. She moved her police car towards him and started to step out, while asking him to stop. He responded by running to the side door of the building where she observed him use a fob to enter. She again called for backup and, when backup arrived, she and her colleagues re-entered the building. She said she spoke to Ms. Stellinga a second time. Ms. Stellinga said she had still not heard from her boyfriend and did not know where he was. Constable Ricioppo's colleagues searched Ms. Stellinga's apartment but they did not find Mr. Lafferty there. Constable Ricioppo and her colleagues left the apartment between about 3:30 a.m. and 4:00 a.m.

Bruce Funk and the Phone Records

[35] Mr. Funk is a licensed security consultant who worked for TELUS for many years where he was responsible for security matters such as wire intercepts and investigations for the mobility division. Since retiring from TELUS, he has been contracted by municipal police forces throughout British Columbia, the RCMP, provincial and federal Crown counsel, a District Attorney's Office in Buffalo, New York, and private entities for the purpose of analyzing cellular phone records and providing testimony in court. He has testified as a factual and expert witness many times.

[36] Mr. Funk was qualified as an expert in the interpretation of cell phone records and the way cell phones interact with cell towers or cell sites. As it turns out, his evidence was largely factual.

[37] Mr. Funk explained that a cell phone is a radio device that transmits and receives a signal from a cellular site. Cellular sites can be located on towers, buildings, or any other location that is capable of providing coverage in a specified area. The cellular site receives the signal from the phone and forwards the information to a switch. The switch is the computer that processes the information and routes the call to the requested destination.

[38] Mr. Funk explained that each cell site is designated with an identity number and name provided by TELUS, and its location is maintained on file. When a cell phone is turned on and then makes or receives a call, it draws upon the cell site that provides the strongest signal. In most cases, the signal is provided by the site closest to the phone but due to height, geographical area and building obstructions, other sites in the vicinity may process the call. If a phone is mobile and active on a call, it switches sites during the call when the signal from one site becomes weaker and the signal from another site becomes stronger.

- [39] Mr. Funk testified that each time a cell phone receives or transmits a call or text message, a record is generated in the switch. He testified about the pieces of information that can be gleaned from the records for Ms. Stellinga's and Mr. Lafferty's phones, which include the date, time, and duration of calls made and received; whether a particular call was answered or forwarded to voicemail; and which cell sites were accessed.
- [40] Mr. Funk identified a number of cell sites in the material area including a site located at the Delta Grand Hotel (the "Delta Site"); a site located at 737 Leon Avenue, which is southeast of the accident scene (the "Kelowna Centre Site"); and a site located at 2268 Pandosy Street near the Kelowna General Hospital (the "Hospital Site").
- [41] The phone records and Mr. Funk's evidence establish the following:
- Between about 9:01 p.m. on February 3, 2017 and about 12:06 a.m. on February 4, 2017, Mr. Lafferty's phone made calls to or received calls from 250-212-8344, 250-801-5990, 778-363-6431, and 250-819-8374. (Ms. Stellinga testified that 778-363-6431 was Cole Charlton's phone number. Mr. Charlton is Mr. Lafferty's cousin).
 - At about 12:40 a.m., Mr. Lafferty's phone called Ms. Stellinga's phone twice, with both calls being forwarded to her voicemail.
 - At about 12:43 a.m., Mr. Lafferty's phone placed a call to 250-863-6377.
 - At about 12:46 a.m., Mr. Lafferty's phone placed a call to 250-808-2461.
 - Between about 12:47 a.m. and 12:50 a.m., Mr. Lafferty's phone called Ms. Stellinga's phone three times, with all three calls being forwarded to her voice mail.
 - At about 12:53 a.m., Ms. Stellinga's phone received and answered a call from Mr. Lafferty's phone. The duration of this call was about one minute.
 - Between about 12:55 a.m. and 1:01 a.m., Ms. Stellinga's phone received and answered six more calls from Mr. Lafferty's phone.
 - At about 1:02 a.m., Mr. Lafferty's phone placed a call to 778-215-6431.
 - Between about 1:02 a.m. and 1:05 a.m., Mr. Lafferty's phone received three calls from Ms. Stellinga's phone, the second of which was answered, with the first and third going to voicemail.
 - At about 1:07 a.m., Mr. Lafferty's phone placed a call to 250-826-3829.
 - At about 1:09 a.m., Ms. Stellinga's phone received and answered a call from Mr. Lafferty's phone.
 - At about 1:13 a.m., Mr. Lafferty's phone called Ms. Stellinga's phone with the call being forwarded to her voicemail.
 - Between about 1:13 a.m. and 1:38 a.m., Ms. Stellinga's phone placed five calls to 778-363-6431 (Mr. Charlton's phone).

- At about 1:22 a.m., Mr. Lafferty's phone placed a call to 778-363-6431 (Mr. Charlton's phone).
- Between about 1:39 a.m. and 4:10 a.m., a period of about two-and-a-half hours, Mr. Lafferty's phone neither placed nor answered any calls. Between 1:39 a.m. and 2:53 a.m., Ms. Stellinga's phone placed nine calls to his phone all of which went to his voicemail and, in addition, Mr. Charlton's phone placed a call to Mr. Lafferty's phone which went to voicemail.
- Between about 1:39 a.m. and 2:48 a.m., Ms. Stellinga's phone also placed calls to and/or received calls from 250-575-0850, 778-363-6431 (Mr. Charlton's phone), 250-870-3381, 250-575-9017, and 250-878-4823.
- Between about 4:10 a.m. and 4:17 a.m., Mr. Lafferty's phone placed calls to 778-581-4001, 250-801-3056, 250-575-4907, 250-718-7858, and 250-300-6230.
- Between about 4:22 and 4:56, there were ten calls between Mr. Lafferty's phone and Ms. Stellinga's phone, some of which were answered.
- Between about 6:11 a.m. and 9:31 a.m., Mr. Lafferty's phone placed calls to 778-363-6431 (Mr. Charlton's phone), 250-448-2833, and 250-575-4907, and received a call from 250-718-7858.

