

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Knitter v. Dennis*,
2025 BCSC 497

Date: 20250320
Docket: M190208
Registry: Vancouver

Between:

Adam Janusz Knitter

Plaintiff

And

Mervin Joseph Dennis and Geraldine Ann Tom

Defendants

- and -

Docket: M208366
Registry: Vancouver

Between:

Krzysztof Wrzosek

Plaintiff

And

Adam Janusz Knitter, Geraldine Ann Tom and Mervin Joseph Dennis

Defendants

Before: The Honourable Justice MacNaughton

Reasons for Judgment

Counsel for the Plaintiff in Action M1902080:

S. Dhaliwal

Counsel for the Plaintiff in Action M208366:

D. Kolb

Counsel for the Defendants Mervin Joseph
Dennis and Geraldine Ann Tom in both
actions:

R. Hodgins
K. Richards, Articled Student

Counsel for the Defendant Adam Janusz
Knitter in Action M208366:

D. Merchant

Place and Dates of Hearings/Trial:

Vancouver, B.C.
October 15–18 and 21, 2024

Place and Date of Judgment:

Vancouver, B.C.
March 20, 2025

Table of Contents

INTRODUCTION 4

CONCLUSION..... 5

EVENTS OF SEPTEMBER 3, 2018 5

 Uncontroverted Facts 5

MR. KNITTER’S AND MR. DENNIS’ COMPETING VERSIONS OF EVENTS 8

 Mr. Knitter’s Version 8

 Mr. Dennis’ Version 9

OTHER WITNESSES 12

 Ms. Tom..... 12

 Mr. Wrzosek 13

 Lynsey Gray and Brock Johnson 13

 Brenda Duke 15

 Constable Kenneth Jaques 16

EXPERT EVIDENCE 17

 Mr. Sdoutz 17

 Mr. Luker 20

 Findings Based on the Expert Evidence 22

CREDIBILITY AND RELIABILITY..... 24

 Legal Framework..... 24

 Findings on Credibility and Reliability 25

Mr. Dennis 25

Mr. Knitter..... 27

ISSUES..... 29

LIABILITY..... 29

 Legal Framework..... 29

FINDINGS OF FACT AS TO THE CIRCUMSTANCES OF THE COLLISION 33

LIABILITY ASSESSMENT 38

 Analogous Case Law 38

 Mr. Knitter’s liability 40

 Mr. Dennis’ liability..... 41

Introduction

[1] These reasons concern liability for a September 3, 2018, two-vehicle, rear-end collision that occurred on Provincial Highway #3 (“Hwy 3”), between Hedley and Princeton, British Columbia (the “Collision”). September 3 was the Monday of the Labour Day long weekend in 2018. Mr. Knitter and Mr. Dennis were both driving westbound on Hwy 3.

[2] Two actions remain outstanding as a result of the Collision:

- a) Action No: M190208, in which Adam Knitter is the plaintiff and Mervyn Dennis, and his spouse, Geraldine Tom are the defendants. In response, Mr. Dennis and Ms. Tom have denied liability.
- b) Action No. M208366, in which Krzysztof Wrzosek, Mr. Knitter’s friend and front seat passenger at the time of the Collision, is the plaintiff and Mr. Knitter, Mr. Dennis, and Ms. Tom are the defendants. In response, all three defendants have denied liability.

[3] On August 3, 2023, Associate Judge Vos ordered that the two actions be tried together on the issue of liability.

[4] The Collision occurred near the intersection of Hwy 3 and Taylor Mill Road. On the day of Collision, Mr. Knitter owned and was driving a two-door 2000 BMW 328i (the “BMW”). Due to its age, the BMW was not equipped with a Restraint Control Module system, commonly referred to as a “Black Box”.

[5] Mr. Dennis and Ms. Tom owned, and Mr. Dennis was driving, a 2017 Ford F150 pickup truck (the “Ford”). Mr. Dennis was alone in the Ford. The Ford was equipped with a Black Box.

[6] There is no issue about the working order of either vehicle. Mr. Dennis had installed after-market tires on the Ford. He described them as top of the line, specialty, off-road, and on-highway tires. The significance of the tires was discussed

by the experts referred to later in these reasons. Both agreed that the tires minimally affected the Ford's braking time.

Conclusion

[7] For the reasons that follow, I find that Mr. Knitter crossed a solid yellow line and moved into the oncoming (eastbound) lane to overtake the Ford on the left. He was driving at a high rate of speed. Mr. Dennis slowed slightly to allow Mr. Knitter to pull in front of him. Seconds after Mr. Knitter pulled back into the westbound lane in front of Mr. Dennis, he struck a deer in the road. He slammed on his brakes and came to a stop directly in front of Mr. Dennis.

[8] Mr. Dennis did not realize that Mr. Knitter had hit a deer. When he saw the BMW's brake lights come on, he began emergency braking but was unable to stop in time and rear-ended it.

[9] I assess liability for the Collision 90% to Mr. Knitter and 10% to Mr. Dennis. Mr. Dennis contributed to the Collision because he was speeding and had installed after-market tires that affected his braking time, although minimally.

Events of September 3, 2018

[10] Mr. Knitter and Mr. Dennis gave irreconcilable versions about how the Collision occurred. Both versions cannot be true. There are, however, several uncontroverted or independently verified facts that I will now summarize.

Uncontroverted Facts

[11] Mr. Knitter and Mr. Wrzosek were travelling from Creston, where they had spent the long weekend, to the Lower Mainland where they both lived. Mr. Wrzosek testified that he needed to return to the coast to start a course the following day. He had long-awaited admission into the course.

[12] Mr. Dennis and Ms. Tom live in Douglas Lake, about a two-hour drive from Princeton. Mr. Dennis works as a haul truck driver at the Copper Mountain Mine in Princeton. His work schedule involved 12-hour shifts, 4 days on / 4 days off. When

working, Mr. Dennis stayed in a motel in Princeton rather than commuting to and from Douglas Lake.

[13] On the day of the Collision, Mr. Dennis worked a 12-hour shift at the mine. He said he was not tired because he was used to working 12-hour shifts, having done so for about eight years.

[14] After his shift, Mr. Dennis returned to his motel. As was his habit, he lay on his bed for a time and then decided to visit a friend, who lived east of Princeton on Old Hedley Road. He began the trip, driving eastbound on Hwy 3. Part way there, he changed his mind because it was getting late.

[15] He stopped at a parking area at the Old Hedley Road, near a bridge over the Similkameen River, and walked down to the water. After a short time, Mr. Dennis returned to the Ford and started driving westbound back to Princeton. He estimated that the Collision occurred about 20 minutes later. This estimate was confirmed by information obtained from the Ford's Black Box, which indicated that 17 or 18 minutes had elapsed between Mr. Dennis last starting the Ford to when he turned it off after the Collision.

[16] When driving westbound along the stretch of highway near the site of the Collision, the Similkameen River will be on the driver's right and a modular home park on the left. There are no streetlights. Any light illuminating the road comes from the modular home park.

[17] The Collision occurred at about 8:15 p.m., on a relatively straight stretch of Hwy 3 before it curves to the right (north) into the Town of Princeton. It was dark, and the road was level, flat, and dry. The posted speed limit was 90 km/h.

[18] On that stretch of Hwy 3, there is one lane of travel in each direction. The lanes are separated by a solid yellow line for westbound travellers, and a broken yellow line for eastbound travellers. As both Mr. Knitter and Mr. Dennis were travelling westbound, they were subject to the solid yellow line prohibiting passing.

[19] Immediately before the Collision, Mr. Knitter struck a deer with the front of his BMW. Seconds later, Mr. Dennis rear-ended Mr. Knitter.

[20] The Ford's Black Box recorded data about Mr. Dennis' operation of the Ford for the five seconds before the Collision. It showed that Mr. Dennis was travelling at 99 km/h, exceeding the posted speed limit.

[21] There were no independent witnesses to the Collision itself.

[22] Two witnesses, Lynsey Gray and Brockton Johnson, came upon the aftermath of the Collision. They were also travelling westbound on Hwy 3. They arrived after the moment of impact, although it is not entirely clear how long after. That said, Mr. Johnson's call to the police was recorded at 8:15 p.m., which is when Ms. Tom testified that she received a call from Mr. Dennis saying that he had been in an accident. This suggests, on a balance of probabilities that Ms. Gray and Mr. Johnson arrived on scene almost immediately after the Collision.

