
CANADA / JUDGMENT

Soto v. Peel

2013 BCSC 409

COURT

Supreme Court of British Columbia

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2013 BCSC 409 Soto v. Peel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Soto v. Peel,

2013 BCSC 409

Date: 20130312

Docket: 43541

Registry: Vernon

Between:

Marlene Guadalupe Catala Soto

Plaintiff

And

Andrew Leonard Peel, Jeremy Patrick Chouinard

Norman James Good and

John Doe, Executor of the Estate of Brenda Mary Good, Deceased

Defendants

And

Jennifer Scott

Third Party

And

Insurance Corporation of British Columbia

Third Party

- and -

Docket: 44732

Registry: Vernon

Between:

Marlene Guadalupe Catala Soto

Plaintiff

And

Jennifer Scott

Defendant

And

Andrew Leonard Peel, Jeremy Patrick Chouinard

Norman James Good and

John Doe, Executor of the Estate of Brenda Mary Good, Deceased

Third Parties

And

Insurance Corporation of British Columbia

Fourth Party

- and -

Docket: 44537

Registry: Vernon

Between:

Jennifer Bernice Scott

Plaintiff

And

Norman James Good, John Doe Executor

of the Estate of Brenda Marie Good, Deceased,

Jeremy Patrick Chouinard, Andrew Leonard Peel

Defendants

- and -

Docket: M084741

Registry: Vancouver

Between:

Norman James Good

Plaintiff

And

Andrew Leonard Peel, Jeremy Chouinard,

Jennifer Bernice Scott, and Marlene Catala Soto

Defendants

And

Insurance Corporation of British Columbia

Andrew Leonard Peel, Jeremy Chouinard and John Doe,

Executor of the Estate of Brenda Mary Good, deceased

Third Parties

- and -

Docket: M093670

Registry: Vancouver

Between:

Norman James Good

Plaintiff

And

Andrew Leonard Peel, Jeremy Chouinard,

Jennifer Bernice Scott, and Marlene Catala Soto

Defendants

And

Insurance Corporation of British Columbia

Andrew Leonard Peel, Jeremy Chouinard and John Doe,

Executor of the Estate of Brenda Mary Good, deceased

Third Parties

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

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Ronald D. Nairne

Place and Date of Trial:

Vernon, B.C.

January 8, 9, 10, 11 and 17, 2013

Place and Date of Judgment:

Vernon, B.C.

March 12, 2013

I. Introduction

- [1] These five actions all arise from a very serious motor vehicle accident which occurred in the evening hours of August 15, 2007 on the Trans-Canada Highway at a point approximately 3.5 kilometers west of Salmon Arm, B.C.
- [2] There are two issues I have been asked to decide in this trial; these issues are common to the five actions.
- [3] The first issue is liability for claims arising from this accident and the second issue is whether or not the driver of one of the vehicles responsible for the accident was driving with the consent, actual or implied, of the owner of that vehicle under section 86 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [the "MVA"].
- [4] I will start these reasons with a summary of the background of the parties followed by a review of the evidence of the accident, and finally, my findings on each of the two issues.

II. The Parties

- [5] Norman James Good and his late wife, Brenda Good, resided in Kitimat, B.C. and in August of 2007 they were vacationing at their summer home at Blind Bay, B.C., which is west of Salmon Arm. At the time, Mr. Good was a practicing chiropractor in Kitimat. Mr. and Mrs. Good were planning to eventually move into the home in Blind Bay permanently as their retirement home.
- [6] With them on vacation was their youngest daughter, Jenelle, who at the time was 11 years old. Mr. and Mrs. Good were also the parents of three other adult children.
- [7] On the evening of August 15, 2007, Mr. and Mrs. Good together with Jenelle had attended a bible study in Salmon Arm which had ended for the evening at approximately 8:30 p.m. After briefly speaking to other participants at the bible study at the close of the meeting, the Goods returned to their late model Honda Pilot (the "Honda"), which is a full-size SUV, to begin the drive to their summer home.
- [8] Before leaving Salmon Arm, Mr. Good stopped at a Dairy Queen and purchased ice cream cones for himself, his wife and Jenelle at approximately 9:00 p.m. and then headed out onto the Trans-Canada Highway in a westerly direction towards Blind Bay.
- [9] Jennifer Scott is a practical nurse who resides in Calgary, Alberta. At the time of the accident she was 29 years of age. Ms. Scott's roommate, both now and at the time of the accident, is Marlene Catala Soto [hereinafter Marlene Catala]. In 2007, Ms. Catala was 27 years old, and was also a practical nurse. She has since become a registered nurse.

- [10] On August 15, 2007, Ms. Scott and Ms. Catala left Calgary in the early afternoon, planning to drive to Scotch Creek, B.C. to visit Ms. Catala's mother on a one week vacation. They were driving in a Ford Focus automobile owned by Ms. Catala. Accompanying them were two small dogs and a cat.
- [11] Ms. Scott and Ms. Catala shared driving duties that day. On the portion of the trip from Calgary to Golden, B.C., Ms. Catala was driving. In Golden, they took a refreshment break and Ms. Scott took over driving. After leaving Golden, Ms. Scott stopped briefly for gasoline in Salmon Arm while Ms. Catala purchased a soft drink.
- [12] Just before 9:00 p.m., around the same time that the Good family headed west, Ms. Scott pulled onto the westbound lane of the Trans-Canada Highway to continue the final leg of their trip to Scotch Creek.
- [13] In the summer of 2007 Jeremy Chouinard was 26 years of age and owned a moving company operating in the Shuswap Lake area and was living in a rented house on Centennial Drive in Blind Bay, B.C. Mr. Chouinard had been living in the Shuswap - North Okanagan area since childhood.
- [14] At trial, Mr. Chouinard described himself as a "big time drinker" and a "heavy alcoholic" in and around 2007. He also described the Centennial Drive residence as a "party house", acknowledging frequent partying and drinking at the house over the summer months in particular. Mr. Chouinard has a lengthy criminal record with several convictions for assault and mischief.
- [15] In the summer of 2007 there were various other people staying from time to time at the Centennial Drive residence including his former girlfriend, Chrissy Stewart.
- [16] Mr. Chouinard was the registered owner of a 2002 Ford Explorer (the "Explorer") which vehicle was driven by Mr. Andrew Peel at the time of the accident on August 15, 2007.
- [17] Andrew Peel had grown up in the Salmon Arm area and was 40 years old as of August 2007. He had first met Mr. Chouinard in Salmon Arm when Mr. Chouinard was 13 years of age. He was an experienced draftsman in the field of sawmill equipment. Over several years leading up to August of 2007, Mr. Peel had been an extreme alcoholic and had been addicted to cocaine, which, he says interfered with every aspect of his life. Mr. Peel had returned to British Columbia from New Brunswick in early 2007 after having been convicted of assault and other charges for failure to appear. He was on parole as of August 2007.
- [18] At approximately 9:00 p.m. on August 15, 2007, Mr. Peel drove the Explorer owned by Mr. Chouinard from the residence on Centennial Drive and onto the Trans-Canada Highway heading eastbound.

