

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bains v. Zhao Estate*,
2025 BCSC 700

Date: 20250417
Docket: M206603
Registry: Vancouver

Between:

Charanjit Singh Bains

Plaintiff

And

The Estate of Jia Wei Zhao

Defendant

Before: The Honourable Justice Stephens

Reasons for Judgment

Counsel for the Plaintiff:

R. Marcoux

Counsel for the Defendant:

D. Sinnott

Place and Dates of Trial:

Vancouver, B.C.
March 11–12, 2025

Place and Date of Judgment:

Vancouver, B.C.
April 17, 2025

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Overview

[1] In this trial on liability only, the plaintiff driver seeks a declaration of liability in connection with a tragic incident on June 13, 2018, in which the defendant pedestrian died in a collision with the plaintiff’s truck on Highway 99 (the “Accident”).

[2] On the day of the Accident, the defendant had parked his vehicle within the solid white lines of a median area on Highway 99 that bisects the northbound traffic lanes (to the left) and a bus lane (to the right), at about the Cambie Road overpass. After he parked in the median, the defendant got out of his vehicle, stood by it, and then, for an unknown reason, entered into the northbound traffic lane as a pedestrian. The plaintiff was driving his truck in that lane at the time, and struck the defendant.

[3] The plaintiff claims in his notice of civil claim that he has experienced personal injuries, including shock, as a result of the Accident.

[4] The defendant estate admits that the deceased defendant was negligent but seeks a 50-50 apportionment of liability. The defendant contends that the plaintiff failed to take certain precautions before the Accident, as he approached the defendant standing in the median — such as honking his horn or changing lanes — which constitute negligence contrary to the common law and s. 181 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [Act], and justify liability apportionment.

[5] For the reasons which follow I do not accept the defendant estate’s position. I find that the defendant is 100% liable for the Accident.

Background

The Accident

[6] These facts are agreed:

[7] The Accident occurred on June 23, 2018, in Richmond, British Columbia on Highway 99.

- [8] Prior the Accident, the defendant was driving a grey BMW X5 M.
- [9] Prior to the Accident, the defendant was driving northbound on Highway 99.
- [10] The plaintiff was driving a 2014 Freightliner.
- [11] The speed limit at the location of the Accident is 90 km/h.
- [12] The defendant, Mr. Jia Wei Zhao, died as a result of injuries sustained in the impact with the Freightliner.
- [13] The police took photos of the Accident scene.
- [14] The police photos accurately show the location of the vehicles where they came to rest following the Accident.
- [15] Prior to the Accident, the defendant stopped the BMW in the location shown in images admitted as evidence by agreement.
- [16] On June 23, 2018, moments before the Accident, Manjinder Sidhu was driving a taxi in the northbound lanes on Highway 99 approaching the Cambie Road overpass. Mr. Sidhu's taxi had a dash camera.
- [17] Following the Accident, Mr. Sidhu provided the dash camera footage (the "Dashcam Footage") to the RCMP.
- [18] At 15:53:27 on the Dashcam Footage, Mr. Sidhu's vehicle passed a vehicle parked in the median between the north bound lanes.
- [19] The Dashcam Footage accurately shows where the defendant stopped and/or parked his vehicle.
- [20] The man depicted next to the vehicle at 15:53:27 is the defendant.
- [21] At the time of the Accident, the defendant was driving his son home from swimming lessons. The defendant's son was 10 years old at the time.

[22] The defendant told his son that the reason he parked his vehicle along the meridian was to check a possible tire issue. He told his son to stay in the car. The parties agree that this statement is double hearsay and cannot be used for the truth. The sole evidentiary purpose of this evidence is to explain why the defendant's son did what he did.

[23] The defendant's son saw the defendant check the tire but remained in the car as directed.

[24] The defendant's son never saw the collision.

[25] The parties further admitted to the authenticity of the dash cam video and colour photographs adduced at trial.

Plaintiff's Evidence

[26] The plaintiff was the only witness who testified at trial.