[23] The front and back ends of Mr. Knitter's BMW were damaged in the Collision. Mr. Dennis' Ford suffered corresponding front-end damage. There is no dispute that the front-end damage to the BMW was caused by a deer strike and the rear-end damage was caused by the Ford. Both vehicles were towed from the scene.

[24] Two experts testified at trial: Gerald Sdoutz for Mr. Dennis and Craig Luker for Mr. Knitter. Both were qualified to give evidence as engineers with expertise in accident reconstruction and analysis of crash data retrieved from vehicles equipped with Black Boxes. The experts had previously worked together and were well-known to each other.

[25] About two weeks after the Collision, using the Ford's data link connector, Mr. Sdoutz downloaded data from the Ford's Black Box. One of his colleagues inspected and photographed the damage to the BMW and the Ford. Mr. Sdoutz prepared a July 17, 2024 report.

[26] Using the data Mr. Sdoutz had downloaded, Mr. Luker prepared an August 24, 2024 report reviewing Mr. Sdoutz' analysis.

[27] In response, Mr. Sdoutz prepared a September 25, 2024 report. Both experts agreed on the pre-crash data obtained from the Black Box. The only real difference in their opinions was with respect to whether the Collision was unavoidable. I will discuss this later in these reasons.

Mr. Knitter's and Mr. Dennis' Competing Versions of Events

Mr. Knitter's Version

[28] Mr. Knitter testified that he was driving westbound on Hwy 3 when a deer suddenly appeared in front of his car. He said that he "hit his breaks" at the same time as he struck the deer. He said the BMW was the only vehicle travelling on the section of the road approaching the location of the Collision. He had not seen a deer during his drive to that point.

[29] Mr. Knitter testified that he did not have time to react or stop his BMW. He applied his brakes but had already hit the deer when his breaks engaged. He said that striking the deer did not stop his car, and described the impact as very low.

[30] Mr. Knitter described the steps he took between the deer strike and the Collision. In particular, he said that:

- a) he pulled his BMW onto the right shoulder of Hwy 3;
- b) put it in park;
- c) engaged his hand brake;
- d) turned on his emergency flashers;
- e) turned off the car in response to a noise from under the hood;
- f) kept his foot on the brake pedal; and

g) engaged in a conversation with Mr. Wrzosek.

[31] Mr. Knitter said that he recalls seeing the headlights of a car approaching from the right-hand bend behind him in his rear-view mirror. Presumably, the vehicle he saw was the Ford. Then an “explosion occurred” as Mr. Dennis rear-ended the BMW. Mr. Knitter estimated that more than three seconds but less than a minute passed between the deer strike and the Collision.

[32] Mr. Knitter testified that he believed he was “totally off the road” when Mr. Dennis collided with him. When he got out of the BMW, his sense was that he was close to the grass, bordering the right shoulder of Hwy 3.

Mr. Dennis’ Version

[33] Mr. Dennis testified that he was driving westbound on Hwy 3 at about 100 km/h, approaching the upcoming right curve into Princeton. There were no vehicles in front of his Ford, but perhaps as many as 10 vehicles behind it. Mr. Dennis was familiar with the site of the Collision.

[34] In the sideview mirror, Mr. Dennis saw the headlights of a vehicle coming from behind him, driving in the oncoming eastbound lane, and passing several cars. He considered the driving to be erratic, referring to the speed at which the vehicle was approaching, the fact that it cut in front of him, and the fact that they were approaching a corner. He testified that he “knew it was not the right thing to do” and that the vehicle passed him at high speed.

[35] In cross-examination, Mr. Dennis agreed that if he was travelling at 100 km/h, the vehicle, which we know to be the BMW, had to be driving faster than he was. Mr. Dennis said he touched his brakes to indicate that he was slowing to allow the BMW to pull in front of him. The BMW cut into the westbound lane directly in front of the Ford, braking as it did so.

[36] Mr. Dennis recalled thinking that the BMW was travelling very fast and was braking due to the upcoming curve in the road. When he realized that the BMW was

braking hard in front of his Ford, Mr. Dennis testified that he double-braked (put both of feet on the brake pedal) to try to stop. While Mr. Dennis was able to slow the Ford down, he was unable to stop it completely, and he rear-ended the BMW squarely from behind in the westbound lane. The BMW was pushed forward. According to Mr. Dennis, the BMW and the Ford came to rest in the westbound lane, about 50 feet apart.

[37] Mr. Dennis testified that before he got out of the Ford, and immediately after the Collision, he called Ms. Tom. He told her that he had been in an accident and that he thought he had “totalled” the Ford, which was new. He said that a vehicle swerved in front of him, he had no time to react, and he did not know why the vehicle had stopped. Another vehicle almost rear-ended him. He told Ms. Tom that the “racket” she was hearing on the phone was from vehicles driving over debris on the road, and that he was going to move the Ford off the road to avoid being hit from behind.

[38] Mr. Dennis testified that another pickup truck was travelling westbound, immediately behind his Ford, and the driver had to swerve to avoid hitting him. The truck stopped ahead of the BMW, on the eastbound side of Hwy 3. Mr. Dennis spoke to the driver, but did not obtain his contact information.

[39] Mr. Dennis described the Collision as “all happening very fast”, within “two to three seconds”, and that it was “all so fast it was crazy”. At his examination for discovery, Mr. Dennis said that the Collision occurred within a split second. At trial, he suggested it could have been 3–4 seconds. At the time, he described the experience as similar to a brake check, where someone brakes suddenly to cause a collision or to scare another driver.

[40] Mr. Dennis did not see the deer prior to the Collision. He did not know why the BMW braked as hard as it did after cutting in front of him. He only learned that Mr. Knitter had struck a deer after the Collision.

[41] Mr. Dennis testified that the BMW remained on the road.

[42] At some point, the police were called and arrived on scene. An RCMP officer checked on Mr. Dennis to see if he had been drinking, but did not ask him what happened. Mr. Dennis did not know why he was not asked to give a statement.

[43] In cross-examination, he was asked why he did not explain his version of events to the officer. He said that the officer went first to the car in front, and he assumed that the driver and passenger told the officer everything. When pushed, he said he thought that what happened was obvious, and he believed that the other driver would tell the truth.

[44] In a subsequent call to Ms. Tom, Mr. Dennis told her he was being taken to the Princeton Hospital. Ms. Tom and the couple's son, who were *en route* to Douglas Lake from Kelowna, turned around and drove to meet him at the hospital.

[45] All three men involved in the accident were taken to the hospital in the same ambulance. Mr. Knitter was lying on a gurney, Mr. Dennis said he was sitting on the passenger side, which I took that to mean the right side. Mr. Wrzosek was standing up. Mr. Dennis testified that Mr. Wrzosek kept repeating that when he and Mr. Knitter passed the Ford and swerved in front of it, he saw a deer eating in the road and they hit it. Mr. Dennis said that the man on the gurney put his hand up as if to try to stop Mr. Wrzosek from repeating himself.

[46] Mr. Knitter testified that the driver of the Ford apologized to him in the ambulance and said he was tired after working a 10-hour shift at the mine. Mr. Dennis denied apologizing. Mr. Wrzosek recalled Mr. Dennis being in the ambulance, but testified that there had been no discussions between them.

[47] Ms. Tom and her son arrived at the hospital about 15 minutes after Mr. Dennis. While they were in the waiting room with Mr. Wrzosek, Mr. Dennis testified that the "young fellow" (Mr. Wrzosek) kept talking about the Collision, saying that when the BMW swerved around the Ford, he saw the deer in the middle of the road and they struck it. Mr. Wrzosek confirmed that he had occupied the waiting room with Mr. Dennis during his testimony but denied the conversation occurred.

[48] On arrival at the hospital, Mr. Dennis' blood pressure was high, but, after about an hour, he was released. He, Ms. Tom, and their son went back to the motel.

[49] The following day, the family went to the scene of the Collision and took photographs. They then visited the towing yard to retrieve Mr. Dennis' belongings from the Ford. Coincidentally, they did so at the same time as Mr. Knitter and Mr. Wrzosek, who were similarly retrieving belongings out of the BMW. Mr. Knitter and Mr. Dennis exchanged insurance information.

[50] During cross-examination, it was suggested to Mr. Dennis that he was tired and had slept at the turning area before turning around. Mr. Dennis was adamant that he was not tired and there is no evidence to suggest that he was. Despite cross-examination, Mr. Dennis remained certain about what he heard Mr. Wrzosek repeat in the waiting room and that he was not confused about what he recalled. He also remained certain that the BMW passed his vehicle, cut in front of him, and then braked suddenly.