III. The Accident

- [19] There is a stretch of the Trans-Canada Highway approximately 3 kilometers west of Salmon arm which is a long, straight stretch of approximately 2 kilometers. In that area the highway consists of two lanes with a paved and outer gravel shoulder on each side of the highway. There is a broken yellow line down the center of the highway and solid white lines to the outside of each travelling line, referred to as "fog lines", which designate the beginning of the paved portion of the shoulders. From the gravel shoulder there is a drop off on the south side of between 2-3 meters and less of a drop off on the north side.
- [20] The speed limit on this stretch of the Trans-Canada Highway was 90 kmh at the relevant time.
- [21] There is no highway lighting on this stretch of highway. There was evidence that sunset on August 15, 2007 was at 8:16 p.m. and the end of "civil twilight" was recorded as 8:52 p.m. Therefore, at just after 9:00 p.m. that evening, the sky was almost completely dark.
- [22] August 15, 2007 was a beautiful warm Okanagan summer evening. The roads were clear and dry.
- [23] There is considerable conflicting evidence of what occurred on this stretch of the Trans-Canada Highway on the evening in question.
- [24] Mr. Peel has no recollection of what occurred, save for the "feeling of hitting" and a "vague picture" of the impact. This is unsurprising given that he had been drinking heavily on that day, had not slept at least the night before and, as he stated, was on a "three day tear". He had also been consuming cocaine. Considering his state of inebriation, fatigue and drug use at that time, I have little confidence that any of the statements by Mr. Peel as to the occurrences of August 15, 2007 are accurate or reliable.
- [25] As Mr. Peel was driving eastbound, Mr. Good was proceeding westbound in the Honda. His wife, Brenda Good, was sitting in the front passenger seat and his daughter Jenelle was sitting behind Mr. Good. All three were wearing over-the-shoulder seat belts.
- [26] I should point out that although the Good family was travelling in the westbound lane of the Trans-Canada Highway, when the accident occurred, the Good vehicle was actually travelling in a northerly direction on the section of the highway in the seconds prior to the accident. Therefore, any residual sunset which would have been in the western sky would not have affected Mr. Good's vision.
- [27] Mr. Good's evidence was he had no recollection of seeing any headlights of vehicles behind the Honda once he turned onto the straight stretch of highway. He also stated in evidence that he was travelling at the speed limit of 90 kmh. The Honda's headlights were on.

- [28] Ms. Scott was meanwhile driving the Ford Focus westbound and recalls other westbound vehicles in front of her which were "a safe highway distance in front of the Ford Focus." She, too, testified that she had turned on the headlights and was travelling at 90 kmh. Ms. Catala was sitting in the front passenger seat and had started to doze off. She was not able to offer any evidence of events just prior to the accident.
- [29] Mr. Good then noticed the lights of an oncoming eastbound vehicle begin to drift over into the westbound lane. He assumed that vehicle must have been passing another eastbound vehicle. After a few seconds of seeing the headlights of the vehicle coming towards him in the westbound lane, the observed vehicle pulled back into the eastbound lane. Mr. Good was not concerned once the oncoming vehicle, which was the Explorer being driven by Mr. Peel, had returned to the eastbound lane.
- [30] Very shortly thereafter, likely within a few seconds, the vehicle that we now know to have been the Explorer (driven by Mr. Peel), swerved into the westbound lane, but this time the Explorer was much closer to Mr. Good's Honda. At first the Explorer was travelling head on towards Mr. Good but then began to drift further into the westbound lane and onto the shoulder of the westbound lane.
- [31] Realizing that he was in imminent danger from the oncoming vehicle, Mr. Good stated he "dropped his ice cream cone on the console", "hit the brakes and kept braking hard" when the oncoming vehicle was in the westbound lane and on the shoulder. Mr. Good also stated that when the oncoming vehicle was on the westbound shoulder, he also moved more towards the center of the highway but that he did not move over the center line.
- [32] Suddenly, as the eastbound vehicle neared Mr. Good's Honda, the Explorer suddenly veered right, back into the westbound lane, towards the Good's Honda. Mr. Good saw gravel flying from the shoulder of the highway and realized that impact was inevitable. He also stated that the oncoming vehicle never did seem to slow down.
- [33] The Explorer impacted the Honda on the front passenger's side and pushed the Honda over into the eastbound lane. Immediately before impact, when seeing the gravel flying, Mrs. Good said "oh" or "oh no". Mrs. Good died, likely immediately after impact.
- [34] Mr. Good was injured and was in shock as a result of the impact with the Explorer. He was not aware of a second impact which occurred shortly after the impact with the Explorer, possibly within one or two seconds, when the Ford Focus driven by Ms. Scott struck the left side of the Honda in the area of the driver's door and the rear door on the driver's side close to where Janelle was sitting.
- [35] Ms. Scott testified that in the few seconds leading up to the accident, she was travelling at the 90 kmh speed limit and was neither gaining on, nor falling behind the vehicle in front of her, which we now know was the Honda.

