COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Emil Anderson Maintenance Co. Ltd. v. Taylor,* 2024 BCCA 156

Date: 20240426
Dockets: CA49104; CA49106
CA49107; CA49108

Docket: CA49104

Between:

Emil Anderson Maintenance Co. Ltd.

Appellant
(Defendant and Third Party)

And

Gloria Jean Taylor

Respondent
(Plaintiff)

And

Judson Thomas Sleeman, His Majesty the King in Right of the Province of British Columbia as represented by the Minister of Justice and Attorney General of British Columbia, and Kelly Molloy, Executor of the Estate of Barbara McNally

Respondents
(Defendants and Third Parties)

– and –

Docket: CA49106

Between:

Emil Anderson Maintenance Co. Ltd.

Appellant
(Defendant and Third Party)

And

Cole Stevens

Respondent
(Plaintiff)

And

Judson Sleeman, the Estate of Barbara McNally, Attorney General of Canada, and Kelly Molloy, Executor of the Estate of Barbara McNally

Respondents
(Defendants and Third Parties)

– and –

Docket: CA49107

Between:

Attorney General of Canada

Appellant
(Defendant)

And

Cole Stevens

Respondent
(Plaintiff)

And

Judson Sleeman, The Estate of Barbara McNally, Emil Anderson Maintenance Co. Ltd., and Kelly Molloy, Executor of the Estate of Barbara McNally

Respondent
(Defendants and Third parties)

– and –

Docket: CA49108

Between:

His Majesty the King in Right of Canada as represented by the Attorney General of Canada

Appellant
(Defendant)

And

Gloria Jean Taylor

Respondent
(Plaintiff)

And

Judson Thomas Sleeman, Emil Anderson Maintenance Co. Ltd., and Kelly Molloy, Executor of the Estate of Barbara McNally

Respondents
(Defendants and Third Parties)

Before: The Honourable Justice Griffin
The Honourable Mr. Justice Abrioux
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated May 1, 2023 (*Stevens v. Sleeman*, 2023 BCSC 719, Vancouver Dockets M172345 and M18396).

Counsel for the Appellant (CA49104 & CA49106)/Respondent (CA49107 & CA49108), Emil Anderson Maintenance Co. Ltd.:	M.D. Silva B.E. Black
Counsel for Respondent (CA49104 & CA49106)/Appellant (CA49107 & CA49108), His Majesty the King in Right of the Province of British Columbia as represented by the Minister of Justice and Attorney General of British Columbia and Attorney General of Canada:	A.W.T. Scarth C.N. Landsiedel
Counsel for the Respondent, Judson Sleeman:	K. Armstrong, K.C. D. Batkin
Counsel for the Respondents, The Estate of Barbara McNally and Kelly Molloy, Executor of the Estate of Barbara McNally:	R.B. Pearce P.M.J. Arvisais
Counsel for Respondent, Cole Stevens:	A.E. Vertlieb, K.C. G. Vecchio-Semchuk, Articled Student
Place and Date of Hearing:	Vancouver, British Columbia January 8–9, 2023
Place and Date of Judgment:	Vancouver, British Columbia April 26, 2024

Written Reasons by:
The Honourable Justice Griffin

Concurred in by:
The Honourable Mr. Justice Abrioux
The Honourable Justice Skolrood

Summary:

After traffic lights went out on an intersection on a busy highway, a serious and fatal accident occurred. The judge found liable the drivers of the two motor vehicles that collided in the intersection, a finding which is not appealed. The judge also found liable the operations communications centre of the RCMP who received a call warning that drivers were racing through the intersection and a serious accident was going to occur, but did not immediately alert the appropriate external agency and did not dispatch the RCMP to the intersection. The Attorney General of Canada appeals the finding of liability. The judge further found liable the highway maintenance contractor whose driver went through the intersection twice that day but took no action to address the problem. The highway maintenance contractor also appeals.

Held: Appeals dismissed.

The judge did not err in finding that there was a duty of care owed by the communications centre employees, as the harm to users of that intersection was reasonably foreseeable. The judge also did not err in her standard of care analysis or in applying too high a standard of care on the appellants. It was not necessary for the judge to have expert evidence supporting her findings on the standard of care. That there was contrary evidence did not undermine the judge's findings, as there was evidence to support her findings. Nor did the judge err in her analysis of causation. The judge's apportionment of 40% liability to the communications centre was in her discretion and she did not make any palpable and overriding errors.

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Reasons for Judgment of the Honourable Justice Griffin:

Introduction

[1] In the morning hours of October 10, 2016, traffic lights ceased operating on a busy highway at an intersection with a secondary cross-road, near Mission, BC.