Other Witnesses

[51] I also heard evidence from Ms. Tom, Mr. Wrzosek, two post-Collision witnesses, the two expert engineers, the RCMP officer who attended the scene, and an ICBC adjuster who received the first report of loss from Mr. Knitter.

Ms. Tom

[52] Ms. Tom explained that she received a phone call from Mr. Dennis at 8:15 p.m. and learned that he had been in an accident. She and their son drove to Princeton to meet Mr. Dennis at the hospital.

[53] While Ms. Tom was in the hospital waiting room with Mr. Dennis and their son, Mr. Wrzosek was sitting across from them. She knew that he was the passenger in the BMW because he said he was catching a ride to go to school. She testified that Mr. Wrzosek said something to the effect of "we just pulled in and boom hit the deer; I just saw the deer eating something on the road and we hit the deer". In

cross-examination, Ms. Tom said that the passenger was looking right at her and Mr. Dennis when he made those statements.

Mr. Wrzosek

[54] Mr. Wrzosek testified that immediately prior to the Collision, he was gazing out the passenger window, thinking about school. Mr. Knitter yelled his name, and he looked in Mr. Knitter's direction and in the left side of the windshield, he saw the head of a deer. He said that the deer strike was "so fast" that he was unable to say whether Mr. Knitter braked.

[55] Mr. Wrzosek testified that less than a minute elapsed between Mr. Knitter hitting the deer and Mr. Wrzosek seeing lights in the passenger side mirror of the BMW and a "massive" impact that "seemed like" it happened about 3–5 seconds later. In cross-examination he agreed that it could have been a minute later but said that it happened so fast he could not tell. He also described the impact as "instant".

[56] Mr. Wrzosek recalled the BMW drifting slowly to the right, parallel to the road. He could not recall where it came to rest. He testified that someone opened the door of the BMW and escorted him away. In cross-examination by Mr. Merchant, he agreed that when he got out of the BMW, he was close to the grass along the shoulder of the Highway.

[57] Mr. Wrzosek agreed in cross-examination by Mr. Hodgins that he did not see Mr. Knitter put his car in park, put on the hazard lights, or put on the parking brake.

[58] Mr. Wrzosek recalled Mr. Knitter passing two or three cars between Hedley and the Collision site but testified that Mr. Knitter had not passed Mr. Dennis before the Collision.

Lynsey Gray and Brock Johnson

[59] Ms. Gray and Mr. Johnson witnessed the aftermath of the Collision. They were travelling westbound on Hwy 3 in Ms. Gray's black Honda Civic, on their way to Vancouver, from Salmo where they spent the Labour Day long weekend. At the

time, they were romantic partners. They arrived at the scene at around 8:15 p.m., very shortly after the Collision per the Ford's Black Box data, a fact which was confirmed by the timing of Mr. Johnson's recorded 911 call.

[60] Both Ms. Gray and Mr. Johnson were independent witnesses. They testified in a forthright manner about what they did and did not remember about the scene of the Collision.

[61] Prior to their evidence, Ms. Gray and Mr. Johnson discussed with each other that they had been asked to testify but not what they would say. Each gave evidence that did not mirror, but was generally consistent with, the other's. They were confident about key pieces of evidence that they observed.

[62] When interviewed by an ICBC adjuster, both witnesses believed that Mr. Johnson had been driving his vehicle. However, they later recalled that Ms. Gray was driving because her Honda had a manual transmission, and Mr. Johnson did not drive "stick".

[63] Ms. Gray had a distinct recollection of a silver BMW passing her, at a high speed, somewhere between Hedley and Princeton. She was imprecise as to when the car passed but thought it was within 20 minutes of her arrival at the scene of the Collision. Ms. Gray commented to Mr. Johnson that the BMW was travelling quite fast. During cross-examination, Ms. Gray said with 100% certainty that the BMW that passed her earlier was the BMW involved in the Collision. She said that she had that distinct recollection at the time. She confirmed that the BMW stood out to her because it was travelling fast and seemed a bit reckless.

[64] Ms. Gray recalled that the Collision occurred on a straight stretch of highway with one lane of travel in each direction.

[65] Mr. Johnson said that it was dark as he and Ms. Gray approached the scene of the Collision. Mr. Johnson saw flashing hazard lights and smoke coming from the BMW, which was stopped in the middle of the road.

[66] As the Honda Civic approached the scene, Mr. Johnson recalled that Ms. Gray had to brake hard to avoid hitting the BMW. He said, with confidence, that the BMW was stopped on an angle facing westbound and straddling the eastbound and westbound lanes. Ms. Gray was less certain of the exact position of the two vehicles, but she generally recalled vehicles being stopped on the road, and she said she was not sure that it would have been easy to pull around the Collision.

[67] Ms. Gray pulled her Honda Civic to the shoulder of the highway. Mr. Johnson approached the BMW. The driver was alone in it and appeared to be in shock. Mr. Johnson asked the driver to pull the BMW over to the shoulder, as he was concerned about it staying on the road. The driver of the BMW did so. Mr. Johnson was not cross-examined on this evidence. He was confident about the fact that he asked the driver to pull the BMW over to the shoulder. I accept his evidence in that regard. It is the kind of thing I would expect a person in Mr. Johnson's circumstances, coming upon a collision on Hwy 3, to remember even so long after it happened. It is unclear where Mr. Wrzosek was when Mr. Johnson spoke to the driver of the BMW. In his evidence, Mr. Wrzosek recalled that he had been escorted out.

[68] Ms. Gray's and Mr. Johnson's evidence was not significantly undermined in cross-examination. When it was suggested to Ms. Gray that her recollection of the Collision events may not have been clear, she responded that "she remembered clearly everything that she gave evidence about".

Brenda Duke

[69] I also heard evidence from Brenda Duke, the ICBC telephone adjuster who took Mr. Knitter's call. Before Ms. Duke retired in 2020, she had 25 years of experience as an ICBC claims adjuster and 15 years of experience as a telephone claims adjuster, handling five or six thousand calls a year. Unsurprisingly, she had no independent recollection of Mr. Knitter's report of the accident to her.

[70] Ms. Duke acknowledged that her role was not to record what Mr. Knitter said to her verbatim in her electronic notes. Rather, she described her electronic notes as

a brief description or interpretation of what she was told by Mr. Knitter about the incident, for ICBC's internal purposes. In this case, because injuries were involved, she referred investigation of the file to an ICBC adjuster. She knew that the assigned adjuster would take statements from everyone involved.

[71] Nevertheless, Ms. Duke testified that when taking a call, she endeavoured to accurately record what she was told. In the written record of the First Notice of Loss, completed by Ms. Duke during Mr. Knitter's call, she recorded that he "was hit by a deer on the front end and then immediately rear-ended" by the Ford. In the Snapshot: Loss Details, which she completed at the same time, she wrote that "Suddenly a deer ran out from the side of the road and hit [insured's] car on the front end. Seconds later, [Third Party] behind [insd]. [Third Party] rear ended [insd]."

[72] In re-direct, Ms. Duke confirmed that she would not have recorded that the deer strike and the rear-end collision occurred immediately after each other unless Mr. Knitter had reported this information to her. She "definitely" would not have made up the fact that the Collision occurred seconds after the deer strike. I accept her evidence in that regard. She was skilled and experienced in recording the details drivers provided her in respect of motor vehicle accidents.

Constable Kenneth Jaques

[73] Cst. Jaques was the Princeton RCMP officer who attended the scene. He prepared a report indicating that the 911 call came into the RCMP at 8:15 p.m. He did not get to the scene of the Collision until after about 9:05 p.m. and he left just over 15 minutes later, around 9:22 p.m. It was clear from his evidence that the Collision was not memorable.

[74] Cst. Jaques recorded that the speed limit in the Collision area was 90 km/h. He also noted that, at the time of the Collision, it was dark, the weather was clear, the road was dry, and the road conditions were good. He took some photographs, but they were not particularly helpful as the vehicles had been moved by the time he arrived.

[75] Cst. Jaques' report notes that the two vehicles involved in the Collision were travelling straight ahead. It says that the damage to the BMW was to the entirety of the front and back ends and the damage to the Ford was to the entirety of the front end.

[76] The synopsis in the RCMP report provides that, as soon as the BMW contacted the deer, Mr. Knitter slammed on the BMW's brakes and the Ford rear-ended it.