[27] The plaintiff testified that, as he approached, he saw the BMW parked on the shoulder, and a man standing by his car with his hand on the roof.

[28] The plaintiff further testified that, as he passed by, the defendant ran in front of the plaintiff's truck. He turned his steering wheel to the left, braked hard, swerved to the left, and ended up hitting another vehicle in the northbound left lane.

[29] When asked how long was it from when he saw the defendant standing next to his car to when the defendant stepped into the traffic lane, the plaintiff testified that it was "very quick".

[30] The plaintiff testified that as soon as the defendant ran toward his truck, he turned the truck, but the defendant kept coming, walking into the truck, jumping, and looking into his eyes.

[31] On cross-examination, the plaintiff testified that he saw the defendant from about 100m away. When he first noticed him, the defendant was already standing outside his vehicle on the driver's side, which is immediately adjacent to the right-

hand northbound lane in which the plaintiff was travelling. He noticed the hazard lights were flashing on the defendant's BMW.

[32] The plaintiff testified he was going about 70 km/h at the time of the Accident.

[33] He testified under cross-examination that when he saw the defendant, he did not brake, though he did ease up on the gas and slowed down. He testified he did not change lanes, and on cross-examination said there was a vehicle passing on the left lane. He did not sound his horn, testifying "no... he was looking at me, at the traffic".

[34] The Dashcam Footage from Mr. Sidhu's taxi travelling just in front of the plaintiff was played at trial. It was a clear, sunny day.

[35] Mr. Sidhu's taxi passed the plaintiffs' truck in the far-left northbound traffic lane and then drove ahead of it for a brief period of time, before reaching the defendant's BMW, then passed by the BMW. The plaintiff's vehicle was travelling behind Mr. Sidhu's taxi in the right northbound traffic lane — the lane adjacent to the median.

[36] In the brief instant as Mr. Sidhu's taxi passed by the defendant's BMW, the defendant is seen standing outside and facing toward his vehicle, inside the solid white painted lines of the median, his back to the plaintiff's traffic lane, with his front torso very close to the vehicle reaching with his right hand onto the hood of the BMW SUV by the driver's side door.

[37] The Dashcam Footage, and other photos at trial from immediately after the Accident, show the BMW parked on the median, inside the solid white lines demarking the outside of the median area.

[38] The Dashcam Footage further shows another car travelling northbound in the right northbound traffic lane, ahead of the plaintiff's truck, which passed by the defendant's BMW in the median when the defendant was then standing next to his BMW. I find this other car (travelling the same lane as the plaintiff) passed by the

defendant, without incident, just a few seconds before the plaintiff's truck ultimately reached the median and the Accident with the defendant occurred.

Issues

[39] These issues arise:

1. Was the defendant negligent?
2. Was the plaintiff also negligent?
3. If the plaintiff was negligent, what apportionment of liability should be made?

Discussion and Analysis

Credibility and Reliability

[55] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, as follows:

[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 (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). 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 (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). 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 (*Farnya* at para. 356).

[40] As explained by this Court in *Hardychuk v. Johnstone*, 2012 BCSC 1359, credibility and reliability are distinct assessments:

[10] The typical starting point in a credibility assessment is to presume truthfulness: *Halteren*. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.

[41] I find that the plaintiff was truthful and trying to be honest in his evidence.

[42] Aspects of the plaintiff's evidence are consistent with the Dashcam Footage from Mr. Sidhu's taxi in front of him, which passed the defendant moments before the Accident. Namely, the plaintiff testified he saw the defendant with his hand on the roof of his vehicle, which is what the Dashcam Footage depicts. That this aspect of his testimony is consistent with other objective evidence supports the reliability of the plaintiff's account of the Accident.