- [36] The first "unusual" action noted by Ms. Scott was when she noticed headlights come out of the eastbound lane and that the vehicle was driving eastbound in the westbound lane , towards the vehicle in front of her, i.e. the Honda. She then saw the oncoming vehicle move onto the westbound shoulder as if it was going "head on" towards the Honda which had also moved closer to the westbound shoulder. She knew something was very wrong and she described the scene unfolding in front of her as if the vehicles were "playing chicken".
- [37] Ms. Scott's reaction to this situation was to move over towards the eastbound lane, believing she had enough room to get around the Honda and the Explorer before any other oncoming traffic was likely to approach the scene. She stated that as she started to move over the center line she noticed the Explorer come off of the shoulder and so she moved further over into the eastbound lane. She then saw bright lights and there was a crash. Ms. Scott said that she felt "weightless" and her car had a "soft landing" on the driver's side and landed in a "ditch" adjacent to the eastbound lane of traffic, facing eastbound.
- [38] In her evidence, Ms. Scott stated that she had not had time to "hit the brakes". By the time of the accident her Ford Focus had gained on the Honda and she testified that she never saw the brake lights on the Honda come on. She further stated, "if I had put on the brakes I don't know what would have happened" and that her first instinct was to not hit the brakes but to try to evade "what was happening on the shoulder".
- [39] Under cross-examination Ms. Scott stated that she only saw the headlights drift over into the westbound lane on one occasion, unlike Mr. Good who had seen headlights drift over the center line on two occasions. An independent witness, Ms. Heather Schiefke, who was driving eastbound behind Mr. Peel, also stated that what we now know as the Explorer passed over the center line on two occasions. I accept the evidence of Mr. Good and Ms. Schiefke that the Explorer passed over the center line on two occasions. However, I do not as a result find that Ms. Scott's failure to see the first occasion when the Explorer crossed the line to be an indication of a lack of credibility on her part or evidence that she was not maintaining a careful lookout as was suggested at trial. I come to this conclusion based on two pieces of evidence. First, I find that Ms. Scott's vehicle would likely not have turned the bend in the highway by the time the Explorer crossed the line the first time and so would not have seen the Explorer cross the center line the first time. Secondly, even if she had turned the bend in the highway, her vehicle was much smaller than the Honda in front of her which may have blocked her sight line of the Explorer's headlights. In any event, I do not consider Ms. Scott's failure to notice the Explorer's first entry into the westbound lane to be relevant to the issue of her liability.
- [40] Finally, Ms. Scott stated on cross-examination:
- I had time to avoid [the Explorer] by going into the eastbound lane. It seemed a collision was inevitable and the other car could bounce into my path. My instincts were to get out of there and I went left.

and:

I was following at a safe highway distance and had enough time to stop without hitting the car in front.

- [41] The independent eye witness, Ms. Schiefke, was driving eastbound behind the Explorer and stated that the Explorer was getting ahead of her, even though she was travelling at the posted speed limit. She saw that vehicle move into the westbound lane and then came back into the eastbound lane and almost into the ditch on the eastbound side. The driver of the Explorer continued to correct its course and then overcorrected back into the westbound lane where it stayed until the collision. From Ms. Schiefke's view point, the Explorer had drifted into the westbound lane, then back into the eastbound lane, and then into the westbound lane for a second time in what was described as a "jerking motion". When she saw the Explorer go back into the westbound lane the second time, she could see headlights coming towards her and slowed as she could see that something was about to happen and she wanted to stay back. The Explorer stayed in the westbound lane until the collision. She recalled only one impact.
- [42] After the accident, Ms. Schiefke pulled her car to the side of the road to assist Ms. Scott and Ms. Catala.
- [43] From the time Mr. Good noticed the Explorer move into the westbound lane for the second time (when he realized there was great danger) to the time of the impact could only have covered a few seconds in time. At first the Honda was travelling at 90 kmh and the Explorer, based on the evidence of Ms. Schiefke was travelling faster than her speed of 90 kmh, the Honda and the Explorer would have been travelling towards each other at a speed of approximately 180 km per hour. I accept that for Mr. Good and Ms. Scott, there was no time to explore and consider alternative means of avoiding the clear danger.
- [44] There is no question that the person primarily responsible for this horrific collision was Mr. Peel. A question I am being asked to decide is whether Ms. Scott, in attempting to maneuver around the Honda and the Explorer in an effort to avoid a collision, was negligent in the operation of the Ford Focus. As Ms. Scott was driving a vehicle owned by Ms. Catala, Ms. Catala would also be vicariously liable for the negligence of Ms. Scott. More specifically, the question is: did Ms. Scott drive in a negligent manner so as to be partially responsible for the impact between the Honda and the Ford Focus so as to cause the injuries suffered by Mr. Good and his daughter, Janelle?

A. RCMP Investigation

- [45] The first officer on the scene after the accident was Cst. Kevin Mayes who, upon arriving at 2128 hours attempted to find the drivers and explore whether alcohol may have been involved in the accident. This was because a call to 911 had mentioned that alcohol appeared to be a factor. Two witnesses pointed to Mr. Peel as the driver of the Explorer. After approaching all three vehicles and determining there had been a fatality in the Honda, Cst.