[42] Mr. Funk's evidence in combination with information gleaned from the phone records, in particular the cell sites identified in the records as being accessed during each call, establishes the likely location of Mr. Lafferty's phone and Ms. Stellinga's phone, in terms of general area, throughout the material time:

- During the period between 12:40 a.m. and 1:07 a.m., Mr. Lafferty's phone was mobile, moving in the downtown area around the Delta Hotel and south towards Harvey Street. The intersection of Water Street and Bernard Avenue, the scene of the accident, is in that general area.
- Specifically, at about 1:02 a.m., Mr. Lafferty's phone made a call that initially activated the Kelowna Centre Site, southeast of the accident scene, and then switched to the Delta Site, north of the accident scene, which is consistent with his phone being in the area between the two sites. The scene of the accident is in that area.
- During the period from 1:09 a.m. to 1:22 a.m., Mr. Lafferty's phone was mobile, moving in the downtown area around Harvey Street and south towards the Kelowna General Hospital.
- Between about 1:39 a.m. and 4:10 a.m., the location of Mr. Lafferty's phone is unknown.
- Between about 4:10 a.m. and 4:48 a.m., Mr. Lafferty's phone was mobile, moving about the area south of Harvey Street.
- During the period between 12:53 a.m. and 1:09 a.m., Ms. Stellinga's phone was in the area around the Delta.
- At about 1:36 a.m., Ms. Stellinga's phone was mobile, moving south towards Harvey Street.

- Between about 1:39 a.m. and 1:41 a.m., Ms. Stellinga's phone was mobile in the area south of Harvey Street, that is south of the scene of the accident.
- At about 1:42 a.m., Ms. Stellinga's phone was in the area around the Delta, north of the scene of the accident.
- At about 1:44 a.m., Ms. Stellinga's phone was mobile moving south from around the Delta toward Harvey Street.
- From about 2:00 a.m., Ms. Stellinga's phone was in the area south of the Kelowna General Hospital. Her apartment is in this area.

Rhea Lafferty

- [43] Mr. Lafferty denies that he was driving the Range Rover when it struck the plaintiffs. He testified that on the evening of February 3, 2017, he got off work at about 9:30 p.m. and that he and Ms. Stellinga went to the Delta Grand Hotel. Ms. Stellinga drove them to the Delta in her Range Rover and parked the vehicle in the Delta's parkade. He acknowledged there was only one key for the Range Rover.
- [44] Mr. Lafferty testified that he and Ms. Stellinga planned to go to the casino, but they ran into his cousin, Cole Charlton, who invited them to a party in a suite at the Delta. They went to the party instead. He said the only people he knew at the party were Mr. Charlton and Ms. Stellinga. He acknowledged that he and Mr. Charlton had earlier had a falling out, and they had not spoken much in the time leading up to the evening in question.
- [45] Mr. Lafferty said he and Ms. Stellinga were both drinking at the party and they had an argument. He said he was quite drunk. He said he left the Delta alone and walked south to a house party by the Kelowna General Hospital. He said he did not know for sure what time he arrived at the house party but speculated that it was sometime after midnight. He denied taking the Range Rover.
- [46] Mr. Lafferty testified that he stayed at the house party for some time and then walked home, arriving at the Walnut Street apartment between 4:00 a.m. and 6:00 a.m. He said Ms. Stellinga told him about the accident when he got home. He agreed that she was very upset. He characterized her as "freaking out".
- [47] As mentioned, the phone records for Mr. Lafferty's phone and Ms. Stellinga's phone, establish that there were several calls made from each of those phones during the material time, including several calls between those two phones. Mr. Lafferty testified that he could not remember making or receiving any of the calls indicated in the records for his phone during the material time. He speculated that he may have phoned friends to ask about the house party or to ask them to come to the house party or to ask for a ride, but he had no specific recollection of any of the calls. The phone records show the phone numbers of the phones to which his phone made calls and from which his phone received calls, but he could not recall whose phones those phone numbers belonged to, with the exception of Ms.

Stellinga's phone number, which he did recall.

- [48] As mentioned, the phone records show that there were a flurry of calls made between Mr. Lafferty's phone and Ms. Stellinga's phone, starting at about 12:40 a.m. Mr. Lafferty said he could not remember any of those calls, but he speculated that he might have been trying to apologize to her for the argument. He denied that he was phoning her to tell her that he had been in an accident with her vehicle.
- [49] The phone records show that Mr. Lafferty's phone placed calls to Mr. Charlton's phone at 1:22 a.m., 6:11 a.m., and 6:15 a.m. The call at 1:22 a.m. was almost two minutes long. The calls at 6:11 a.m. and 6:15 a.m. were each about four minutes long. Again, Mr. Lafferty could not remember anything about these calls.
- [50] The phone records show that between about 1:39 a.m. and 4:10 a.m., Mr. Lafferty's phone did not make or receive any calls but several calls were forwarded to his voicemail during this time. Although he said he could not remember anything about any of the calls made or received by his phone during the material time, he said he did remember that his phone died when he got to the house party and that he was looking for a phone charger. Initially, he said he "must have" found a way to charge his phone. Later in his testimony, he said he might have purchased a phone charger at a 24-hour gas station and he remembers plugging his phone into the outside of a building.
- [51] The phone records show several calls between Mr. Lafferty's phone and Ms. Stellinga's phone between about 4:22 a.m. and 4:56 a.m., totaling in excess of 28 minutes. Mr. Lafferty said he could not recall anything about these calls, although he clearly recalled that Ms. Stellinga told him about the accident when he got home sometime before 6:00 a.m.