[2] At 1:36 p.m., a concerned driver called the non-emergency line of the Royal Canadian Mountain Police ("RCMP") Mission detachment advising that the lights were not functioning. His call was routed to the RCMP Operational Communications Centre at 'E' Division dispatch (the "OCC"). The caller said that some drivers were treating the intersection as a four-way stop but "tons of people [were] just racing through". He said:

> I'm concerned there's going to be a serious accident there if somebody doesn't get those lights addressed soon.

[3] The traffic lights remained out.

[4] An employee of Emil Anderson Maintenance Co. Ltd. ("Emil"), the highway maintenance contractor responsible for that section of highway, drove through the intersection twice, while the lights were out.

[5] Nothing was done to warn drivers.

[6] At 3:08 p.m., a serious accident did occur at the intersection.

[7] A driver, Barbara McNally, tentatively attempted to enter the intersection from the cross-road to turn left onto the highway. Another driver, Judson Sleeman, was speeding along the highway in his pickup truck. He drove into the intersection and braked only momentarily before crashing into Ms. McNally's car.

[8] The trial judge held that both drivers were at fault: reasons for judgment, indexed as *Stevens v. Sleeman,* 2023 BCSC 719 (the "Reasons").

[9] The question that is the focus of this appeal is who else was at fault. The trial judge held that Emil and the Attorney General of Canada ("AGC"), on behalf of the OCC, were also at fault. On appeal, they argue they were not.

[10] The AGC also argues on appeal that if the OCC is liable, the judge erred in apportioning 40% fault to it.

[11] For the reasons that follow, I would dismiss the appeal.

Background

[12] The intersection where the accident occurred was between Nelson Street and Lougheed Highway in Mission, BC. The highway is busy and drivers often speed.

[13] The OCC provides 24-hour emergency and non-emergency call-taking and dispatching for RCMP detachments, including for the RCMP detachment at Mission.

[14] The OCC call-takers and dispatchers prioritize calls and can take various actions to bring the information to the attention of police members, from doing nothing, to sending a low priority message internally from computer to computer, to creating a police file, to alerting police members by radio and dispatching a police member to the scene.

[15] At 1:36 p.m., the OCC received a telephone call (the "First Call") from a concerned driver, Kenneth Galpin. Mr. Galpin said:

> Hi there. Just making a report. The traffic lights at Nelson and Lougheed have been out for over an hour. You got some people doing it as a four way stop, which is correct, and tons of people just racing through there. I'm concerned there's going to be a serious accident there if somebody doesn't get those lights addressed soon.

[16] Kelly Garrett was the OCC call-taker who received the First Call.

[17] At 1:43 p.m., Ms. Garrett sent a message to OCC dispatcher Amanda Graham as follows:

> NELSON/ LOUGHEED PEOPLE RACING THROUGH AS POWER OUT, COM STATES SERIOUS ACCIDENT WILL OCCUR

[18] Ms. Garrett did not create a police file or notify those responsible for repairing the traffic lights.

[19] Ms. Graham forwarded the message to on-duty Mission RCMP members via the mobile work station located in their police vehicles. This treated the message as a low priority communication that was not likely to result in police attendance. Many of the officers on shift that day testified, and none recalled seeing the message.

[20] Ms. Graham did not create a police file or dispatch an RCMP member via radio.

[21] Ms. Garrett received a second call regarding the traffic lights at 2:26 p.m., and sent another message to Ms. Graham (the "Second Call"). Only at 2:37 p.m. did Ms. Graham notify the District of Mission that the traffic lights were inoperative. The District informed her that the intersection was under provincial jurisdiction.

[22] At 2:42 p.m., Ms. Graham then called the Regional Transportation Management Centre ("RTMC") of the provincial Ministry of Transportation and Infrastructure ("MOTI") and spoke to Neil Doolaar, an RTMC operator. She advised him that the traffic lights were out at the intersection. She did not communicate the fact an earlier caller had described the situation as involving drivers racing through the intersection and had warned a serious accident might occur.

[23] The MOTI contracted with Emil to provide road maintenance services for the area that included the intersection.

[24] At 2:45 p.m., Mr. Doolaar called MOTI contractor Cobra Electric (South Coast) Ltd. ("Cobra") to dispatch an electrician to repair the lights. Mr. Doolaar testified had he known of the traffic issues at the intersection, he would have dispatched Emil for traffic control as well: Reasons at para. 30.