[43] However, I have concerns as to the reliability of some other aspects of the plaintiff's evidence. For example:

- (a) He testified he saw the defendant as he approached, with his hand on the roof of the BMW, and looking into traffic. This seems implausible, given that to reach on top of the car with his hand the defendant would be standing facing the BMW, not facing the northbound traffic.
- (b) Additionally, the plaintiff testified that he did not honk his horn since the defendant was facing him and the traffic. The plaintiff's evidence that the defendant was facing the traffic is again inconsistent with his evidence that the plaintiff saw the defendant reaching on top of his BMW, which would make it difficult for the defendant to be also facing the traffic. The Dashcam Footage depicts the defendant before the Accident with his right hand on top of the BMW. Given the height of the BMW, together with the physical body movement required by the defendant to reach on top of his vehicle, it would

be very difficult for the defendant to face the traffic while at the same time in that reaching position with his back to the traffic lane.

(c) Thirdly, the plaintiff testified the collision happened very quickly, that he was travelling about 70km/h, and he swerved left and hit the brakes hard as the Accident occurred. I accept that he did swerve immediately in response to the defendant unexpectedly being in the northbound traffic lane, and hit the brakes hard. However, the very short amount of reaction time the plaintiff had when the Accident occurred is at odds with the degree of detail of his description of the defendant's movements, testifying he continued to walk toward the truck even after the plaintiff swerved, jumping, looking at him. If the Accident happened very quickly, as I find it did, there was not likely time for plaintiff to observe the defendant doing as much as the plaintiff described in his evidence.

[44] These factors detract from the plaintiff's reliability.

Findings About the Accident

[45] Considering all the evidence, I conclude the Accident happened this way, and I make the following findings.

[46] The plaintiff was driving his truck in the right-hand lane of a two-lane northbound highway portion of Highway 99. It was a clear, sunny day.

[47] About 100m away from the defendant's BMW, as he approached, the plaintiff saw the defendant standing next to his BMW within the median area to the immediate right of the traffic lane he was driving in. The BMW was parked with its hazard lights on, within the solid white lines of the median. When he initially saw him, the defendant was reaching on top of his BMW and was standing very near to, but within, the solid white lines of the median, and was not in the northbound traffic lane.

[48] The plaintiff did not change lanes, or honk, after he initially saw the defendant. When the plaintiff initially saw the defendant, he slowed down. He continued to approach the defendant in his truck, going about 70 km/hour.

[49] Very shortly before the plaintiff's truck reached the median (close to the point of the rear bumper of defendant's BMW), the defendant, without warning, stepped into the right-hand northbound traffic lane — the lane the plaintiff was driving in — into the path of the plaintiff's truck, and was struck by the plaintiff's truck.

[50] The plaintiff saw the defendant walk into the traffic lane, and at the moment before impact the plaintiff swerved his truck quickly to the left and braked hard, going into the left-hand traffic lane, and coming to a complete stop.

[51] The Accident occurred quickly: the time from when the defendant walked into the northbound traffic lane, to the moment of his collision with the plaintiff's truck, was very quick.

[52] There was no admissible direct evidence at trial about the deceased defendant's intent, or motive, for walking into the traffic lane, and no other evidence from which a legally permissible inference could be made: see *Fuller v. Harper*, 2010 BCCA 421 at para. 38; *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at paras. 339–341. Accordingly, I make no findings about the deceased defendant's intent or motive for walking into the traffic lane prior to the Accident, as to do so would be to engage in impermissible speculation: *Chavez-Salinas v. Tower*, 2022 BCCA 43 at paras 23- 24, 29, 38; *Fuller* at para. 38; *J.P.* at para. 341.

Issue 1: Negligence of Deceased Defendant

[53] To establish negligence it must be proved, on a balance of probabilities, that the party owed a duty of care to the other, that they breached the standard of care applicable, and that the breach caused, in fact and in law, the other to suffer damage: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3. Legislative standards are relevant to the common law standard of care, although the two are not

necessarily co-extensive: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, 1999 CanLII 706 at para. 29; see also *Yang v. Croin*, 2021 BCSC 955 at para. 3.

[54] The legislative provisions of the *Act* supplement the common law duty of all highway users to exercise what constitutes due care: *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 21, citing *Cook v. Teh*, [1990] B.C.J. No. 776, 1990 CanLII 1077 (C.A.).