Ava Stellinga

- [52] Ms. Stellinga testified that she and Mr. Lafferty went to a party at the Delta Grand Hotel on the evening in question. She drove her Range Rover and parked it in the parkade. She used the key fob to lock the vehicle. She only had one set of keys for the vehicle, which she put in her jacket pocket or in her purse. She estimated they arrived at the Delta about 10:00 p.m.
- [53] Ms. Stellinga testified that the only people she knew at the Delta party were Mr. Lafferty and Mr. Charlton. She acknowledged that she and Mr. Charlton did not like each other. She spent most of the time sitting at a table in the common area of the suite, drinking. She testified that she got very intoxicated.
- [54] Ms. Stellinga testified that she and Mr. Lafferty had an argument at the Delta party and she was upset and angry. She testified that she decided to leave, on her own. She estimated that this was between 12:00 a.m. and 1:00 a.m. She testified that she does not know whether Mr. Lafferty was still at the Delta party when she left.

- [55] Ms. Stellinga testified that she got turned around a bit in the hotel when she left the suite, and it took her a little while to find her way down to the lobby. She said she walked out onto Water Street and started heading south towards the Cactus Club. She saw a cab and tried to flag it down, but it did not stop because it already had a fare. She saw a second cab and flagged it down. It stopped, and she got in. She acknowledged that Mr. Gill was the cab driver. She testified that she did not recall telling Mr. Gill that her boyfriend took her vehicle and got in an accident, and she did not recall him telling her that he had just passed the accident scene and knew where it was. She said she did not remember anything about the conversation she had with Mr. Gill. She insisted that she remembered only bits and pieces of what happened after she left the Delta.
- [56] In a portion of her examination for discovery read in by the plaintiffs, Ms. Stellinga testified that after she got into the cab and it started driving south on Water Street, she saw the lights of a tow truck up ahead and then she saw her Range Rover up on the sidewalk. She testified she told the cab driver to stop and she jumped out of the vehicle.
- [57] Ms. Stellinga testified that there was a girl with brown hair at the scene of the accident who put her hands on Ms. Stellinga's shoulders and tried to calm her down. She said she was frantic. She testified that she does not remember saying that she got a phone call telling her about the accident. She recalls going into a nearby pub called Fernando's, where she sat down and waited for the police. She said her memory of what happened at the scene is fuzzy.
- [58] Ms. Stellinga testified that she spoke to the police while she was in Fernando's. She acknowledged that the phone records show that she phoned Mr. Charlton's number at about 1:13 a.m. and again at about 1:37 a.m. She seemed to agree that she spoke to the police in Fernando's between those two calls. After speaking to the police, Ms. Stellinga went home.
- [59] Ms. Stellinga testified that she recalls Constable Ricioppo coming to her apartment early in the morning on February 4, 2017, but she only recalls having one conversation with her. She said she does not recall telling Constable Ricioppo that she and Mr. Lafferty had an argument and that she thought he had taken her vehicle because her key was gone. She acknowledged that other police officers searched her apartment looking for Mr. Lafferty. She acknowledged that Constable Ricioppo asked for her boyfriend's name. She characterized Constable Ricioppo as aggressive and she said she asked the police to leave because she felt intimidated.
- [60] Ms. Stellinga acknowledged that she knew her key to the Range Rover was missing. She later learned, from a police report, that the key was found inside the Range Rover after the accident.
- [61] Ms. Stellinga testified that from the time she arrived at the scene of the accident, she was frantically trying to call Mr. Lafferty. She testified that she has no recollection of actually reaching him. The phone records establish that there was no activity on her phone between about 8:32 p.m. on February 3 and 12:40 a.m. on February 4. As mentioned, the records

show that between 12:40 a.m. and 12:50 a.m., Mr. Lafferty's phone placed five calls to Ms. Stellinga's phone, all of which went to her voicemail. The records establish that at about 12:53 a.m., Mr. Lafferty's phone placed a call to her phone that was actually answered. That call lasted about one minute. The phone records show a series of calls between Mr. Lafferty's phone and Ms. Stellinga's phone between about 4:22 a.m. and 4:56 a.m., totaling in excess of 28 minutes.

- [62] Ms. Stellinga testified that she thought the calls from Mr. Lafferty that went to her voicemail at and shortly after 12:40 a.m., came in while she was still at the Delta party. She insisted that after she arrived at the accident scene, she was frantically trying to reach Mr. Lafferty but she has no recollection of succeeding. She does recall speaking to Mr. Charlton. She said she called him to ask him to help her find Mr. Lafferty. She maintained that she had no memory of speaking to Mr. Lafferty until he arrived home sometime between 6:00 a.m. and 7:00 a.m.
- [63] Ms. Stellinga testified that when Mr. Lafferty got home she told him about the accident. She said he appeared shocked to learn about the accident. She said he consoled her and assured her that he had not been driving, and she believed him. She clearly recalled this conversation and maintained that by this time she was sober.
- [64] Ms. Stellinga acknowledged giving a written statement to ICBC on March 21, 2017. She said the statement was written by the lawyer who was acting for her at the time, and she read it before signing it. She said that she did the best she could when giving the statement.
- [65] The March 21, 2017 statement reads:

I, Ava Stellinga am the registered owner of the black Range Rover motor vehicle bearing BC license plate CW2 24H. I am 23 years old and I am normally employed as an early childhood educator. On February 3, 2017, I attended a party at the Delta Hotel in Kelowna hosted by persons unknown to me. I drove to the party in my Range Rover and parked it in the parkade that is located at the hotel. I believe that I put the key fob into my pocket or purse but I am not certain. I arrived around 10:00 and stayed for about three hours. I consumed alcohol and socialized at the party. I estimate that there were at least fifty people at the party. At some time after midnight, I decided to leave because I wanted to go home and I was tired. I chose not to drive because I had consumed alcohol. I never drink and drive. I left alone and walked out of the Delta Hotel toward the Cactus Club restaurant that is nearby. I did not go to the parkade before I left the hotel. I hailed a taxi in front of the Cactus Club and asked the male driver to drive me home. We proceeded south on Water Street and after only two or three blocks I saw what I thought were tow truck lights and then spotted what I believed to be my vehicle pointed southbound on Water Street and crashed into a fence at Blenz Coffee. This is at the intersections of Water Street and Bernard Avenue. I yelled at the taxi driver to stop and I got out of the taxi and ran toward the vehicle. No one was in the vehicle. The driver door was open. There was a female with long brown hair who tried to talk to me. I was very upset and had to sit down, so I went to a pub next door called Fernando's and sat down. I believe that the female with brown hair was with me.