[77] Cst. Jaques testified that the Collision appeared to be a standard motor vehicle accident with no concerns. As a result, he did not complete a detailed investigation, only an MV6020 (an ICBC form with respect to the Collision) in which he entered codes including codes for apparently contributing factors. However, he conceded that he did so based on a basic understanding of the Collision and that the factors he entered were only factors that might have influenced how the Collision occurred, not ones that had actually done so. He did not issue any violation tickets or lay any charges.

Expert Evidence

Mr. Sdoutz

[78] Mr. Sdoutz testified about:

- a) the process of downloading the Ford's Black Box data;
- b) how data was recorded;
- c) the intervals, in seconds, at which the Black Box samples and records information; and
- d) the type of data recorded, including the speed at which the Ford was travelling, changes in its steering direction, and whether the brake pedal was engaged and, if so, how hard.

[79] Mr. Sdoutz also explained the concept of acceleration and deceleration (braking) and that 1g is the maximum braking a driver can achieve as, at this point, a vehicle is completely stopped. Finally, he explained that the Black Box records how often a car goes through an ignition cycle and how long it has been since the last time the engine was started.

[80] In Mr. Sdoutz's July 17, 2024 report, he concluded:

- a) The BMW's front-end damage was consistent with a deer impact.
- b) The BMW's rear-end damage and the Ford's front-end damage indicated that at impact, the two vehicles were at the same westerly heading, with the Ford slightly offset to the left/south of the BMW.
- c) From the Black Box data, five seconds prior to impact, the Ford was travelling at a constant speed of 99 km/h.
- d) About 2.5 seconds prior to impact, Mr. Dennis began to brake. He did so in two stages. At first, he braked moderately hard and, just before impact with the BMW, he braked maximally.
- e) The Ford had slowed to about 47 km/h when it struck the BMW.
- f) For five seconds prior to impact, the Ford travelled in a straight line.

[81] In cross-examination, Mr. Sdoutz testified that he was initially retained on September 17, 2018, to download the Ford's Black Box data. He confirmed, based on his July 17, 2024 report that, according to the service brake on/off column in the data, Mr. Dennis first put his foot on the brake 2.5 seconds before impact. Put differently, in the five seconds of recorded data before impact, Mr. Dennis did not take his foot off the gas pedal until 2.5 seconds before impact.

[82] Mr. Sdoutz agreed in cross-examination that if Mr. Dennis said he was braking in the time before the Black Box recorded him doing so at 2.5 seconds before impact, that could not be true.

[83] When cross-examined about the force of impact, Mr. Sdoutz testified that, while it was not possible to determine where the vehicles came to rest based on the damage, the impact between the vehicles was fairly close to the center of the vehicles (meaning between the front two seats). In other words, it was a straight-on collision. Although he would not rule out the possibility that the BMW was slightly rotated, he opined that, on a balance of probabilities, the impact went straight through the BMW upon being rear-ended. As a result, the BMW was pushed forward.

[84] When asked about the role of fatigue in human error in accidents, Mr. Sdoutz agreed that fatigue was a factor, but to an unquantifiable degree. He also agreed with the principle that fatigue can impact a persons' perception of events and their physical responses to events, but again said that its effect would be difficult to quantify.

[85] He agreed that the data he downloaded from the Black Box provided pre-crash data at 10 intervals per second. When asked why he used the data correlating to two intervals per second in his July 17, 2024 report, he replied that he had only been asked to provide a summary of the data for the purposes of the report.

[86] Mr. Sdoutz agreed that Mr. Luker's charts, using pre-crash data at 10 intervals per second, were accurate. He also agreed with Mr. Luker's opinion that if Mr. Dennis had immediately begun emergency braking, he would have been able to stop before colliding with the BMW. He took no issue with Mr. Luker's calculations but said that Mr. Luker's conclusion assumed that the BMW had fully stopped in the five seconds before impact. From the Black Box data, we know that Mr. Dennis did not start emergency braking until 2.5 or 2.6 seconds before the Collision. Instead, he engaged in two-phase braking.

[87] He agreed in cross-examination that, if the BMW was still moving forward at the point of impact, and if Mr. Dennis had applied maximum braking, he would not have rear-ended the BMW. He also agreed with Mr. Luker's conclusion that if the Ford was travelling at the posted speed limit of 90 km/h and had applied maximum

braking in the 2.5 seconds before impact, the Ford would have stopped 18 metres before the Collision, and Mr. Dennis would not have hit the BMW.

Mr. Luker

[88] In Mr. Luker's August 30, 2024 responsive report, he concluded that:

- a) The BMW had front-end damage consistent with a significant deer impact.
- b) The front of the Ford hit the rear of the BMW while both vehicles were generally parallel with one another, and the Ford was offset to the left of the BMW.
- c) The Ford was travelling in a straight line for at least the five seconds before impact.
- d) The Ford approached the BMW at 99 km/h, 9 km/h above the speed limit.
- e) Mr. Dennis started to brake 2.6 seconds before impact. Mr. Luker described the initial deceleration of the Ford as "quite abrupt" and then Mr. Dennis eased off his braking. From 2.3 to 0.8 seconds before impact, he braked at an average of 0.49g that Mr. Luker described as "moderately hard". From 0.8 seconds until the moment of impact, Mr. Dennis built to braking at an average of 0.93g, which Mr. Luker called "full emergency braking".
- f) Mr. Luker measured the emergency braking at 10 intervals per second, as recorded by the Black Box. His final calculation was slightly different from that calculated by Mr. Sdoutz, because Mr. Sdoutz measured braking at two intervals per second.
- g) The significance of the two-phase braking is key. If Mr. Dennis had used full emergency braking from the point at which he first perceived the BMW as a hazard, and leaving all other values unchanged (that is the braking begins from a speed of 99 km/h, and occurs at the same time and same

distance from impact), then Mr. Luker opined that Mr. Dennis could have avoided the Collision.

- h) Repeating the analysis set out in g) above, the Collision would have been more avoidable had the Ford's starting speed been the posted speed limit of 90 km/h.
- i) At the moment of impact, the Ford's speed was about 47 km/h. This is consistent with the Black Box recorded speed change of 25 km/h and with the damage to both vehicles, assuming that the BMW was stationary at impact.

[89] Mr. Luker expressed concern that Mr. Sdoutz had based his July 17, 2024 report on Black Box data recorded at two intervals per second rather than the available 10 intervals per second data. He explained that the 10 intervals per second data provided a more accurate picture of the Ford inputs in the seconds before the Collision. In Figure 3 of his report, he provided an explanation of additional information gathered from the more granular 10 intervals per second data.

[90] During cross-examination, Mr. Luker clarified that Figures 3 and 4 in his report were based on *actual raw data* from the Black Box, using the 10 intervals per second data. In comparison, at page 3 of Mr. Sdoutz's report, the numbers used were based on Mr. Sdoutz's *calculations* based on the two intervals per second data.

[91] Mr. Luker agreed that the damage to the vehicles supported Mr. Sdoutz's conclusion that the vehicles were essentially aligned, one behind the other, on impact and that there was no significant difference in angle between the vehicles.

[92] In cross-examination, Mr. Luker agreed with Mr. Sdoutz that, in the seconds before impact, there was no real steering input recorded by the Ford. This meant that Mr. Dennis did not turn the steering wheel to redirect the Ford—it was driving in the same direction as the BMW.

[93] Additionally, because the Ford's speed on impact was 47 km/h, he concluded that the BMW was actually stopped when it was rear-ended by the Ford. He based this on the Ford's 25 km/h drop in speed in the split second before impact. In reaching his opinion, Mr. Luker adopted Mr. Sdoutz's perception response time (PRT) of 1.5 seconds in his calculations. PRT is a measure of the delay between when a driver first notices a hazard and when they can implement an avoidance action. Here, the PRT of 1.5 seconds is how long Mr. Sdoutz calculated it took Mr. Dennis to start to hit the brakes.

[94] Mr. Luker said that the 10 intervals per second data more accurately portrays what the Ford was doing in the seconds prior to impact.

Findings Based on the Expert Evidence

[95] Unlike many motor vehicle accident cases in which liability is in issue and experts testify about competing theories for the plaintiff and the defendant, this case does not involve a true contest of experts.

[96] Neither expert was able to provide a full reconstruction of what happened on September 3, 2018, because the BMW was not equipped with a Black Box. There are no scene photographs at the time of the Collision. Cst. Jaques' scene photographs were taken some time after the Collision and after both vehicles had been moved to the westbound shoulder of Hwy 3.