[55] When an accident occurs on a highway, the starting point for analysis is a determination of who had the right of way: *Hmaied* at para. 22.

[56] Here, at the time of the Accident the defendant was a pedestrian on a highway. Therefore, the plaintiff driver had the right of way in accordance with s. 180 of the *Act*.

Crossing at other than crosswalk

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

[57] I find that that the defendant, a pedestrian, was negligent in failing to yield to the right of way of the plaintiff's vehicle, contrary to s. 180 of the *Act*.

[58] Further, the defendant's conduct with respect to his BMW also constituted additional negligence.

[59] By parking within the boundary of the solid white painted median on Highway 99, in a location between northbound traffic lanes (to the left of the median) and the northbound bus lane (to the right of the median), the defendant drove without reasonable consideration for other persons using the highway, contrary to s. 144(b) of the *Act*. There was no evidence at trial that the defendant's vehicle experienced any mechanical failure which required the defendant to need to park in that highway median at that time.

[60] Further, by parking on the median and not on the right-hand side of the road, the defendant breached s. 190 of the *Act*, which states "a driver must not stop, stand

or park a vehicle on a roadway other than on the right side of the roadway and with the right hand wheels parallel to that side”.

[61] I am not satisfied there was also a breach of s. 151(b) of the *Act*, as alleged by the plaintiff, since this provision appears to concern moving from lane to lane over a solid line, as opposed to crossing a solid line onto a median space.

[62] Similarly, I am not satisfied that there was a breach of s. 163(a) of the *Act*, also as alleged by the plaintiff, which appears to concern driving over a barrier or dividing section between two roads which are going in opposite directions.

[63] Nor am I satisfied the plaintiff has demonstrated that the defendant parked on the median in a manner “so as to obstruct the free passage of traffic on the highway” contrary to s. 187(2) of the *Act*. There is no evidence that the defendant’s vehicle was “so disabled that it is not practicable to avoid stopping and temporarily leaving it on a highway”, and so s. 187(2) could have been engaged in these circumstances. However, there was not sufficient evidence on which to base a finding of a breach of s.187(2) by the defendant.

[64] The defendant could not have walked into the traffic lane had he not parked his vehicle where he did contrary to the standard of care. In other words, the placement of the BMW in the median area caused and contributed to the Accident: *Hoang v. The Personal Insurance Co.*, 2017 ONSC 3649 at para. 20.

[65] The defendant’s breach of duty of care, both by parking the vehicle where he did on the median and then entering the lane of highway traffic as pedestrian, caused and contributed to the Accident, and constituted acts of negligence.

Issue 2: Was the Plaintiff Driver Also Negligent?

Legal Framework for Negligence Analysis

[66] An analysis of liability of the plaintiff driver, in these circumstances, is governed by existing legal principles.

[67] In my view, in this case, there are two points in time when the court should assess whether the plaintiff driver was negligent: (1) after the defendant entered the road as pedestrian, onto the traffic lane of the highway into the path of the oncoming vehicle which has the right of way; and (2) when the plaintiff driver, approaching, initially saw the defendant, standing next to his car within the solid white lines of the median.

At the Moment of the Collision in the Highway Lane

[68] As explained by this Court in *Ibaraki v. Bamford*, 1996 CanLII 1814, [1996] B.C.J. No. 724 (S.C.), a plaintiff driver's obligation to take evasive action is triggered when the plaintiff becomes aware (or ought to have been aware), that the defendant is not going to obey the law:

[12] In the case of an adult pedestrian, a driver's obligation to take evasive action arises only when she becomes aware or ought to have become aware that the pedestrian is not going to obey the law...

See also *Addison v. Nelles*, 2003 BCSC 1860 at para. 19, aff'd 2004 BCCA 623.

[69] Since the plaintiff was driving the vehicle with the right of way, pursuant to s.180, the plaintiff was the "dominant" driver": see *Nerval v. Khehra*, 2012 BCCA 436 at para. 33.