Mayes found Mr. Peel in an ambulance and joined him in the ride to the hospital. Cst. Mayes stated that Mr. Peel was uncomfortable, was arguing with the ambulance attendants, and was waving his arms wildly. Cst. Mayes determined from his behaviour and from the liquor on his breath that Mr. Peel was impaired and arrested him for impaired driving causing death. Later, Cst. Mayes obtained a warrant for a blood sample and that sample resulted in a Certificate of Analysis indicating a blood alcohol of 274 milligrams of alcohol in one hundred millilitres of blood, i.e. the Certificate indicated that Mr. Peel's Blood alcohol reading was approximately 3.5 times the legal limit. The accuracy of this certificate was not disputed at trial.

- [46] Cst. Mayes found Mr. Peel to be incoherent and generally unable to respond to questions. He was also not satisfied Mr. Peel understood the demand for a blood sample which resulted in Cst. Mayes obtaining a blood warrant.
- [47] Mr. Peel was eventually released from hospital and was taken to a cell in the Salmon Arm RCMP detachment.
- [48] On August 16, 2007 Cst. Mayes attended a towing yard where he located the Explorer driven by Mr. Peel and owned by Mr. Chouinard. Among other items found in the Explorer, Cst. Mayes located two letters to Mr. Peel. The first was a letter from the Bank of Montreal to Mr. Peel and the second was from Community Corrections to Mr. Peel at the address which he determined to be that of Mr. Chouinard. Community Corrections in Salmon Arm was the office administering Mr. Peel's parole after his return to B.C.
- [49] Days later Mr. Chouinard attended at the detachment and refused a statement as he told Cst. Mayes he "did not want to be screwed by ICBC". Also at that time, Cst. Mayes sought a statement of Mr. Chouinard's then girlfriend, Christie Stewart, who also refused a statement at that time but did provide a statement at a later date.
- [50] Cst. Mayes also determined that Mr. Chouinard had not reported to the RCMP or any other authority that the Explorer was stolen before or on August 15, 2007.
- [51] Cst. Sean Orb also attended at the scene of the accident at approximately 2300 hours. Cst. Orb is a qualified collision analyst; however, his evidence was restricted to factual evidence, rather than opinion, due to his report having been filed outside the time period prescribed in the Rules. As well, Cst. Orb took many photographs of the scene of the accident and gave evidence explaining several photographs.
- [52] Cst. Orb's evidence identified a "rolling tire imprint" in the west bound gravel shoulder leading to the ditch on that side as well as two tire marks in the paved west bound shoulder. Weight shift marks and gouges were both located in the west bound lane; the natural inference to be drawn from these markings is that they indicate a change of direction. He also located white paint smears on a road sign post in the westbound gravel shoulder and a white plastic wheel flair to the north of the highway sign. The Explorer was white in colour. This evidence corroborates the evidence of Mr. Good, Ms. Scott and Ms. Schiefke describing

the Explorer having drifted over the westbound lane into the gravel shoulder.

- [53] Additionally, there was an antifreeze fluid spray pattern leading to the final position of the Explorer.
- [54] Regarding the Honda, Cst. Orb reported "extensive damage to the right side", i.e. the passenger side. He also noted that "the driver's door had several dents. Green paint smears were located on the rear left alloy wheel and the driver's door." The green paint smears matched the colour of the Focus. Silver paint from the Honda was found on the right side panels of the Focus and "structural components [of the Focus] were peeled towards the rear of the vehicle". Cst. Orb stated that the structural components referred to "had been attached by glue and had peeled towards the rear".
- [55] Reviewing the evidence of Cst. Orb, especially in relation to the collision between the Honda and the Focus, and the evidence of Ms. Scott, I find the same to be consistent with the evidence of Ms. Scott that the Focus, attempting to pass the pending collision by moving to the eastbound lane, deflected off of the driver's side of the Honda shortly after the much more violent impact between the Explorer and the Honda. Upon being struck by the Explorer on the right or passenger's side, the Honda was pushed into the eastbound lane where the Honda was struck with a glancing impact, sending the Focus over the eastbound shoulder and down into the ditch beside the highway.
- [56] Under cross-examination, Cst. Orb stated that he did not see any pre-impact tire marks from the Honda or the Focus.
- [57] The final member of the RCMP to testify was Cst. Steven Rose. Cst. Rose did not attend at the scene of the accident but did report to the detachment shortly after midnight of the day of the accident to assist Cst. Mayes in his effort to obtain a search warrant authorizing a blood test of Mr. Peel and otherwise assist with paper work.
- [58] Cst. Rose was also involved in the release of Mr. Peel from custody at the detachment late the next morning. He had observed Mr. Peel in his cell and engaged in a discussion with him regarding the accident and eventually went over to the cell counter in the detachment as Mr. Peel was making two phone calls. Cst. Rose was standing a few feet from Mr. Peel while Mr. Peel was making the calls and Mr. Peel was aware that Cst. Rose could hear at least Mr. Peel's side of the conversation. Cst. Rose also took notes of the conversation as it continued prior to release of Mr. Peel from custody.
- [59] Of significance during that conversation is the following:
- a) Mr. Peel said he wanted to call "Jay Smith" and provided Cst. Rose with some phone numbers.
 - b) After dialing the number, Mr. Peel told the person he had called that he had been in an accident, had gone to the hospital, received a 24 hour suspension, had hit the steering wheel, was in pain and asked the person to come pick him up at the RCMP detachment.

- c) Mr. Peel told the person he called that he "didn't know much, they haven't told me much", "I took the vehicle, I understand, I'll put it in writing", "I don't want to come back there", and "I got no money".
 - d) After hanging up he said to Cst. Rose, "I took the vehicle without consent. I drove away after an argument. I got up and left. I want to make that a part of this."
- [60] Mr. Peel did not make a statement in writing and left after calling a taxi which soon came to pick him up. Cst. Rose was clearly of the opinion that Mr. Peel was told by the person on the other end of the call to make sure he told the RCMP that he had taken the Explorer without consent. The inference to be drawn is that Mr. Peel had not called "Jay Smith" but had called the owner of the Explorer, who was Mr. Chouinard.
- [61] Mr. Chouinard testified at trial and stated he had received a call from Mr. Peel advising of the accident and that Mr. Peel told him there was a fatality, but denies having told Mr. Peel what to tell the RCMP.