Then the police attended and asked me questions. I answered them. Then I went back outside with the police. I told the police that I was not the driver and that I had arrived by taxi. I explained that I did not know who had taken my vehicle. Nor did I know who had my keys. Because I gave a statement to the police, I did not know that I had to separately report my vehicle as being stolen. It was definitely stolen because I did not consent to anyone taking it at any time on February 3 or February 4, 2017. My vehicle was damaged and I am seeking insurance compensation in that regard. I have read this statement and it is true.

[66] Ms. Stellinga agreed that she intended to convey to ICBC that she coincidentally happened upon the scene of the accident while she was in the cab, the implication being that she did not know about the accident before she got into the cab.

[67] Counsel for ICBC suggested to Ms. Stellinga that she claims to have no recollection of what she told Mr. Gill when she got into the cab because she knows the only person she spoke to on the phone in the preceding moments was Mr. Lafferty, and if she knew about the accident before getting into the cab, this would implicate Mr. Lafferty as the driver. Counsel for ICBC suggested that she made a false statement to protect Mr. Lafferty, with whom she was in a relationship at the time. She denied these suggestions.

[68] Ms. Stellinga testified that she did not wilfully make a false statement. She said that at the time she gave the March 21, 2017 statement, she did not have all the facts. She testified that she trusted and believed what Mr. Lafferty told her, and she maintained that the March 21, 2017 statement reflects what she understood to be true at the time it was made. However, she said she now has "high suspicions" that Mr. Lafferty was driving the Range Rover when it struck the plaintiffs. She did not say what she had learned, since March 21, 2017, to cause her to now suspect he was driving.

Credibility and reliability

[69] Ultimately, the assessment of the credibility of witness testimony turns on whether the testimony is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357.

[70] The factors identified by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, also play a role in assessing whether the evidence of a witness is truthful and accurate. These factors include the ability of the witness to resist being influenced by his or her interest in recalling events; the internal and external consistency of the witness's evidence; whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence; whether his or her evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case; and the witness's demeanour, meaning the way he or she presents while testifying.

- [71] There was nothing in the testimony of any of the witnesses other than Mr. Lafferty and Ms. Stellinga that gave rise to any credibility concerns. All of them testified in a reasonable and straightforward manner. They did not exaggerate. Their evidence was not shown to be either internally or externally inconsistent. I accept their testimony without reservation.
- [72] However, I have serious concerns about the credibility of Mr. Lafferty and Ms. Stellinga. There were several aspects of the testimony of each of them that have caused me to conclude that they were not truthful about the central facts.
- [73] When Mr. Lafferty was confronted with the phone records showing that he was moving around in the downtown area between about 12:40 a.m. and shortly after 1:00 a.m., in the vicinity of the scene of the accident, Mr. Lafferty changed his evidence about what he did after leaving the Delta. Initially, he testified that he left the Delta and walked to the house party, travelling south on Water Street and later cutting over to Pandosy Street. This route would have taken him right through the intersection of Water Street and Bernard Avenue, but he insisted that he did not see the accident or its aftermath. When confronted with the phone records, he said that perhaps he forgot something such as his lighter or cigarettes, and perhaps he checked out some nightclubs before going to the house party.
- [74] Mr. Lafferty's testimony about the phone charger was implausible. Initially, he said that he looked for a phone charger at the house party but then he said he thought he bought a phone charger at a 24-hour gas station and then plugged his phone into the outside of a building. The records establish that his phone was functioning by about 4:10 a.m. Even if he managed to find an electrical outlet on the outside of a building, it is implausible that, in the middle of a snowy winter night, he would walk to a gas station to buy a phone charger and charge his phone outside rather than simply walking home and charging it at home.
- [75] Mr. Lafferty's testimony reflected a selective memory of the night as a whole. He remembered that he and Ms. Stellinga fought at the Delta, and he left the Delta alone. He remembered the general location of the house party, close to the hospital. He remembered that his phone went dead, he bought a charger, and he charged his phone by plugging it into the outside of a building. He remembered the names of some of the people at the house party. He remembered Ms. Stellinga telling him about the accident when he got home. He remembered that she was very upset. However, he cannot remember anything about any of the conversations or phone calls he made or received from the time he left the Delta until he arrived at the apartment hours later. This is not believable. Ms. Stellinga knew the police were looking for him. She acknowledged that they searched her apartment for that purpose. It is inconceivable that she did not tell him the police were looking for him during their phone calls between 4:22 a.m. and 4:56 a.m. This is something he would have remembered. He did not explain why he had a clear memory of what she told him after he arrived at the apartment but not what she told him during these phone calls, which occurred, at most, about two hours earlier.