[70] The test for whether a dominant driver is negligent after seeing that a servient driver has disregarded the law is set out *Pacheco (Guardian of) v. Robinson*, 75 B.C.L.R. (2d) 273, 1993 CanLII 383 (C.A.), arising in a context of a left handing turning vehicle scenario, as follows:

[18] ...to fix any blame on the dominant driver, the servient driver must establish that after the dominant driver became aware, or by the exercise of reasonable care should have become aware, of the servient driver's own disregard of the law, the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself. In such circumstance any doubt should be resolved in favour of the dominant driver.

See also *Dawes v. Valadas et al.*, 2005 BCSC 1319 at paras. 30–32; and *Nerval* at para. 37 ("although Ms. Khehra had the right of way, she could exercise that right only in a safe manner").

[71] A similar test for determining a dominant driver's negligence has been articulated in the case of a jaywalking pedestrian, in *Pinsent v. Brown*, 2013 BCSC 794:

[54] The accident occurred while Ms. Pinsent was jaywalking. Accordingly, [the driver] Ms. Brown had the right of way. Ms. Pinsent has failed to establish that after Ms. Brown became aware, or by the exercise of reasonable care should have become aware, of Ms. Pinsent's own disregard of the law, Ms. Brown had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself.

See also *Addison* at para. 18 ("because the plaintiff was not in a crosswalk or at an intersection, the issue is whether the defendant driver had become aware or should have become aware of the possible collision in time to avoid it"); and *Ibaraki* at para. 12.

[72] The defendant did not establish that the plaintiff, after becoming aware, or by the exercise of reasonable care should have becoming aware, of the defendant's own disregard of the law by failing to yield, had sufficient opportunity to avoid the Accident of which a reasonably careful and skilful driver would have availed himself. In my view, the plaintiff was not negligent for failing to take some reasonable evasive steps after the defendant stepped into the traffic lane.

[73] The Accident happened very quickly after the defendant walked out into the northbound traffic lane. Unfortunately, the plaintiff had no reasonable or realistic time to react in order to take a meaningful or reasonable evasive action which could have avoided the collision. I find the plaintiff did not have sufficient opportunity to avoid the Accident of which a reasonably careful and skilful driver would have availed himself, and there is not doubt about this. And, if there were any doubt about the matter, it would be resolved in the plaintiff's favour in any event.

[74] I find that the plaintiff was not negligent for failing to take some evasive step, just before impact, after the defendant stepped into the traffic lane. The plaintiff was not negligent for this reason, at this moment in time.

At the Moment When Plaintiff Driver Initially Saw Defendant Standing in the Median

[75] The defendant's submissions on the plaintiff's liability focuses on the plaintiff's conduct when driving up the highway after he spotted the defendant from about 100m away, beside his car, in the median a very short distance from the traffic lane, in a hazardous situation.

[76] The defendant contends that the plaintiff ought to have taken advance precautionary measures in light of a hazardous situation, and by not doing so he was negligent and that this caused or contributed to the Accident. The defendant relies on common law principles, as well as s. 144 and s. 181 of the *Act*. The defendant submits that s. 181 "places a more stringent standard on the motorist".

[77] The defendant submits:

4. While the defendant can acknowledge they were negligent in some of their actions leading up to the moment of impact; however, the plaintiff also acted negligently during this time.
5. In this particular instance, when assessing the negligence of the plaintiff, it is not a question of what he did, but a matter of what he did not do under the circumstances.

[78] The defendant's counsel submits that the following things the plaintiff did not do constitutes negligence:

8. It is also important to note the actions, or in this instance, the lack of action taken by the plaintiff once he observed the defendant, who in my submission, was in a place of danger and posed a potential hazard to the plaintiff, as follows:
 - He did not apply the brakes or slow down his vehicle in any appreciable manner, despite having the opportunity to do so;
 - He did not change lanes into the left-hand travel lane of Hwy 99;
 - He did not move over to his left in order to allow more room for the defendant;
 - And of particular note, the plaintiff did not sound his horn at any time during the period in question
9. It is respectfully submitted that any and all of the above steps are actions the plaintiff, or any reasonable person in a similar situation, ought to have taken to minimize the risk posed by the defendant's presence and the failure to do so leads to a finding of negligence as against the plaintiff.