IV. Facts Relevant to the Issue of Consent for Mr. Peel to drive the Explorer

- [62] At this point, it is important to recall that both Mr. Chouinard, the owner of the Explorer, and Mr. Peel, who was driving the Explorer at the time of the accident, testified at the trial. These two men had known each other for many years and had become reacquainted early in 2007 upon Mr. Peel's return to the Salmon Arm area, where they had both been raised.
- [63] Mr. Chouinard was renting a home during 2007 at an address on Centennial Drive in Blind Bay, B.C., which is a relatively rural area west of Salmon Arm. The home was large, having four bedrooms. Mr. Chouinard insisted in evidence that no one else was living in the home during the summer of 2007, which is disputed by Mr. Peel. Mr. Peel testified that on his return to the Salmon Arm area, he was on parole as a result of a conviction while he had been in New Brunswick, was in need of a place to stay and was offered a room by Mr. Chouinard in the Centennial Avenue house. Mr. Peel stated that the agreement was that Mr. Chouinard was letting him stay at the house "until he could get back on his feet." He accepted the offer and was provided with a downstairs bedroom as well as an office where he could work online as a draftsman. Mr. Peel stated that he moved into the house in late May or early June of 2007.
- [64] Mr. Peel also stated that while he was living there, Mr. Chouinard's then girlfriend, Christie Stewart, was also living at the house more than 50% of the time.
- [65] Mr. Peel admitted that during 2007 and for several years previous, he had been drinking alcohol daily, was dependent on alcohol and that his drinking problem "interfered with everything". He was also dependent on cocaine and testified that he had been diagnosed as bipolar, for which he was consuming medication.

- [66] Mr. Chouinard referred to the home, with a smile on his face, as a "party house". As previously mentioned he admits to being an alcoholic and was a "big time drinker" as of 2007. Gatherings and parties during which alcohol and narcotics were consumed in excess were the norm during the summer of 2007. The afternoon and evening of August 15, 2007 was no exception.
- [67] Mr. Peel also testified that he had been told that Mr. Chouinard had a bad temper, signs of which were readily apparent during Mr. Chouinard's testimony during the trial. Mr. Peel also admitted to having a criminal record which included several convictions for assault.
- [68] During the summer of 2007, Mr. Peel was the owner of a Dodge Durango SUV, however, Mr. Peel testified that vehicle had been impounded as of mid-July for lack of insurance but later corrected himself and stated that, in fact, his driver's license had been suspended. As there was no bus service in the area of the Centennial Drive house, Mr. Peel was therefore dependent on others for transportation. He stated in evidence that he had obtained the consent of Mr. Chouinard to drive the Explorer on occasions prior to August 15, 2007. He stated that Mr. Chouinard would allow him to drive the Explorer when Mr. Chouinard "wanted something picked up" or "to do errands". Mr. Peel stated he never kept the keys to the Explorer. Instead, he testified that they were always stored in one of a few places: in the "junk drawer" in the kitchen shared by the occupants; in Mr. Chouinard's bedroom; or, in Mr. Chouinard's pocket. On the occasions when he drove the Explorer, he stated he had always asked Mr. Chouinard for permission. Mr. Peel stated that Mr. Chouinard usually gave him permission but if it was "just me wanting to get out, he [Chouinard] would say no."
- [69] Mr. Chouinard's evidence regarding the use by Mr. Peel of the Explorer before August 15, 2007 was that Mr. Peel had gone to the store a few times for groceries. He also stated that on occasion he had refused Mr. Peel's request for the keys to the Explorer. He was also emphatic in stating more than once that he would never allow someone to drive his vehicle if that person had been drinking. In this vein, Mr. Chouinard answered, "you just do not do those things [give a car to an impaired person]. It is like stabbing someone in the eyeball with a knife or giving a child a gun".
- [70] Based upon my observations of Mr. Chouinard during the trial including his deliberate avoidance of answering many questions while under cross-examination, I have no hesitation in finding that Mr. Chouinard's sole concern while giving evidence was to attempt to avoid liability which could attach to him should it be found that he consented to Mr. Peel driving the Explorer on the evening of August 15, 2007. Mr. Chouinard expressed concern that he did not want "to get screwed by ICBC" but in reality, by avoiding questions and constantly stating "I don't know", he was deliberately attempting to subvert the true account of the events of August 15, 2007 so as to avoid liability.

- [71] On August 15, 2007, Mr. Peel had returned to the Centennial Drive house in the late morning after staying with friends in Digamous. He admitted he had been on a three day "tear" consuming plenty of alcohol and cocaine and that he had not slept during those three days. He went to lunch with Mr. Chouinard and other friends at a nearby golf course where Mr. Peel stated that he drank a "couple of cocktails" and some water.
- [72] They returned to the Centennial Avenue house in the afternoon where Mr. Peel and Mr. Chouinard were joined by Christie Stewart, her aunt and others. Based on the unreliability of Mr. Peel's evidence, and the lack of credibility of Mr. Chouinard, I find it impossible to determine exactly how much alcohol was consumed by Mr. Peel once they returned to the house. The only reliable evidence of how much Mr. Peel had to drink is found in the Certificate of an Analyst of Mr. Peel's blood sample which was filed in evidence which certified that Mr. Peel's blood alcohol level was 274 milligrams of alcohol in one hundred millilitres of blood. The sample of blood was taken about 4 hours after the time of the accident which would mean that it is more likely than not that Mr. Peel's blood alcohol level was significantly higher at the time of the accident.
- [73] At some point in time on August 15, which Mr. Peel estimated was 5:30 p.m., those present determined that guests expected for that evening's party that evening liked to drink tequila and so the plan became to prepare for a tequila party which would require several shot glasses for those participating. Mr. Peel stated that Mr. Chouinard then gave him the keys to the Explorer so Mr. Peel could drive to Sorrento, a nearby town, to pick up some shot glasses for the party. Mr. Peel testified that the trip to Sorrento took approximately 30 minutes.
- [74] Mr. Chouinard actually did admit, during his examination for discovery and at trial, that he there was a party at the house on August 15, 2007 and there were "very many people" at the party, that he consumed alcohol, and when asked what he was drinking, beer, wine or hard alcohol, he stated "Don't remember, probably a little bit of everything." He also admitted that Mr. Peel was at the party.
- [75] I find, based on all of the evidence, that when Mr. Chouinard gave the keys to the Explorer to Mr. Peel it had to be readily apparent to Mr. Chouinard that Mr. Peel had been drinking alcohol as they had been together since the late morning of that day. Again, in my view, Mr. Chouinard's repeated answer of "I don't know" represented a continued attempt by him to avoid answering truthfully. His trial testimony that he had no recollection of having given the keys to the Explorer to Mr. Peel so as to go out and purchase the shot glasses was one of the few occasions when Mr. Chouinard did not answer "I don't know". Instead, he fully denied having done so; this, to me, demonstrates that he provided a definitive answer only when he thought it might assist his position.