- [76] Mr. Lafferty's testimony about not remembering the purpose or content of his phone calls to Mr. Charlton, particularly those that occurred at 6:11 a.m. and 6:15 a.m., was not believable. On his own evidence, Mr. Lafferty had been out partying all night, arriving home sometime between 4:00 a.m. and 6:00 a.m. As noted, the phone records show he was calling Ms. Stellinga, who was at the apartment, just before 5:00 a.m., so he almost certainly did not get back to the apartment until after 5:00 a.m. He would not have placed phone calls to Mr. Charlton, with whom he was not on good terms, an hour later, so early on a Saturday morning, after partying all night and then learning about the accident from a very upset Ms. Stellinga, unless he had something important to talk to Mr. Charlton about. It is very unlikely that he would not remember what that was.
- [77] I turn now to Ms. Stellinga's credibility. She did not deny telling Mr. Gill, when she got into the cab, that her boyfriend had taken her vehicle and gotten into an accident. She did not deny declaring, at the accident scene, that she had received a phone call telling her about the accident. She did not deny telling Constable Ricioppo that she believed her boyfriend was driving. Rather, she simply maintained that she did not recall saying any of those things, insisting that her memory of the evening was fuzzy and that she remembered only bits and pieces.
- [78] For the reasons expressed below, I am satisfied, on a balance of probabilities, that Mr. Lafferty was driving the Range Rover at the time of the accident and that, before Ms. Stellinga got into Mr. Gill's cab, she knew that he had taken her vehicle and gotten into an accident. What is key to her third-party claim against ICBC, is whether I accept that she must have forgotten about all that and, by the time she gave her statement to ICBC about six weeks later, she believed (albeit mistakenly) that she had learned about the accident when she coincidentally happened upon the scene while on her way home in a cab. That notion is absurd.
- [79] Ms. Stellinga's memory of the evening was selective, in a way that clearly suggested she was shaping her evidence to align with her interest. She remembered many innocuous details. For example, she remembered that she drank four tequila shots plus mixed drinks at the Delta, that she and Mr. Lafferty argued, that she left the Delta alone, that she got turned around in the hotel on her way down to the lobby, that the first cab she encountered would not take her because it already had a fare, that Mr. Gill's cab was the second cab she flagged down, and that the girl who helped her at the accident scene had brown hair. In contrast, she could not recall any of the details that might implicate Mr. Lafferty. For example, she could not recall what conversation she had with Mr. Gill in the cab, she could not recall what she told Constable Ricioppo, she could not recall any of the many calls between her phone and Mr. Lafferty's phone. Her explanation is that she was drunk and upset. While I accept she had been drinking, I do not accept that she was very intoxicated. Mr. Gill observed her and spoke to her in the close confines of his cab and he testified that she did not appear intoxicated.

- [80] An accident like this one would be a significant event in anyone's life. After having an argument with Mr. Lafferty, her common-law partner, at a party where they were both drinking, he took her vehicle, caused an accident, and fled the scene. It is improbable, if not inconceivable, that having learned of this information and acted on it, by flagging down a cab and telling the driver what happened, she would, within a few hours, forget that she had heard the information and instead come to believe that she just happened upon the scene by coincidence.
- [81] Having the RCMP arrive at one's home in the middle of the night would be a significant event for anyone. Ms. Stellinga was questioned by the police, in a manner that she said was aggressive, about the potential involvement of her then common-law partner in a serious criminal matter. She told Constable Ricioppo that she thought Mr. Lafferty had taken her keys and was the driver. Again, this would be a memorable event. She would not forget that she had implicated her partner in a serious crime.
- [82] It is particularly improbable that Ms. Stellinga did not remember the phone calls she had with Mr. Lafferty after 4:00 a.m. Those calls occurred only a short time after she told Constable Ricioppo that she thought Mr. Lafferty had taken her vehicle. Again, she had just implicated him in a crime. She says she clearly remembers speaking to Mr. Lafferty when he got home a couple of hours later. She said by that time she was sober. However, by the time of the 4:00 a.m. phone calls, four hours had passed since she left the Delta. In the meantime, she had learned that her vehicle had been in an accident that had injured two people, she had spoken to police at the accident scene, she had participated in many phone calls, the police had been at her apartment looking for Mr. Lafferty, and she had implicated him in the crime. Even if she was impaired by alcohol when she left the Delta, given all that subsequently occurred, it is more likely than not that she would have sobered up sufficiently to remember speaking to Mr. Lafferty four hours later.

Liability

[83] The following three liability issues arise:

1. Is the driver of the Range Rover liable?
2. Was Mr. Lafferty the driver?
3. Is Ms. Stellinga vicariously liable?

Is the driver of the Range Rover liable?

[84] I have no difficulty concluding that the negligence of the driver of Ms. Stellinga's Range Rover caused the accident and is 100% liable.

[85] The defendants concede that Ms. Stellinga's Range Rover was involved in the accident and struck the plaintiffs.

- [86] As mentioned, there is no reason to doubt the evidence of Mr. Sariyski, Ms. Mitchell, Ms. Savaia, and Mr. Gillespie, all of which was uncontested. I accept their evidence without reservation. Based on their evidence I find that:
- (a) the Range Rover was travelling quite fast, southbound on Water Street, in snowy conditions, and it ran a red light at the intersection of Water Street and Bernard Avenue;
 - (b) Mr. Sariyski, who was westbound on Bernard and whose light was green as he entered the intersection, saw the Range Rover coming and took evasive action, but was unable to avoid hitting the Range Rover on the driver's side;
 - (c) the impact of the collision pushed the Range Rover onto the sidewalk on southwest corner of the intersection, where it hit the plaintiffs, who were walking on the sidewalk and had no time to react before being hit; and
 - (d) the driver of the Range Rover got out of the vehicle and ran away from the scene.
- [87] In driving quite fast, in snowy conditions, and then running the red light, the driver of the Range Rover was negligent and his negligence caused the accident that injured the plaintiffs. That driver is 100% liable.

Was Mr. Lafferty the driver?