[97] The Black Box data from the Ford only recorded what Mr. Dennis was doing in the five seconds before the Collision.

[98] As a result of the absence of Black Box information for the BMW, the experts cannot tell:

- a) the BMW's speed of travel;
- b) when Mr. Knitter started to brake and the rate at which he did so;
- c) the location at which the BMW stopped and when it did so;

- d) whether the BMW changed its direction of travel; and
- e) whether the BMW was stopped before the Collision and, if so, for how long.

[99] The absence of contemporaneous scene photographs means that the location where the BMW struck the deer and the location where the BMW stopped after the deer strike remains unknown. There appears to be a dead deer in the photos taken the following day, but it is well off the Highway. It also unknown where the BMW was located at the moment of impact. Cst. Jaques did not arrive at the Collision scene until about 50 minutes after the call to dispatch came in. By that time, the vehicles had been moved.

[100] Mr. Luker assumed that the BMW was stopped for the full five seconds before the Collision, during which the Ford's Black Box data was available.

[101] Mr. Luker conceded that the BMW could have been closer to the Ford than the assumed 120 meters when Mr. Dennis started braking. For example, if the BMW was still moving when the Ford started braking, the distance between the Ford and the BMW would have been closer than 120 meters.

[102] In his report, Mr. Luker used a PRT of 1.5 seconds when interpreting the Ford's braking data. However, he agreed in cross-examination that PRT depends on the situation and that drivers respond differently when facing different hazards. He agreed that a PRT of more than 1.5 seconds was possible.

[103] The experts differ as to how they presented the information regarding Mr. Dennis' braking and whether the Collision was unavoidable. The significant difference in the two opinions is with respect to their assessment of PRT and the reaction of single-phase braking (as opposed to two-phase braking) in response to a perceived hazard.

[104] In presenting his "what-if-scenarios" in his response report, Mr. Luker assumed that the BMW was stopped for the entire five seconds prior to the Collision.

He also assumed that the perceived hazard was such that Mr. Dennis ought to have initiated single-phase maximum braking from the outset.

[105] Mr. Sdoutz counters that there are so many unknowns regarding the onset of the BMW's final braking, as well as the rate at which it braked, that the assumptions made by Mr. Luker are not reasonable in the circumstances of this Collision. He says that, given the situation, and the visual clues then available to Mr. Dennis—the BMW's brake lights—it is unlikely that Mr. Dennis would have immediately begun full emergency braking in response to the BMW braking/slowing in front of him.

[106] To these issues I would add that neither expert is able to tell me whether Mr. Dennis braked the Ford in the period before the five seconds of recorded Black Box data. Thus, there is nothing to refute Mr. Dennis' evidence that he tapped his brakes as the BMW overtook him to signal to the driver that that it could pull in front of him.

Credibility and Reliability

Legal Framework

[107] In this case, the credibility and reliability of the witnesses' evidence is central to assessing liability. Credibility (truthfulness) and reliability (accuracy) are related but distinct concepts. A truthful witness, for example, may be unreliable if they are mistaken about what they observed.

[108] Credibility and reliability are not all or nothing concepts. I may believe some, all, or none of a witnesses' evidence and attach different weights to different parts of their evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291 at para. 93, [1996] S.C.J. No. 8;, 2023 BCSC 2157 at para. 157; *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para. 28.

[109] The basic approach to the assessment of the truthfulness of any interested witness was discussed in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, [1951] B.C.J. No. 152 (C.A.):

In short, the real test of the truth of the story of a witness ... must be its 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.

[110] More recently, in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Justice Dhillon identified several factors that may be considered in assessing credibility and reliability:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.

[Citations omitted.]

[111] With respect to the last factor—consistency with the probabilities affecting the case as a whole—judges may rely on their common sense and life experience in assessing reasonableness and plausibility: *R. v. Kruk*, 2024 SCC 7 at paras. 75, 78. However, the law prohibits stereotypical reasoning or speculation about human behaviour from affecting a judge's assessment of credibility: *Kruk* at para. 187. The credibility of a witness must be assessed in the context of the evidence as a whole: *Faryna* at 356.

Findings on Credibility and Reliability

Mr. Dennis

[112] For the reasons that follow, I find Mr. Dennis to be both a credible and generally reliable witness as to the events of September 3, 2018.

[113] Mr. Dennis is a thoughtful, soft spoken, and legally unsophisticated, Indigenous man who was sometimes confused by questions asked by skilled and

experienced counsel. Rather than disagree with the questioner, he appeared suggestible and tended to agree or accede to the questioner's position.

[114] For example, when he was asked in cross-examination about whether he agreed that a driver who rear-ends another vehicle is looked at with suspicion, he agreed with that proposition. When it was suggested to him that it was surprising that he did not approach Cst. Jaques, at the scene of the Collision, to report his version of what happened. It was apparent from Mr. Dennis' answer, as well as his demeanor in giving it, that the possibility of approaching the police officer had never crossed his mind. He never contemplated the possibility that Mr. Knitter would give the officer a dishonest version of events. His evidence in that regard was entirely believable. Mr. Dennis testified that he thought there was no need for him to speak to the officer because he thought Mr. Knitter had told the truth. I accept his explanation.

[115] Mr. Dennis acknowledged the differences between his distance and time estimates at his examination for discovery in June 2024 and his evidence at trial. He could not explain why he had said in his discovery that, in addition to the front-end damage, his Ford was struck from behind after the Collision. He knew the Ford had not been struck from the rear and, before the discovery, had never suggested that it had been. When confronted at trial, he did not try to suggest that he was confused about the facts or by the question. He said he did not recall saying it and clearly acknowledged that it was not true. His frankness was palpable.

[116] In addition, while there were minor differences in Mr. Dennis' recollection of the speeds of the vehicles, the distances between them, and the exact timing of his braking, he never wavered in his evidence regarding the critical events. In particular, he never wavered from his evidence that Mr. Knitter passed him at speed, and then cut in front of him, before braking so suddenly that Mr. Dennis was unable to stop in time to avoid hitting the BMW. I accept Mr. Dennis' evidence that there was traffic behind him. It is reasonable to infer that on the Monday of a Labour Day weekend,

there would be traffic travelling westbound on Hwy 3 to the coast, and I know that Ms. Gray and Mr. Johnson were doing exactly that.

Mr. Knitter

[117] I did not find Mr. Knitter to be a credible witness. His evidence appeared scripted and rehearsed. During his direct examination, and in cross-examination when responding to what happened after he struck the deer, his answers, and the manner in which he delivered them, were nearly identical. His evidence of significant events around the accident appeared self-serving.

[118] I observed a noticeable change in his demeanor between his direct evidence and his cross-examination. His level of distress concerning the accident, six years afterwards, appeared feigned. This was not a catastrophic accident. No one was killed or grievously injured. Both drivers were released from hospital the same night and attended at the towing yard the next day to gather their belongings, at which time they exchanged insurance information. Mr. Knitter then waited for a friend to arrive at the yard to drive him and Mr. Wrzosek back to the coast.

[119] There were several parts of Mr. Knitter's evidence that concerned me. First, he testified that his memory was "sketchy" after the Collision. He said he suffered a concussion and experienced difficulty walking. Yet, he said that he clearly remembered a man (Mr. Dennis) apologizing for the Collision and telling him that he was tired from working a 10-hour shift in the mine. Initially, he testified that Mr. Dennis did so when they were in the ambulance. In re-direct, he said this happened while they were in the examining room at the Princeton Hospital, divided by a curtain.

[120] Second, Mr. Knitter's recollection changed over time. At his examination for discovery, Mr. Knitter said that the deer was 15 to 20 feet away from the BMW when he first saw it. This changed at trial, where he estimated that the deer was only three to four feet away before he struck it. Similarly, Mr. Knitter initially testified that, when he pulled the BMW over, it was "pretty close" to the grass on the side of Hwy 3. He later remembered that the right side of the BMW was on the grass.

[121] Third, there are significant differences between Mr. Knitter's trial evidence and his report of the Collision to ICBC on September 4, 2018, the day after the Collision. In his report to Ms. Duke, he referred to the deer strike immediately followed by the rear-end collision and that both happened within seconds.