- [76] Also, Mr. Peel stated that on his return from purchasing the shot glasses, he did not return the keys to the Explorer to Mr. Chouinard and that Mr. Chouinard did not ask for them. If Mr. Chouinard was as concerned about Mr. Peel having used his vehicle while impaired as he claims to have been, it would make sense that he would have demanded the return of the keys. Mr. Peel did say that he returned the keys to the kitchen drawer where they were commonly stored.
- [77] From the time he returned with the shot glasses to the time of the accident, Mr. Peel testified that he consumed two shots of rye whiskey and a couple of beers.
- [78] Finally, the evidence is uncontradicted that at no time did Mr. Chouinard contact or attempt to contact the authorities to report that the Explorer had been stolen or taken without his consent. Although Mr. Chouinard denies having known that Mr. Peel had taken the Explorer on the evening of August 15, 2007 following the argument with him, he stated that by some point the next day, and in particular when Mr. Peel placed a telephone call to him from the RCMP detachment, he was aware that the Explorer was gone from his residence.
- [79] Mr. Chouinard also testified that although he recalled having received a telephone call from Mr. Peel on August 16, 2007 during which he learned of the accident, he testified that he did not tell Mr. Peel what Mr. Peel should tell the police. However, he also confirmed that he did not give a statement to the RCMP when requested to do so.
- [80] I will deal firstly with the question of whether Ms. Scott was negligent in her operation of the Ford Fusion before turning to the second issue of whether Mr. Chouinard consented to Mr. Peel driving the Explorer on August 15, 2007.

V. Liability

A. Liability of Mr. Peel

- [81] It was uncontentioned at trial that Mr. Peel was negligent. The only live question was whether liability ought to be apportioned amongst any of the other defendants.

B. Was Mr. Good Negligent in his operation of the Honda Pilot?

- [82] In action # 43541 a claim was made against Mr. Good for negligence, however, that allegation was not seriously pursued at trial. Counsel for Mr. Peel and Mr. Chouinard stated in argument that "the evidence does not indicate anything that Norman Good could have done differently to avoid or lessen the impact of the accident".
- [83] Counsel for Ms. Scott and Ms. Catala submit that Mr. Good should be apportioned some liability only if Ms. Scott and Ms. Catala are found partially responsible for the accident. This contingent argument is based on their submission that "if this court determines that it is appropriate to scrutinize the minutiae of the dynamics of the accident and find liability on any party other than Mr. Peel, Good's driving ought not to escape criticism", In their submissions they point to the evidence that Mr. Good was eating an ice cream cone, the

discrepancy in the evidence as to whether Mr. Good applied his brakes leading up to the accident, and the fact that Mr. Good admits to not having seen the Scott vehicle in his rear view mirror.

[84] In response to this argument I would say that negligence must be determined based upon the evidence as it applies to each driver in question. The outcome as to Ms. Scott's liability does not, in any way, determine the liability of Mr. Good absent evidence that establishes Mr. Good's negligence on the civil standard of proof.

[85] As the fact of the case unfolded it became readily apparent that Mr. Good's actions were not negligent. I would dismiss any claims against him.

C. Was Ms. Scott negligent in her operation of the Ford Focus?

[86] Counsel for Mr. Good and his wife's estate allege that Ms. Scott should shoulder some blame for the collision. More particularly, it is alleged that she should have recognized a dangerous situation materializing in front of her and should have braked until it was clear what was going to happen. Instead, she continued on, moving into the eastbound lane, eventually striking the driver's side of the Honda before continuing into the ditch on the eastbound side of the highway.

[87] Mr. Nairne, counsel for Mr. Good, refers to the decisions of *Power v. White*, 2012 BCCA 197 and *Stankowski v. Samant*, 1993 CanLii 586 (BCSC) which essentially find that when a driver fails to take reasonable precautions to avoid a dangerous situation, even when the other driver is driving erratically, the failure to take reasonable precautions amounts to negligence.