- [88] I also have no difficulty concluding that Mr. Lafferty was driving the Range Rover when it struck the plaintiffs.
- [89] It is helpful to start by determining, with more specificity, when the accident occurred. Ms. Savaia's evidence about the timing was the most precise. She testified that she and Mr. Gillespie left the Cactus Club at about 12:30 a.m.. She estimated the accident happened about 12:45 a.m.. The evidence of the other witnesses about the timing is consistent but less precise. For example, Mr. Gillespie placed the time of the accident at between 12:30 a.m. and 1:00 a.m., and Ms. Mitchell said she left Sergeant O'Flannigan's pub sometime around midnight.
- [90] Constable Ricioppo testified she arrived at the accident scene between 1:05 a.m. and 1:10 a.m. She said she was one of the first to arrive, she does not believe the paramedics were there yet, and the scene was chaotic with emotional people. I took her evidence in this respect to mean that she was one of the first emergency personnel to arrive.
- [91] Constable Ricioppo testified that the police received a call from the paramedics reporting the accident, she was then dispatched to the scene, and she drove there in a marked police car. She did not say how long it took her to get there. However, her estimate of her arrival between 1:05 a.m. and 1:10 a.m., after someone reported the accident to the paramedics, the paramedics reported it to the police, the police dispatcher dispatched her to the scene, and she drove there, supports the conclusion that the accident most likely occurred closer to 12:30 a.m. than to 1:00 a.m.

- [92] There is no dispute about the location of the Cactus Club. It is a couple of blocks north of the scene of the accident, and just south of the Delta. It would have taken Ms. Savaia and Mr. Gillespie less than ten minutes to walk from the Cactus Club to the location of the accident.
- [93] Based on the evidence summarized above, I find that the accident occurred between 12:30 a.m. and 12:45 a.m.; that Constable Ricioppo arrived at the scene between 1:05 a.m. and 1:10 a.m.; and that she arrived before the paramedics.
- [94] Mr. Gill testified that before Ms. Stellinga got into his cab, he had already passed by the scene of the accident and he had seen ambulances and police in the intersection. Given the findings I have just made, it follows that Mr. Gill must have driven past the accident scene after 1:05 a.m., because that is the earliest Constable Ricioppo arrived and there were no paramedics there when she arrived. Mr. Gill drove a little more than a block north on Water Street and picked up Ms. Stellinga somewhere around the north side of the Queensway roundabout.
- [95] The phone records show that no calls were placed to Ms. Stellinga's phone between about 8:32 p.m. on February 3 and about 12:40 a.m. on February 4, that there was then a flurry of calls between Ms. Stellinga's phone and Mr. Lafferty's phone between about 12:40 a.m. and about 1:13 a.m., and that the first person she called during the material time, other than Mr. Lafferty, was Mr. Charlton. The first call she placed to Mr. Charlton was shortly after 1:13 a.m. That call had a duration of 55 seconds. The phone records show there were no calls to or from her phone for about the next 24 minutes. Then, between about 1:37 a.m. and shortly after 1:38 a.m. she placed four calls to Mr. Charlton's phone. In a portion of her examination for discovery evidence that was read in to the record by the plaintiffs, she testified that she recalled speaking briefly to Mr. Charlton and she thought that happened right before she spoke to the police. At trial, she somewhat reluctantly agreed that she probably spoke to the police after the 1:13 a.m. call to Mr. Charlton and before the next call she placed to him at about 1:37 a.m. That timing is consistent with her not taking or receiving any phone calls in the intervening period. It is reasonable to infer that she turned off her phone while speaking to the police.
- [96] I find that Ms. Stellinga arrived at the accident scene before she placed the first call to Mr. Charlton at 1:13 a.m., because that call likely occurred right before she spoke to the police. She was in Mr. Gill's cab for only a couple of minutes. Given my conclusion that Mr. Gill must have driven past the scene after 1:05 a.m., before picking up Ms. Stellinga, it follows that Ms. Stellinga must have gotten into Mr. Gill's cab sometime between about 1:07 a.m. and 1:10 a.m.
- [97] Mr. Gill testified that Ms. Stellinga told him that her boyfriend had taken her car and gotten into an accident. Mr. Sariyski testified that he heard Ms. Stellinga say that she had received a phone call advising her that her vehicle had been in an accident. Neither of them would have any reason to make up that evidence. Again, Ms. Stellinga did not deny making these statements. She said only that she did not remember making them. I accept the testimony of

Mr. Gill and Mr. Sariyski and find that Ms. Stellinga did tell Mr. Gill, when she got into his cab, that her boyfriend had taken her car and gotten into an accident and, at the scene of the accident, she did declare that she had received a phone call advising her that her vehicle had been in an accident.

- [98] As Ms. Stellinga is a party, her out of court statement that she received a phone call advising her that her vehicle had been in an accident is admissible for the truth of its contents; in other words, it is admissible to establish that she did, in fact, receive such a phone call. She knew about the accident before getting into Mr. Gill's cab. The only calls she received before arriving at the scene of the accident were from Mr. Lafferty's phone.
- [99] The phone records establish that the first five calls Mr. Lafferty placed to Ms. Stellinga after about 12:40 a.m. went to her voicemail. One of those, at about 12:48 a.m., was for a duration of 43 seconds, while the others were much shorter (4 or 9 seconds). It is likely that he left a message during the 43-second call. The phone records establish that her phone answered the next seven calls he made to her, and that she then placed three calls to his phone, the second of which was answered with the other two being forwarded to voicemail. The records indicate that the duration of the answered calls between Ms. Stellinga and Mr. Lafferty during the period between about 12:40 a.m. and about 1:13 a.m. varied between 55 seconds and 9 seconds, and totalled about four minutes. Again, she received calls from no one else during this time. The only reasonable inference is that Mr. Lafferty was the person who told her, over the phone, that her car had been in an accident, that she became upset, and that they then engaged in a series of calls back and forth to and from each other.
- [100] After participating in some of these calls, Ms. Stellinga got into Mr. Gill's cab, crying, and told him her boyfriend had taken her car and gotten into an accident. The only reasonable inference is that Mr. Lafferty told her that he had taken her car and was driving it at the time of the accident.
- [101] Mr. Lafferty had the opportunity to take the Range Rover when he left the party. There is nothing to suggest the Range Rover was broken into or hotwired. To the contrary, the key was found inside the vehicle after the accident. It is reasonable to infer that Mr. Lafferty, as Ms. Stellinga's common law partner, would have known where she normally kept her car key. He knew where the Range Rover was parked. With reference to Constable Ricioppo's evidence that Ms. Stellinga said she believed Mr. Lafferty had taken her car because, after an argument, she looked for her keys and they were missing, Ms. Stellinga was asked why her first thought after arguing with Mr. Lafferty would have been to check for her car key. She responded: "well, he has stolen things from me before".