[122] His report cannot be reconciled with his trial evidence in which he detailed: pulling over to the side of the road, putting his car in park, engaging his handbrake, turning on his emergency flashers, turning off his engine in response to a noise from under the hood, and conversing with Mr. Knitter—all before seeing the headlights of a car approaching in his rear-view mirror and experiencing the “explosion” of the rear-end collision. Mr. Knitter's evidence appeared to be a reconstructed version of the Collision created to avoid a finding of liability against him and to maximize his personal claim for damages.

[123] While some of Mr. Knitter's evidence was corroborated by Mr. Wrzosek, Mr. Wrzosek did not corroborate Mr. Knitter's evidence about the steps he took immediately after the deer strike. Mr. Wrzosek did not recall the detailed steps Mr. Knitter said he took after the Collision at the side of the road. Mr. Wrzosek also said that Mr. Knitter and Mr. Dennis did not have a conversation in the ambulance on the way to the hospital.

[124] Mr. Knittter described the impact of the deer strike as “very low”. In Mr. Luker's report, he described the damage to the BMW as having been caused by a “significant” deer strike. I do not accept Mr. Knitter's description.

[125] It is highly unlikely that, if Mr. Dennis came upon the scene after the deer strike, and the BMW was entirely over onto the shoulder of the road with its emergency hazard lights flashing, that Mr. Dennis would engage in the two phase-braking from 2.6 or 2.5 seconds prior to the Collision.

[126] It is also highly unlikely that Mr. Knitter was travelling between 70 and 80 km/h prior to the deer strike like he claims, given his evidence that he did not see the deer until it was immediately in front of the BMW.

[127] Mr. Knitter’s evidence that he was “totally off the road”, when he was rear-ended, is directly contradicted by Mr. Johnson’s evidence which I accept.

Issues

[128] I am asked to answer the following questions in this matter:

- 1) Is Mr. Dennis liable for the Collision?
- 2) Is Mr. Knitter liable for the Collision?
- 3) If they are both liable for the collision, how should liability be apportioned between them, if at all?

Liability

Legal Framework

[129] Drivers have a common law duty to take reasonable care for the safety of others sharing a roadway. This duty is informed by statutory duties and obligations set out in Part 3 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [MVA]: *Perez-Alarcon v. Lee*, 2013 BCSC 408 at para. 118.

[130] In this case, the following sections of the *MVA* are applicable:

Careless driving prohibited

144(1) A person must not drive a motor vehicle on a highway

- (a) without due care and attention,
- (b) without reasonable consideration for other persons using the highway, or
- (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

...

Driving on laned roadway

151 A driver who is driving a vehicle on a laned roadway

- ...
- (b) must not drive it from one lane to another if that action necessitates crossing a solid line,

...

(f) must not pass a vehicle on the left if that action necessitates driving on that part of the highway designated for travel in the opposite direction, ...

...

Highway lines

155(1) Despite anything in this Part, if a highway is marked with

...

(b) a double line consisting of a broken line and a solid line,

...

(ii) the driver of a vehicle proceeding along the highway on the side of the solid line must drive the vehicle to the right of the double line, except only when finishing the passing of an overtaken vehicle, ...

...

Duty when overtaking another vehicle

157(1) Except as provided in section 158, the driver of a vehicle overtaking another vehicle

(a) must cause the vehicle to pass to the left of the other vehicle at a safe distance, and

(b) must not cause or permit the vehicle to return to the right side of the highway until safely clear of the overtaken vehicle.

...

Passing on left

159 A driver of a vehicle must not drive to the left side of the roadway in overtaking and passing another vehicle unless the driver can do so in safety.

Clear view on passing

160 A driver of a vehicle must not drive to or on the left side of the roadway, other than on a one way highway, unless the driver has a clear view of the roadway for a safe distance, having regard for all the circumstances.

...

Following too closely

162(1) A driver of a vehicle must not cause or permit the vehicle to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the amount and nature of traffic on and the condition of the highway.

[131] Many of the above-quoted sections of the *MVA* are also relevant to the duties of an overtaking driver.

[132] In *Samograd v. Collison*, 67 B.C.A.C. 223, 1995 CanLII 708, the appellant motorcyclist overtook the respondent vehicle, not noticing that the respondent's left turn signal was on. The respondent did not look in his side mirror before he started his left turn and collided with the motorcycle. Justice Finch, writing for the majority, upheld the trial judge's finding apportioning liability 40/60 against the appellant. In doing so, Finch J. stated that it would be an error of law to suggest that there is a greater duty of care on an overtaking driver than the driver of a left-turning vehicle.

[133] The sections I have set out provide guidelines for assessing fault in motor vehicle accidents, but they do not, alone, determine whether a party met the requisite standard of care: *Salaam v. Abramovic*, 2010 BCCA 212 at para. 18; *Charlton-Miner v. Hedgecock*, 2020 BCSC 86.

[134] Instead, liability is assessed based on the facts of each case. A highly relevant consideration will be which driver had the better opportunity to see the potential for a collision before it occurred and, therefore, had a correspondingly greater opportunity to avoid it: *Samograd* at paras. 61–63; *Tabori v. Renaud*, 2016 BCSC 1242 at para. 42, aff'd 2017 BCCA 189.

[135] In rear-end collisions such as this one, the onus often falls on the following driver to show that the collision was not their fault: *Chauhan v. Welock*, 2020 BCSC 1125 at para. 65, aff'd 2021 BCCA 216; *Barrie v. Marshall*, 2010 BCSC 981 at para. 23; *Cue v. Breitkreuz*, 2010 BCSC 617 at para. 15. As Justice Crerar wrote in *Chauhan*, this reflects the fact that a rear-end collision is *prima facie* evidence that the following driver failed to keep a safe distance or drive with due care and attention. However, "this principle should not be taken as reversing the legal burden of proof where the rear driver is the defendant": *Chauhan* at para. 65.

[136] The strength of the presumption that the following driver is at fault depends on the circumstances of the accident. Where a following driver encounters unexpected and unforeseeable conditions, the occurrence of an accident does not necessarily establish that they were negligent: *Chauhan* at para. 66; *Vo v. Michl*, 2012 BCSC 1417 at para. 14; *Baragar v. Bowers*, 2024 BCSC 1656 at para. 72.

Instead, the court must consider whether the following driver's conduct met the standard of care in the circumstances. The court may consider the following factors in assessing the following driver's conduct (*Chauhan* at para. 66):

- a) the speed of the rear vehicle;
- b) the distance between the two vehicles as they were driving along;
- c) what the driver of the rear vehicle was doing as they were driving along; and
- d) as the emergency arose, how the rear driver responded.

(See also *Biggar v. Enns*, 2017 BCSC 2290 at para. 46, citing *Ayers v. Singh*, 85 B.C.A.C. 307 at para. 10, 1997 CanLII 3410.)

[137] The standard of care is not perfection, but rather the conduct expected of an ordinary prudent driver in similar circumstances: *Harry v. Kalutharage*, 2019 BCSC 579 at paras. 22–23; *Chauhan* at para. 70. Drivers are expected to exercise due care and attention, to adapt their driving to the changing circumstances of the road, and to maintain a following distance sufficient to allow them to react safely in the event of a sudden or unanticipated hazard: *Cue* at para. 15; *Barrie* at para. 24. These duties are expressly set out in s. 144(1) of the *MVA*.

[138] Drivers are not required to anticipate every possibility, however remote. The requisite standard of care must be assessed in light of the circumstances known or reasonably knowable to the driver in advance, and not with the benefit of hindsight: *Chauhan* at paras. 67, 70.

[139] In *Ziemer v. Wheeler*, 2014 BCSC 2049, Justice Watchuk described drivers' obligations where one driver becomes a hazard to others:

[107] Even if a defendant has created a hazard to other drivers, other drivers must exercise reasonable care to avoid that hazard. A driver has failed to exercise reasonable care in circumstances where that driver became or should have become aware of the hazard and had in fact a sufficient opportunity to avoid the accident and where a reasonably careful and skilful driver would have availed himself of that opportunity (*Walker v. Brownlee*, [1952] 2 D.L.R. 450 (S.C.C.) at p. 461). ...

[108] A court may draw an inference that a driver has breached the standard of care because that driver was driving in the wrong lane, but any

such inference can be rebutted by evidence that the defendant's conduct was equally consistent with negligence and no negligence (*Pitts Enterprises Ltd v. Farkes*, 2005 BCCA 511 at paras. 3, 5, aff'g 2004 BCSC 1493).

[140] Similarly, a person who violates a traffic law assumes a heightened duty of care. Road users are entitled to assume that others will comply with the rules of the road, thus a heightened duty of care arises for those who act differently: *Charlton-Miner* at para. 32, citing *Ivanoff v. Bensmiller*, 2002 BCCA 173 at para. 7.