[79] The defendant submits that the plaintiff's lack of action in this regard amounts to a failure to discharge his duties under ss. 144 and 181 of the *Act*, which includes the duty to take reasonable care for others, to exercise due care to avoid colliding with a pedestrian who is on the highway, and to give warning by sounding the horn of the vehicle when necessary.

Driver's Duties When They Have the Right of Way

[80] Despite the plaintiff having the right of way, he as a driver nevertheless had a duty of care in these circumstances. As explained by this Court in *Hmaied*, the plaintiff had a duty to keep a proper lookout and take reasonable precautions in response to apparent potential hazards:

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

See also *Marcena v. Thomson*, 2019 BCSC 1287 at para. 31 ("Both pedestrians and drivers owe a duty to take reasonable care for the safety of themselves and others when using a roadway. This common law duty is supplemented by the statutory duties found in the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318.")

[81] The standard required of drivers when responding to a pedestrian creating a hazard (such as jaywalking) is not one of perfection: *Hmaied* at para. 24. The standard is whether the driver acted in a manner in which an ordinary prudent person would act: *Hadden v. Lynch*, 2008 BCSC 295 at para. 69.

[82] Further, "a driver's obligation to take evasive action arises only when she becomes aware or ought to have become aware that the pedestrian is not going to obey the law": *Addison* at para. 19, quoting *Ibaraki* at para. 12.

[83] The plaintiff also had statutory obligations, as set out in s. 181 of the *Act*:

Duty of driver

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

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

[84] As explained by the Court of Appeal in *Russell v. Parks*, 2014 BCCA 104 at para. 16, where there are no crosswalks, ss. 180 and 181 are more appropriate to apply than s. 179.

[85] The defendant also relies on s. 144 of the *Act*, which states:

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.

(2) A person who contravenes subsection (1) (a) or (b) is liable on conviction to a fine of not less than \$100 and, subject to this minimum fine, section 4 of the *Offence Act* applies.

(3) In imposing a sentence for an offence under subsection (1), the fact that the commission of the offence causes death or bodily injury to a vulnerable road user is to be considered as an aggravating factor.

[86] Statutory duties, “supplement the common law duty of all highway users to exercise what constitutes, in all of the circumstances, due care”: *Hmaied* at para. 21. While the court considers the “rules of the road... those rules do not eliminate the need to consider the reasonableness of the actions of the parties”: *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21.

Drivers are Entitled to Expect a Pedestrian to Obey Rules of Road

[87] The reasonableness of a driver's conduct and the content of their common law and statutory duties, including the taking of "reasonable precautions" (*Hmaied* at para. 23) must, in turn, be assessed and informed by the principle of law that a driver is entitled to expect that a pedestrian will obey the rules of the road – including that set out in s. 180.

[88] Specifically, as explained in *Hmaied*, drivers with the right of way are ordinarily entitled to expect an adult pedestrian will not walk out directly in front of them as they are driving on the road:

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

[89] That general principle of law is also articulated (in the context of drivers of vehicles) in *Pacheco* at para. 11, our Court of Appeal stating there that:

[11] The plaintiff was not bound to guard against every conceivable eventuality but only against such eventualities as a reasonable person ought to have foreseen as being within the ordinary range of human experience. The plaintiff was entitled to proceed on the assumption that all other vehicles will do what it is their duty to do, namely observe the rules regulating traffic. [emphasis added]

[90] In support of that principle, the Court of Appeal in *Pacheco* at para. 14 refers to *Etter v. Trent*, [1991] B.C.J. No. 237, 1991 CarswellBC 1975 (C.A.), as follows:

[14] Mr. Justice Locke said at p. 5:

The situation is, in principle, almost exactly the same as in *Bissky v. Trottier et al* (1984), 54 B.C.L.R. 288, where Macdonald J. had to resolve liability where a driver turning left across the line of traffic when it was plainly unsafe to do so sought to fix a portion of the liability on the oncoming car which struck him when the driver of the oncoming car had momentarily glanced away. In what I respectfully adopt as a compendious review of the principles applicable, he quoted extracts from *London Passenger Tpt. Bd. v. Upson*, [1949] A.C. 155, [1949] All E.R. 60 (H.K.), *Toronto Rly v. King*, [1908] A.C. 260 (P.C.), *B.C.Elec.Ry. v. Farrer*, [1955] S.C.R. 757, [1955] 5 D.L.R. 161, *Walker v. Brownlee*, [1952] 2 D.L.R. 450 (S.C.C.), *MacLeod v. Kuhlmann*, [1960] O.W.N. 14, 20 D.L.R. (2d) 614 (C.A.), *Taylor v. Ainslie*, [1931] O.R. 188, [1931] 3 D.L.R. 26 (C.A.) and *Fardon v.*

Harcourt-Rivington (1932), 48 T.L.R. 215 and his judgment is distilled in the headnote:

... To fulfil his duty of care, the user of the road is not bound to guard against every conceivable eventuality but only against such eventualities as a reasonable man ought to foresee as being within the ordinary range of human experience. W. was not negligent in taking his eyes off the approaching car as he had no reason to anticipate that T. would turn into his lane ...

An integral part of this decision is the well-known statement from *Toronto Railway v. King*, approved over and over again, that:

...Traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets ...

[Emphasis added]

[91] The Court of Appeal has commented that the s. 181(a) standard of “due care” in a parking lot “will obviously be higher” than on a freeway, since “one can expect pedestrians to be using” the parking lot: *Russell* at para. 16. That comment in *Russell* is consistent with the principle that a driver is not generally reasonably expected to foresee that an adult pedestrian will walk out “directly in front of them as they are proceeding lawfully along their way” on a highway traffic lane: *Hmaied* at para. 22.

Findings – Alleged Negligence of Plaintiff Driver

[92] The plaintiff did not breach his duty of care after he saw the defendant standing by his vehicle on the median immediately adjacent to the right-hand northbound traffic lane on Highway 99.

[93] Acknowledging that the defendant standing beside the traffic lane was a “potential hazard”, the plaintiff did keep a proper lookout and did not fail to take reasonable precautions in response to apparent potential hazards. He did not fail to exercise due care to avoid colliding with the defendant pedestrian who was on the highway: s. 181(a).

[94] I find that at the moment the plaintiff saw the defendant from a distance, the defendant was standing beside his car inside the area of the median, outside of the traffic lane. The plaintiff slowed down a little bit when he saw initially the defendant, and was traveling at a speed of 70km/h at the time of the Accident.

[95] As he drove forward approaching the defendant, the plaintiff was entitled to expect the defendant would obey the law and not enter the traffic lane in front of the plaintiff's vehicle, contrary to s. 180 of the *Act*. *Hmaied* at para. 22; *Pacheco* at para. 11.

[96] The plaintiff driver was entitled to expect that the defendant, an adult pedestrian, would "not jump out directly in front of them as they are proceeding lawfully along their way": *Hmaied* at para. 22, citing *Enright v. Marwick*, 2004 BCCA 259 at para. 35.

[97] Further, when the plaintiff saw the defendant from 100m away, it was not reasonably foreseeable or apparent at the time that the defendant would disregard the law and create a hazardous situation by walking into the traffic lane. The plaintiff was thus not obliged at that moment to take all reasonable steps to avoid a collision: *Hmaied* at para. 23; *Senner v GE Canada Leasing Services Company*, 2017 BCSC 1939 at paras 170, 182. At common law, the obligation of a driver (with the right of way) to take evasive action to avoid a pedestrian arises only when they become aware or ought to have become aware that the pedestrian is not going to obey the law: *Addison* at para. 19; see also *Senner* at para 182.

[98] Put another way, the plaintiff driver did not fail to act in a manner in which an ordinary prudent person would act: *Hadden* at para. 69. He did not fail to take "reasonable care for the safety of themselves and others when using a roadway": *Marcena* at para. 31. He kept a proper lookout, and did not fail to take reasonable precautions in response to any apparent potential hazard: *Hmaied* at para. 23.