- [102] The phone records place Mr. Lafferty in the area where the accident occurred at the material time. Again, it was Mr. Funk's evidence that when a wireless phone makes or receives a call, it draws upon the cell site that provides the strongest signal and, in most cases, this is the site closest to the phone. The accident scene is located in between the Delta Site and the Kelowna Centre Site. The Hospital Site is further south on Pandosy, close to the hospital.
- [103] The phone records establish that when Mr. Lafferty was leaving voicemail messages for Ms. Stellinga between about 12:40 a.m. and about 12:51 a.m., he was utilizing the Delta Site. By 1:00 a.m., he was utilizing the Kelowna Centre Site. Shortly after 1:02 a.m., one of his calls switched back from the Kelowna Centre Site to the Delta Site. At about 1:03 a.m., he was again utilizing the Kelowna Centre site. Shortly after 1:09 a.m., one of his calls switched from the Kelowna Centre Site to the Hospital Site. The next call, at 1:12 a.m., utilized the Kelowna Centre Site. The call after that utilized the Hospital Site. From this evidence, I conclude that until about 1:09 a.m., Mr. Lafferty was moving around in the area between the Delta Site and the Kelowna Centre site. This is where the accident occurred.
- [104] Ms. Mitchell's description of the driver as having dark skin and dark hair is consistent with Mr. Lafferty being the driver. She was within three or four feet of the driver, in a well-lit area, and she saw his face. She confirmed that a photograph of Mr. Lafferty, taken about two months after the accident, looked similar to the driver. She identified Mr. Lafferty in the courtroom as someone who could have been the driver. To be clear, given the lack of certainty in her identification evidence it would not have been sufficient, on its own, for me to conclude, even on a balance of probabilities, that Mr. Lafferty was the driver. However, her identification evidence contributes to that conclusion, along with all the other evidence.
- [105] As already discussed, I did not find Mr. Lafferty's evidence credible. I reject his evidence that he was not the driver.
- [106] Ms. Savaia's evidence that she heard Ms. Stellinga say her vehicle had been stolen is not inconsistent with my finding that Ms. Stellinga also told Mr. Gill that her boyfriend had taken her vehicle. Given that Mr. Lafferty did not have a driver's licence, that he took her vehicle without her knowledge after they had argued, that he had stolen things from her before, and that she was understandably very upset, it is not surprising that, at the accident scene, one of things she said was that her vehicle had been stolen.
- [107] For these reasons, the totality of the evidence I accept establishes, on a balance of probabilities, that Mr. Lafferty was the driver of the Range Rover at the time of the accident. He is liable.

Is Ms. Stellinga vicariously liable?

- [108] Section 86(1) of the Motor Vehicle Act provides:

86(1) In the case of a motor vehicle that is in the possession of its owner, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who

(a) is living with, and as a member of the family of, the owners, or

(b) acquired possession of the motor vehicle with the consent, express or implied, of the owner, is deemed to be the agent or servant of, and employed as such by, that owner and to be driving or operating the motor vehicle in the course of his or her employment with that owner.

[109] The effect of this provision is to make Ms. Stellinga liable to the plaintiffs for damages arising from the accident if Mr. Lafferty was driving the Range Rover and if he was living with her as a member of her family at the time or he was driving the Range Rover with her express or implied consent. I have found that Mr. Lafferty was driving the Range Rover when it struck the plaintiffs.

[110] There is no dispute that Mr. Lafferty and Ms. Stellinga were living together, in a romantic relationship, at the material time. Mr. Lafferty agreed that he was a member of her family. Ms. Stellinga agreed that they were living together as a couple and he was a member of her family.

[111] The conditions expressed in ss. 86(1)(a) and (b) are disjunctive. In the circumstances, it is not necessary to consider whether Mr. Lafferty had Ms. Stellinga's consent, either express or implied, because he was living with her, as a member of her family, at the time. In the result, she is vicariously liable.

Coverage

[112] ICBC admits that Ms. Stellinga purchased third party liability insurance for the Range Rover and that insurance was in place at the time of the accident, but says Ms. Stellinga forfeited coverage under s. 75(c) of the Insurance (Vehicle) Act by giving a wilfully false statement with respect to the claim.

[113] Section 75 of the Insurance (Vehicle) Act provides in material part:

All claims by or in respect of the insured are invalid and the right of the insured to insurance money under the plan or an optional insurance contract, is forfeited if

(c) the insured makes a wilfully false statement with respect to the claim.

[114] In order to establish that Ms. Stellinga's coverage has been forfeited under this provision, ICBC must prove three things: (1) Ms. Stellinga made a false statement with respect to the claim; (2) that false statement was made wilfully; and (3) the wilfully false statement was material. The first two aspects arise from the language of s. 75(c) itself; the third arises from the Court of Appeal's decision in *Inland Kenworth Ltd. v. Commonwealth Insurance Company* (1990), 48 B.C.L.R. (2d) 305. In that case, the Court of Appeal also provided a

definition of "material" (at 310):

It is sufficient, if the fraud or wilfully false statement is capable of affecting the mind of the insurer either in the management of the claim or in deciding to pay it.

[115] As to the definition of "wilful", ICBC relies on the following passage from *Gill v. Insurance Corporation of British Columbia*, [1989] B.C.J. No. 1417, which was quoted with approval by the Court of Appeal in *Petersen v. Bannon* (1993), 84 B.C.L.R. (2d) 350:

A wilful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. A wilful act differs essentially from a negligent act. The one is positive and the other negative.