[141] Justice Watchuk also summarized the factors found to be significant in cases involving motor vehicle collisions with wildlife: *Ziemer* at para. 115. These factors are:

- the time of day when the accident took place;
- the visibility of the animal, including type and colour of fur, contrast with its surrounding environment, and direction of approach;
- road conditions and weather conditions, including the presence of rain, ice or fog, and whether the road and surrounding land was straight and level or at a slope;
- whether or not the accident occurred inside a moose or deer "warning zone", as indicated by signs, generally known to the public, or familiar to the drivers;
- the applicable speed limit on the road where the accident took place, and the actual speeds of the drivers;
- the lighting of the area where the collision took place, including the use of any headlights, highbeams, warning flashers, or other lighting equipment;
- whether traffic was heavy or light; and
- the condition of the drivers' vehicles.

[142] Liability in wildlife collision cases is highly fact dependent: *Ziemer* at para. 114; *Pitt Enterprises Ltd. v. Farkes*, 2005 BCCA 511 at para. 12.

Findings of Fact as to the Circumstances of the Collision

[143] Mr. Knitter's and Mr. Dennis' version of how the Collision occurred are irreconcilable. I must assess liability on a balance of probabilities. For the reasons that follow, I find Mr. Dennis' evidence and version of events more credible than Mr. Knitter's.

[144] Having considered all three expert reports, I conclude that Mr. Luker's use of the 10-intervals per-second data from the Ford black box presents a more accurate picture of what Mr. Dennis was doing in the five seconds before the Collision. Nevertheless, in the absence of any information about when the BMW began to brake and the rate at which it did so, the expert evidence is not particularly helpful to my analysis in this case. It does not assist me in determining whether Mr. Knitter passed Mr. Dennis at all, or at a high rate of speed. It also does not assist me in determining when or how quickly Mr. Knitter began to brake once he noticed the deer. Nor does it tell me what Mr. Knitter did after he struck the deer.

[145] Mr. Dennis' evidence and recitation of what occurred in the Collision has remained consistent throughout this proceeding. Mr. Dennis testified that, as the BMW passed him, he braked a bit to let the BMW pass and to show that he would let the BMW into the westbound lane in front of him. He described tapping his brakes. I find that it is probable that this braking action occurred prior to the five seconds of pre-Collision data collected from the Ford's Black Box.

[146] Mr. Dennis also testified that the BMW passed his Ford at a high rate of speed and in a manner that he described as erratic or reckless. The fact that the BMW passed the Ford immediately prior to the Collision was confirmed by what Mr. Wrzosek said to Ms. Tom in the hospital waiting room: they had just pulled into the lane when they hit the deer. To pull into the lane, Mr. Knitter must have pulled out of it.

[147] Although Mr. Wrzosek did not confirm that he said this in his evidence, I find Ms. Tom more credible than him. She specifically recalled that Mr. Wrzosek was catching a ride to go to school and that he was concerned about getting back to Vancouver to begin a course, which he had waited to get into, the next day.

[148] Ms. Tom could only have learned this information about Mr. Wrzosek from him directly and the only contact between Ms. Tom and Mr. Wrzosek was in the hospital waiting room. Ms. Tom's clear evidence was also consistent with Ms. Gray's

evidence that the occupants of the BMW asked whether they could get a ride with her and Mr. Johnson back to the coast.

[149] Mr. Dennis provided a detailed recollection of his thoughts upon seeing the BMW approaching to pass him. His observations about the manner in which the BMW was being driven are similar to those of Ms. Gray, whose evidence I accept. Ms. Gray testified that a silver BMW, which she was certain was the BMW involved in the Collision, had passed her at a high speed on an earlier stretch of Hwy 3. Her certainty was compelling because, like Mr. Dennis, she recalled thinking that the driving was “reckless”. I accept Ms. Gray’s evidence that Mr. Knitter had driven in a similar manner when he passed her Civic earlier that evening.

[150] I infer that Mr. Knitter was travelling more than Mr. Dennis’ speed of 99 km/h when he cut in front of Mr. Dennis because he could not have passed him otherwise. I find that the BMW passed the Ford by illegally crossing a solid yellow line into the eastbound lane while speeding.

[151] Mr. Dennis’ estimate that the BMW pulled back into the westbound lane approximately three seconds before the deer strike occurred is generally consistent with the Black Box data and the expert evidence. Importantly, Mr. Sdoutz opined that, given the situation and the visual cues then available to Mr. Dennis, it is unlikely that he would have immediately begun full emergency braking in response to the BMW braking/slowing in front of him. This is supported by the braking rates and pattern obtained by the Black Box. I accept Mr. Dennis’ testimony that the events occurred within seconds and that he was unable to stop the Ford in time.

[152] I find that Mr. Dennis had no way of knowing that the BMW would hit the brakes suddenly in front of him and then stop when it collided with a deer. In light of his evidence that the BMW had its brake lights on constantly as it pulled back into the westbound lane, there was nothing to suggest to Mr. Dennis that full emergency braking was immediately required.

[153] In my view, Mr. Knitter's report to ICBC accurately reflects the very short time frame in which events unfolded and how they unfolded. It also confirms much of Mr. Dennis' evidence. As set out, Ms. Duke recorded that Mr. Knitter struck a deer and was then "immediately" and "seconds later" rear-ended by the Ford. This timeframe was also what Mr. Wrzosek initially described in his evidence.

[154] I conclude that the point at which Mr. Knitter passed Mr. Dennis and the point at which Mr. Knitter hit the deer were mere seconds apart and that the Collision occurred seconds thereafter. Mr. Dennis did not know that Mr. Knitter had hit a deer. The evidence of the deer strike was in the photographs of the BMW taken by a colleague of Mr. Sdoutz following the accident and the photograph of a dead deer taken the day after the Collision, well off Hwy 3. On the evidence, I find that the BMW stopped at some point within the five seconds before the Collision but was not stopped for the full five seconds. By the time Mr. Dennis realized that the BMW had come to a stop in front of him, he was unable to stop the Ford and avoid colliding with the BMW.

[155] Mr. Knitter's evidence was not credible. The suggestion that Mr. Knitter pulled his BMW totally onto the shoulder of the road after the deer strike and before the rear-end collision occurred is not credible. Mr. Knitter appeared to be reciting a corrected version of the Collision that would not result in any liability for him or affect his claim for damages. I note once again the difference between his trial evidence and what he told Ms. Duke the day after the Collision. Mr. Knitter appears to have made a similar report about the timing of the deer strike and the rear-end Collision based on the clinical notes from his first visit to see his family doctor, Dr. Tong, about six days after the accident.

[156] If, as Mr. Knitter testified, the Collision occurred after he pulled his car over to the side of Hwy 3, parked it, put on his hazard lights, heard a noise, shut off the engine, and had a discussion with Mr. Wrzosek, then the Ford's Black Box steering data would have recorded a steering input, indicating a change in the Ford's direction of travel from west to north (toward the shoulder) in the five seconds before

the Collision. It does not. In fact, the damage to both vehicles evinces a front-to-end straight-on Collision. There is also no evidence to support the conclusion that Mr. Dennis turned the steering wheel to any degree.

[157] I find that Mr. Knitter's and Mr. Wrzosek's evidence that the Collision occurred on the shoulder of the westbound lane not credible. It is inconsistent with Mr. Dennis' evidence and Mr. Johnson's clear and credible recollection that he asked the driver of the BMW to pull it over to the side of the road after the Collision. As a result, I find that the Collision cannot have occurred on the shoulder of Hwy 3.

[158] I accept Mr. Johnson's evidence as to the positions of the BMW following impact. He was very confident that he saw the BMW in the middle of the road and asked that it be pulled over to the shoulder. It is unlikely that he would be mistaken about that recollection, particularly since it was consistent with Ms. Gray's general impression of the Collision scene.

[159] Mr. Dennis' version of how events unfolded is consistent with what Mr. Wrzosek said to him and Ms. Tom in the waiting room at the hospital. It is also corroborated by Mr. Johnson's independent evidence, Ms. Tom's testimony, and Ms. Duke's evidence as to what Mr. Knitter first reported to ICBC, all of which I accepted. Most importantly, the Ford's Black Box data confirms Mr. Dennis' version of how fast he was travelling. He did not shy away from the fact that he was speeding, and quite accurately estimated his speed at 100 km/h, which was confirmed by the Ford's Black Box data.