[88] I have also been referred to the recent decision of the Supreme Court of Canada in *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181 in which the court found that a plaintiff cannot succeed unless he or she would not have suffered the loss "but for" the negligent act or acts of a defendant and the applicability of the "material contribution" test. More specifically, Chief Justice McLachlin stated the following at para. 46:

[46] The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:

1. As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.
2. Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to the risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for"

cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

- [89] Considering the ratio of *Clements*, before a "but for" analysis can be undertaken it is necessary to determine if Ms. Scott breached the standard of care in her operation of the Ford Focus. If Ms. Scott's driving met the standard of care it will not be necessary to consider the issue of causation.
- [90] The question is, did Ms. Scott fail to take reasonable precautions to avoid an accident by maintaining her speed, pulling over the yellow line into the eastbound lane and thereby attempting to get around the pending accident between the Explorer and the Honda?
- [91] In assessing the actions of Ms. Scott, it is very important to keep in mind the very short period of time, likely a few seconds, between the time when Ms. Scott did or should have realized there was imminent danger facing her and the time within which she would have been able to react. Looking at the events in hindsight, it would be very easy to judge after a considered analysis of the alternatives available to Ms. Scott and the time within which a reasoned decision can be achieved and assessed.
- [92] Our courts have found that drivers in emergency situations are compelled to make split second decisions without the ability to assess all considerations. In *Wormell v. Hagen* [2009] B.C.J. No. 1717, Mr. Justice Goepel, cited the following extract from *Walls v. Mussels Ltd. et al* (1969), 11 D.L.R. (3d) 245 at 247-248 (N.B.C.A.):

... where the plaintiff is compelled to make a quick decision in the 'agony of the moment' he is not expected to take into account all the considerations that a calmer appraisal of the situation might present to the mind. Perfect foresight and presence of mind are not required. This rule, sometimes called the 'agony of the moment' rule, is merely a particular application of the rule that the standard of care required of both plaintiff and defendant is that of a reasonable man.

- [93] Also, in *Ayers v. Singh* (1997), 85 B.C.A.C. 307, [1997] B.C.J. No. 350, the Court of Appeal was faced with a situation of assessing the actions of a driver faced with an option of stepping on his brakes as opposed to swerving to avoid a collision and at paras. 13 and 14, Lambert, J.A. stated:

13 The trial judge in this case referred to the agony of the moment and in doing that he must have had in mind the fact that the plaintiff's first reaction was to look for a way of avoiding the accident rather than to step on his brakes. The trial judge may have been suggesting that the other course of action, namely, to step on the brakes first, would have been preferable, but is attributing that error in judgment to the agony of the moment rather than to negligence.

The Court of Appeal went on to find that there was no palpable and overriding error in that case: para 14.

- [94] In this case, it has been alleged that Ms. Scott must have been either following too closely behind the Honda or was not keeping a reasonable lookout of what was happening in front of her. Regarding the former, there is no evidence which could lead me to disbelieve Ms. Scott's evidence that she was keeping a safe highway distance behind the Honda. Mr. Good testified that he did not even see lights of any vehicles behind him in the seconds leading up to the accident.
- [95] As well, Ms. Scott stated that she did not see the brake lights of the Honda engage which would contradict the evidence of Mr. Good that he was breaking very hard once the Explorer came over to the westbound lane and shoulder. Cst. Orb testified that he did not locate any pre-impact tire marks from the Honda, which also would seem to contradict the evidence of Mr. Good that he had been breaking very hard. I suspect that in the pending chaos and "agony of the moment", with horrifying results likely, that the parties would have a difficult time recalling exactly what happened during those critical few seconds.
- [96] Ms. Scott testified that she could see the oncoming danger and described the pending collision as two cars "playing chicken". It would not be surprising if, over a few seconds, with one vehicle headed in her direction at high speed, that she may not have noticed the brake lights of the Honda engage, if they had in fact been engaged.
- [97] In retrospect, Ms. Scott had two choices. The first would have been to brake and attempt to come to a stop before colliding with either vehicle. Although braking may have prevented the Focus from impacting the side of the Honda, the efficacy of this possible aversion was not established on the evidence and such a conclusion would therefore require speculation. Furthermore, if she had braked hard while staying in the westbound lane, it is equally plausible that she could have put herself and her passenger in a position of increased risk of collision and serious injury; no one knew at the time whether the Explorer was going to continue on a line to impact either or both of the westbound vehicles.
- [98] By turning into the eastbound lane at a time when there were no immediate oncoming vehicles in that lane, Ms. Scott was attempting to steer clear of the pending crash in the westbound lane. Ms. Scott had no way of knowing that the Explorer would turn into the Honda and push it into the eastbound lane, and thus into the path of the Ford Focus.
- [99] Accordingly, I find that by attempting to turn away from the westbound lane where the oncoming Explorer was positioned to run head on into the Honda, Ms. Scott was taking reasonable care to avoid a collision and her actions within those very few seconds did not constitute negligence on her part.
- [100] Having found that Ms. Scott was not liable for the damages that resulted from the collision of the Ford with the Honda, I now turn to the second issue at trial.

VI. Did Mr. Chouinard consent to Mr. Peel operating the Explorer?

[101] As a preliminary matter, I will make a few brief comments about the witnesses that gave evidence on this issue. The Court heard from Mr. Chouinard, Mr. Peel and Ms. Stewart.

[102] As I have made abundantly clear at earlier points in these reasons, I do not find Mr. Chouinard to be a credible or reliable witness. His evidence appeared to be contrived to advance his legal position and his very selective memory as to the events on the date of the accident and the following day belies any alternative finding. Mr. Peel presented as a forthright witness in some areas but not in others. There was argument that some aspects of his testimony had been tailored to suit the interests of Mr. Chouinard. I find that argument persuasive on the evidence; particularly in light of the evidence of Cst. Rose and Ms. Stewart. Where Mr. Peel's evidence contradicts that of Cst. Rose or Ms. Stewart in any significant way, I prefer their evidence. While Ms. Stewart admits to having been a heroine user at the time of the accident, I find that she presented as a credible and forthright witness in relation to the matters before the court.

[103] Determination of this issue requires a consideration of section 86 (1) of the Motor Vehicle Act, which reads as follows:

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 highway, a person driving or operating the motor vehicle who

- a) is living with, and as a member of the family of, the owner, 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.