[99] The defendant alleges that the plaintiff failed to reduce his speed or apply the brakes upon seeing the defendant, and that this amounts to a breach of his duty.

However, the plaintiff did slow down when he initially saw the defendant, and I am not persuaded that he was obliged to further reduce his speed, since it was not reasonably foreseeable that the defendant would enter into the traffic lane. I also recognize that the plaintiff was traveling at a reduced speed of around 70 km/h in a 90km/h zone at the time of the Accident. In my view, by travelling at this reduced speed while observing the circumstances around him, the plaintiff fulfilled his obligation to take “reasonable care for the safety of themselves and others when using a roadway” (*Marcena* at para. 31).

[100] Further, the plaintiff did not breach s. 181(b) or (c) of the *Act*. The defendant has not established that it was necessary for the plaintiff to sound the horn, given that the defendant was standing outside the traffic lane, and since it was not reasonably foreseeable that the defendant would enter the traffic lane: s. 181(b); *Senner* at para 170.

[101] There is no evidence, or no sufficient evidence, justifying any finding that the defendant was a “confused or incapacitated person on the highway” requiring special measures to be taken by the plaintiff driver: s. 181(c).

[102] The defendant also contended that the plaintiff, as he approached the defendant standing in the median, ought to have changed lanes and/or moved over to the left to allow more room for the defendant, and if he had done so it would have prevented the Accident.

[103] That the defendant walked into the traffic lane, into northbound traffic, was not an eventuality that a reasonable person ought to have foreseen as being within the ordinary range of human experience: *Pacheco* at para. 11. To require the plaintiff to have moved over to the left or changed lanes into the far left-hand northbound traffic lane from about 100m away, after seeing the defendant standing in the median area adjacent to the right-hand traffic lane, in anticipation of a possibility the defendant could walk into oncoming traffic, would be to require the plaintiff to “guard against every conceivable eventuality”, which the law of negligence does not require: *Pacheco* at para. 11.

[104] To suggest the plaintiff should have taken precautionary measures in anticipation of the deceased defendant walking into the highway traffic lane directly in front of him – an event which was not reasonably anticipated – would be to seek to hold the plaintiff to a standard of perfection, beyond reasonable care. The plaintiff was not required to meet a standard of perfection under the law of negligence: *Hadden* at para. 69.

[105] Further, and in any event, the defendant did not establish factually, on a balance of probabilities, that the plaintiff had a reasonable and safe opportunity to change into the left-hand traffic lane (or move over to the left, to straddle the left and right hand lanes) in advance of reaching the median (i.e. from the time after he saw the defendant 100m away, to the time of the Accident). In his evidence, the plaintiff testified there was a vehicle passing him in the lane on his left.

[106] I do not hold that a driver is never, in any circumstance, required by law to slow down to a particular reduced speed, change lanes, move over, or honk their horn, as they approach an adult person who is standing close to the side of a highway or road. Every case should be considered on its own facts. Here, the plaintiff did reduce his speed when he initially saw the defendant in the median.

[107] However, on the facts of this case, I find that the plaintiff was not required to slow down further, change lanes, partially change lanes to move over, or honk their horn by the applicable standard of care as he approached the adult defendant standing beside his car within the boundary of a median adjacent to the northbound traffic lane. His failure to take such steps was not contrary to the conduct of an ordinary prudent person, nor did it represent a want of reasonable care, or breach the applicable standard of care.

[108] In the result, the plaintiff did not act negligently in respect of the Accident.

Issue 3: Liability Apportionment for the Accident

[109] Given my conclusion on issue 2, no consideration of apportionment of liability arises because the defendant is 100% liable.

Conclusion and Order Granted

[110] I therefore order and declare that the defendant is 100% liable for the Accident.

[111] If the parties cannot agree on costs they may, within 30 days, submit a request to Supreme Court Scheduling for an appearance before me to make submissions on the matter of costs.

“Stephens J.”