[116] ICBC says that Ms. Stellinga's March 21, 2017 statement was wilfully false in the following three respects:

(a) It was designed to give the impression that she first became aware of the accident when she coincidentally came upon the scene while in a cab on the way home when, in fact, she knew Mr. Lafferty had taken the Range Rover and gotten into the accident before she got into the cab. ICBC relies, in particular, on the following passage in the statement:

I hailed a taxi in front of the Cactus Club and asked the male driver to drive me home. We proceeded south on Water Street and after only two or three blocks I saw what I thought were tow truck lights and then spotted what I believed to be my vehicle pointed southbound on Water Street and crashed into a fence at Blenz Coffee. This is at the intersection of Water Street and Bernard Avenue. I yelled at the taxi driver to stop and I got out of the taxi and ran toward the vehicle.

(b) It was designed to give the impression that Ms. Stellinga told the RCMP that she had no information or knowledge as to who had likely taken her vehicle when, in fact, she told Constable Ricioppo that she believed Mr. Lafferty had taken her keys and was in possession of the Range Rover. ICBC relies, in particular, on the following passage in the statement:

Then I went back outside with the police. I told the police that I was not the driver and that I had arrived by taxi. I explained that I did not know who had taken my vehicle. Nor did I know who had my keys.

(c) It was designed to give the impression that Ms. Stellinga had no knowledge of who had taken her vehicle, even as of March 21, 2017, when the statement was made. ICBC relies, in particular, on the sentence "I explained that I did not know who had taken my vehicle" which forms part of the passage quoted in (b) above.

[117] I am satisfied that Ms. Stellinga's March 21, 2007 statement was wilfully false in two respects.

- [118] I agree that the passage quoted in para.116 (a) above was clearly designed to give the impression that Ms. Stellinga first became aware of the accident when she coincidentally came upon the scene while in the cab on the way home. This was false. For reasons already expressed, I have concluded that Ms. Stellinga knew that Mr. Lafferty had taken her car and gotten into an accident before she got into Mr. Gill's cab.
- [119] I am also satisfied that this false statement was wilfully made. Again, I reject Ms. Stellinga's assertion that she must have forgotten about knowing about the accident before getting into the cab. If she had told ICBC that someone phoned her and told her about the accident, she almost certainly would have been asked follow-up questions such as who contacted her, what did they tell her, how did they know it was her vehicle, and were they involved in the accident. By asserting that she coincidentally happened upon the accident, she avoided having to answer questions that would implicate Mr. Lafferty as the driver.
- [120] I am not satisfied that the specific passage in the March 21, 2017 statement about Ms. Stellinga "going back outside with the police" and explaining she did not know who had taken her vehicle can, strictly speaking, be said to be false. When read in the context of the March 21, 2017 statement as a whole that particular passage pertains to what she told the police when they questioned her at the scene of the accident. There is no evidence in the record about what she told the police at that time that is inconsistent with this passage.
- [121] Of course, the March 21, 2017 statement is incomplete in the sense that it does not refer to the fact that Ms. Stellinga was also questioned later by Constable Ricioppo, at her apartment, at which time she said she believed her boyfriend had taken her key and was in possession of the Range Rover. However, I have not been provided with any submissions or authority concerning the implications of providing a deliberately incomplete statement.
- [122] Having said that, I am satisfied that the statement as a whole was intended to convey that, as of March 21, 2017, Ms. Stellinga did not know who had been driving the Range Rover at the time of the accident. This is inescapable given the wilfully false representation that she coincidentally happened upon the scene of the accident, the express statement that she told the police at the scene that she did not know who had taken her vehicle, the omission of any information about the police questioning her at her apartment later that evening and her response at that time to the effect that she believed Mr. Lafferty had been driving, and the assertion, near the end of the statement, that her vehicle "was definitely stolen". This overarching or predominant message was false. For the reasons already expressed, Ms. Stellinga knew that Mr. Lafferty was driving the Range Rover at the time of the accident. She knew this before getting into Mr. Gill's cab, and she did not forget it. She knew it when she signed the March 21, 2017 statement. There is no other reasonable conclusion on the evidence.
- [123] I have no difficulty concluding that the wilfully false aspects of the March 21, 2017 statement were material in the sense that they are capable of affecting the mind of the insurer either in the management of the claim or in deciding to pay it.

[124] Taken together, the wilfully false aspects pertain to the identity of a driver who fled the scene of an accident in which two people were injured. Because of Ms. Stellinga's wilfully false statement, ICBC took further steps to investigate the identity of the driver of the Range Rover, such as retaining Mr. Funk to analyse the phone records, that would have been unnecessary had she been truthful in her statement. Further, if a driver's identity is not ascertainable, then the plaintiffs' claims would be subject to the procedure outlined in s. 24 of the Insurance (Vehicle) Act, which applies to hit and run accidents, and the associated coverage limits. Accordingly, Ms. Stellinga's wilfully false statement was capable of and did affect the mind of the insurer in the management of the claim.

[125] For these reasons, I find that Ms. Stellinga forfeited her coverage pursuant to s. 75(c) of the Insurance (Vehicle) Act.

Conclusion

[126] The driver of the Range Rover, who fled the scene of the accident, is 100% liable for the damage the accident caused to the plaintiffs.

[127] Mr. Lafferty was the driver of the Range Rover when it struck the plaintiffs and, therefore, he is liable.

[128] Ms. Stellinga is vicariously liable pursuant to s. 86(1)(a) of the Motor Vehicle Act.

[129] Ms. Stellinga forfeited her coverage pursuant to s. 75(c) of the Insurance (Vehicle) Act. Her third-party claim against ICBC is, therefore, dismissed.

[130] If the parties wish to speak to costs they may do so if, within 60 days of the release of these reasons for judgment, they contact the Registry to secure a date for a costs hearing.

"Warren J."

The Honourable Madam Justice Warren

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