[104] In this case, subsection 86(1)(b) is the relevant to the determination of whether Mr. Peel "acquired possession of the motor vehicle with the consent, express or implied, of the owner". Both counsel for Mr. Good and counsel for Ms. Scott and Ms. Catala allege that Mr. Chouinard provided express or implied consent to Mr. Peel to drive the Explorer on August 15, 2007.

[105] The evidence satisfies me that Mr. Chouinard permitted others to drive his Explorer even when those persons were without a valid driver's license. Specifically, I accept the evidence presented at trial that Mr. Chouinard gave the keys to the Explorer to Mr. Peel so as to allow Mr. Peel to travel to town to pick up the shot glasses for the planned tequila party.

[106] I also accept that Mr. Chouinard had to have known that Mr. Peel had been drinking alcohol during that day. As mentioned, Mr. Peel and Mr. Chouinard had been drinking at the nearby golf course over lunch, there was more drinking on their return to the Centennial Drive house and there is further evidence that Mr. Peel was under the influence of drugs. After Mr. Peel returned with the shot glasses, the evidence is clear that in the evening there were a number of people present at the party and that there was drinking at the party.

[107] In *Morrison v. Cormier Vegetation Control*, [1996] B.C.J. No. 2601 (C.A.) [Morrison] at para. 24, Goldie, J.A. stated:

It is apparent the legislature has imposed a heavy burden on those who have within their power the control of motor vehicles. In the language of the old authorities the mischief aimed at is the perceived irresponsibility of owners in their control of the possession of motor vehicles. The reason for legislative intervention may be traced, in part at least, to the appalling consequences of reckless use of motor vehicles. Irresponsibility on the part of those who may deny or confer possession of motor vehicles may be seen as the reason for the legislative initiative. The legislation in question must be regarded as remedial.

[108] The quotation of Goldie, J.A. has been referred to often and was recently cited in the Court of Appeal decision of *Snow (Committee of) v. Friesen*, 2010 BCCA 416.

[109] The *Morrison* decision also included a discussion of how the availability of keys to the vehicle and the "free exercise of the owner's will" can amount to express consent under then section 79(1) of the Motor Vehicle Act (now section 86 (1)). In that case, the defendant driver was employed as a salesman by the defendant car dealership. As a salesman, the driver had access to the spare keys to vehicles in stock at the dealership for the purpose of demonstration of vehicles to customers of the dealership. The salesman, contrary to the policy of his employer, took a luxury vehicle to an out-of-town auto show without the knowledge of the employer. At paras. 27 and 28 Goldie, J.A. stated:

[27] Possession of an automobile is acquired with the transfer of the means of control. The vehicle itself may be, say in a parking lot, but when keys which enable their possessor to enter and operate the vehicle, wherever it may be, possession is acquired within the meaning of s-s 79(1) of the Motor Vehicle Act. The transfer of the means of possession - the keys to open and operate the vehicle - convey the required degree of exclusivity of control. Cf: *Holt v. Dawson*, [1939] 3 All E.R. 635 (C.A.). I emphasize that in the case at bar there has been express consent to the Employee acquiring control of certain automobiles through the availability of the keys; the custody of the D plates and the key to the place where they were kept. This consent, as contrasted with instructions of use, was never revoked or limited.

[28] The arrangements described in detail by the trial judge alter the principle of statute. Carter, by the "free exercise of the owner's will" enabled the Employee to acquire possession of the white Alfa on 23 May 1993 and whether the use to which he put it thereafter was one of which Carter would approve is immaterial if, in his driving or operation of the vehicle, he was at fault.

[110] In the case at bar, Mr. Chouinard agreed he had, on previous occasions, consented to Mr. Peel driving the Explorer and Mr. Peel was made aware of where the keys could be located, that is, in Mr. Chouinard's bedroom, on his person or in the "junk drawer" in the kitchen of the house. Mr. Peel testified that the keys were "usually in the junk drawer" or "he (Mr. Chouinard) would hand me keys or tell me where they were". The two letters found in the Explorer by the RCMP after the accident, both addressed to Mr. Peel, one of which was to

the address on Centennial Drive, amount to further evidence that Mr. Peel had been using the Explorer on prior occasions. The evidence presented at trial leads me to find that there was no agreement between Mr. Chouinard and Mr. Peel that required Mr. Peel to specifically ask to drive the car on each and every occasion.

- [111] Additionally, Mr. Peel's practice, based on his own evidence, was to return the keys to the kitchen, either in the drawer or on the counter above, which is what he did on returning to the house on August 15, 2007 after using the Explorer to pick up the shot glasses. Mr. Chouinard made no attempt to take away or hide the keys from Mr. Peel during the early evening of August 15, 2007. When Mr. Peel got into an argument with Mr. Chouinard during the party that evening, the keys were still in the kitchen drawer where they had been placed not long before. The evidence shows that he took the keys and proceeded to back out towards the road. I accept that Mr. Chouinard either saw Mr. Peel leave or was made aware that he had left soon thereafter.
- [112] I find that on August 15, 2007, Mr. Chouinard voluntarily handed the keys to the Explorer to Mr. Peel to enable Mr. Peel to drive to pick up some shot glasses. At that time, Mr. Chouinard knew that Mr. Peel had been drinking that day and he also knew that Mr. Peel continued drinking at the Centennial Drive house into the evening. Mr. Chouinard never asked for the keys to be returned to him. Instead, they remained in place accessible to Mr. Peel. I am satisfied on balance that Mr. Chouinard never revoked the express consent he had given to Mr. Peel earlier in the day.
- [113] Having found Mr. Chouinard expressly consented to Mr. Peel driving the Explorer that day, there is no need to consider any implied consent.

VII. Conclusion

- [114] The claims against Ms. Scott, Ms. Catala and Mr. Good are dismissed. Having found that Mr. Chouinard consented to Mr. Peel driving the Explorer, Mr. Chouinard is liable pursuant to s. 86 of the Motor Vehicle Act.

"The Honourable Mr. Justice Jenkins"

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