[160] The independent witnesses and the documents do not support Mr. Knitter's version of events. Mr. Wrzosek did not recall the steps that Mr. Knitter said he took at the side of the road prior to the collision. Mr. Dennis' two-phase braking before the Collision, as confirmed by the expert evidence and Black Box data, is inconsistent with Mr. Knitter's evidence.

[161] I do not accept that Mr. Dennis apologized to Mr. Knitter in the ambulance. Had that happened, it is probable that Mr. Wrzosek would have remembered such an admission as all three men were transported in the ambulance together.

[162] Overall, and on a balance of probabilities, I accept Mr. Dennis' version of events and reject Mr. Knitter's version.

Liability Assessment

Analogous Case Law

[163] I have considered a number of cases in which a rear-end collision occurred in circumstances where both parties were driving in the same direction, one overtook the other, and a rear-end collision occurred. Some of them were relied on by the parties. Of course, no one case presents entirely analogous facts.

[164] In *Hough v. Dyck*, 2010 BCSC 1374, both drivers merged into a southbound lane of traffic on a roadway with one lane of traffic in each direction initially separated by a concrete barrier. The defendant was the lead driver. When the barrier ended, the plaintiff pulled into the oncoming northbound lane, crossing solid double centre line, and passed the defendant, before pulling back into the southbound lane and abruptly stopping. The defendant rear-ended the plaintiff. The trial judge preferred the defendant's version of events, as verified by an independent witness, and found the plaintiff solely at fault. The plaintiff's claim was dismissed.

[165] In *Power v. White*, 2010 BCSC 1084, the plaintiff was driving northbound in the left lane ahead of the defendant on a four-lane road with two lanes in each direction of travel. The plaintiff saw a deer about 200 feet ahead of him in his lane and began a change into the right lane. While his head was turned to shoulder check, the deer moved into the path of the plaintiff's vehicle. The plaintiff hit the brakes but was unable to avoid striking the deer.

[166] The defendant was driving a pickup truck, towing a U-Haul. Before the collision, he saw the plaintiff hesitate and took his foot off the accelerator. He then saw the deer and the plaintiff's brake lights. The defendant applied his emergency

brakes but rear-ended the plaintiff's vehicle. The impact occurred when the plaintiff's vehicle was stopped, straddling the line between the right and left lanes. The plaintiff's vehicle spun, hit the concrete barrier, and came to rest facing northbound. The defendant was driving below the speed limit but faster than the maximum speed (of 88.5 km/h) the rental company recommended when towing a U-Haul.

[167] The defendant was found 100% liable for the accident because he was following too closely. He ought to have been aware of the need for caution after seeing the deer and the plaintiff's hesitation. The plaintiff's lane change was predictable in the circumstances. The accident would have been avoided if the defendant immediately began braking when he saw the deer, or even when he saw the plaintiff start to change lanes.

[168] In the circumstances, the plaintiff's decision to start to change lanes then suddenly brake in response to the deer was reasonable. He was entitled to assume that the defendant would react promptly and be travelling at a speed that would allow him to stop in time to avoid an accident. The plaintiff was not contributorily negligent.

[169] In *Cue*, the plaintiff and the defendant were travelling in the same direction on a roadway with three lanes of traffic in each direction. The curb lanes on each side of the roadway were occupied by parked cars. As the parties approached an intersection, the plaintiff accelerated, changed lanes in front of the defendant, and suddenly slammed on the brakes. The defendant initially took his foot off the accelerator to allow the plaintiff to move into his lane, but when he saw the plaintiff's brake lights come on, he applied his brakes. The defendant rear-ended the plaintiff who was found solely liable for the accident:

[16] ... [T]he plaintiff, by changing lanes in the manner that he did, created the situation in which the defendant did not have a safe stopping distance behind the plaintiff's vehicle. Had the plaintiff not stopped, the defendant would have had the opportunity to slow down and allow the distance between them to increase. But when the plaintiff stopped immediately following the lane change, the defendant had no chance to avoid the collision. The defendant had no reason, in the moments leading up to the accident, to anticipate the plaintiff's lane change and stop.

[170] Finally, in *Turchak v. Tarczali*, 74 A.C.W.S. (3d) 531, 1997 CanLII 456 (B.C. S.C.), the plaintiff diagonally crossed four lanes of traffic intending to enter a parking lot. The defendant, who was travelling in the fourth lane of traffic, rear-ended the plaintiff. The defendant was driving 10km/h over the speed limit of 50 km/h. He first saw the plaintiff when the plaintiff was in the curb lane. Despite slamming on his brakes, he could not avoid the accident due to concrete barriers to his left. The Court apportioned 80% liability to the plaintiff and 20% to the defendant. The plaintiff fell below the standard of care by not keeping a proper lookout and not waiting until it was safe to cross the lanes. The defendant would not have expected a vehicle to their right to cross in front of them.

[171] However, the defendant failed to take reasonable care and decrease his speed contributing to the accident. He saw the plaintiff begin an unusual path, which should have alerted him to exercise due care by slowing down and paying greater attention.

Mr. Knitter's liability

[172] In all the circumstances, I find Mr. Knitter primarily responsible for the Collision. The Collision occurred while it was dark outside on a highway with no artificial lighting, and in circumstances where there was some level of reduced visibility due to the dark conditions.

[173] Mr. Knitter overtook Mr. Dennis when it was unsafe to do so at a time when he described the light to be pitch black. He crossed a solid yellow line into the oncoming eastbound lane to pass Mr. Dennis and cut in front of him. He did so in an area that was posted for possible wildlife. To have passed Mr. Dennis, who we know was travelling at a speed of 99 km/h, Mr. Knitter had to have been travelling faster than that. Accordingly, I find that Mr. Knitter was driving faster than Mr. Dennis.

[174] Unlike the defendant in *Power*, in the circumstances that confronted Mr. Dennis, he did not have the option of following less closely. The Collision took place in circumstances where Mr. Knitter was overtaking Mr. Dennis. The defendant in *Power* had always been the following driver, and he had more warning than

Mr. Dennis had. The circumstances in this case are more analogous to those in *Hough*. Mr. Dennis could not have anticipated that Mr. Knitter would suddenly slam on brakes after pulling in front of him.

[175] Mr. Knitter's driving fell below the standard of care expected of an ordinary prudent driver. He drove the BMW negligently by:

- a) failing to keep a proper lookout for wildlife and being inattentive;
- b) failing to be aware of wildlife situations while driving in dark lighting conditions and in an area generally known for wildlife;
- c) illegally passing the Ford on a solid yellow line;
- d) overtaking the Ford at speed and in traffic and when it was unsafe to do so; and
- e) driving at an excessive speed well above the applicable speed limit.

[176] Mr. Knitter assumed a heightened duty of care by deciding to illegally pass the Ford on a solid yellow line, in dark conditions, in an area where he knew wildlife could be present, and at a speed well above the posted speed limit: *Charlton-Miner* at para. 32, citing *Ivanoff* at para. 7. A reasonably prudent driver would have waited until there was a broken dividing line that allowed passing, or at least until after the curve in the road, to pass slower vehicles (although the Ford was not travelling slowly at about 99 km/h). Mr. Knitter was negligent in attempting to pass the Ford in these conditions. He did not ensure that passing of vehicles could be completed in safety.

Mr. Dennis' liability

[177] I find that Mr. Dennis was the more reasonably prudent driver.

[178] Nevertheless, Mr. Dennis was speeding. While his speed was not overly excessive, it exceeded the posted limit on an unlit road at night and in an area where he knew there could be wildlife.

[179] Based on his assessment of Mr. Knitter's driving, he should have anticipated the possibility that he may need to slow down. Unlike in *Cue*, Mr. Dennis anticipated Mr. Knitter's lane change. In fact, he anticipated that Mr. Knitter would have to pull back in front of him when he saw Mr. Knitter's lights approaching and tapped his brakes to indicated he would let Mr. Knitter pull in front of him. Mr. Dennis was aware of the risk of wildlife on the roadway and described Mr. Knitter's driving as erratic. What Mr. Dennis could not anticipate is Mr. Knitter striking a deer in front of him after passing him at speed. I also find, based on the expert evidence, that the after-market tires installed on the Ford were a factor, though a minimal one, in the Collision.

[180] In all the circumstances, I find both drivers liable for the Collision and apportion 90% of liability to Mr. Knitter and 10% to Mr. Dennis.

"MacNaughton J."