[25] At around 2:54 p.m., Bruce Stammers, an employee of Emil, approached the intersection westbound on his regular highway patrol. He noticed the traffic lights

were out. He observed vehicles safely following the four-way stop procedure and took no action.

[26] Mr. Stammers passed through the intersection again at approximately 3:04 p.m., returning eastbound. He observed that traffic was “running fine.” He drove on to the Emil yard where he was ending his shift, approximately 6.5 km away. He took no immediate action, although he planned to call in a report about the traffic lights being out after he unloaded debris from his truck. He was notified about the accident first.

[27] At 3:08 p.m., Mr. Sleeman was travelling on Lougheed Highway above the 80 km/h speed limit in a 2007 Ram pickup truck. He was travelling as fast as 120 km/h when he approached the intersection. He noticed that the usual advance warning lights prior to the intersection were not flashing. This indicated to him that the light ahead was green and so he did not slow down. As he approached the intersection he noticed another vehicle slowing down. He did not have a clear view of the McNally vehicle, a 2007 Cadillac sedan, which would have been starting to come into the intersection from his right, because there was a vehicle in the lane to his right blocking that sightline. He did not notice that the traffic lights were out until he was almost in the intersection. He slammed on his brakes but not in time to avoid the collision with Ms. McNally’s vehicle.

[28] The accident reconstruction evidence estimated that at impact, the speed of Mr. Sleeman’s vehicle was in the range of 86 to 91 km/h; and the speed of Ms. McNally’s vehicle was in the range of 33 to 37 km/h.

[29] The judge found that a modest decrease in Mr. Sleeman’s speed as he approached the intersection (prior to his slamming on his brakes) would have resulted in the accident being avoided, whether it was decreased to 109 km/h or 100 km/h for example: Reasons at paras. 47–51. This conclusion was supported by two accident reconstruction expert opinions.

[30] A video of the crash was captured on another driver's dashboard camera (the "Dashcam Video"). The Dashcam Video was entered into evidence, and showed that before the accident, several vehicles on the highway drove quickly through the intersection without stopping, but also showed that some vehicles were stopped and attempting to follow a four-way stop procedure.

[31] The Dashcam Video indicates that Ms. McNally had stopped on the crossroad of Nelson St. at the intersection, waited for some moments, then tentatively entered the intersection to initiate a left turn onto the highway. It was when she was in the intersection that Mr. Sleeman's vehicle crashed into her vehicle.

[32] The force of the collision pushed the Sleeman and McNally vehicles into two stationary eastbound vehicles, one of which had Gloria Taylor as a passenger. The accident resulted in multiple injuries and the death of Ms. McNally. The respondent Cole Stevens and an infant David Lopez were passengers in the McNally vehicle.

[33] Emil was notified of the accident at approximately 3:25 p.m. It then called out its subcontractor, Protech Traffic Control ("Protech") at 3:30 p.m. Protech took approximately two hours to arrive on site. It is not known to what extent that was affected by the accident having caused traffic to back-up.

[34] The trial below dealt with liability issues only, not damages.

Trial Judgment

[35] The trial judge found that a myriad of errors contributed to the accident. In addition to the drivers, Mr. Sleeman and Ms. McNally, the judge found that the AGC, on behalf of the OCC, and Emil were each liable.

[36] In summary, the judge reached these conclusions:

a) The OCC call-taker and dispatcher (together, the "OCC employees") were warned of the hazardous condition on the highway: the lights were out and not all drivers were following the four-way stop. However, the OCC employees did not follow their internal procedures

for a road hazard. Had they followed the standard operating procedure ("SOP"), they would have alerted police directly and that would have caused the police to attend quickly. If the police had attended, the presence of a police car would slow traffic down. If Mr. Sleeman had only slowed down slightly the accident would have been avoided.

b) Further, if the OCC employees had acted according to procedure when first notified of the problem, the MOTI would have been immediately notified, which would in turn have caused Cobra and Emil to be notified. There would have been personnel on site to either fix the problem or provide traffic control within 1 hour or perhaps slightly longer, but before the accident occurred.

c) Mr. Stammers did not follow prescribed procedures for a road hazard. If he had provided some initial traffic control measures upon encountering the inoperative traffic lights, enough to slow down the traffic, then the accident would not have occurred.

[37] The judge apportioned liability 40% to the AGC (on behalf of the OCC); 25% to the road maintenance contractor, Emil; 25% to the speeding driver, Mr. Sleeman; and 10% to the deceased driver, Ms. McNally.

Grounds of Appeal

[38] The AGC advances four grounds of appeal. The AGC submits that the judge erred in:

a. finding the OCC employees each owed the plaintiff a duty of care;

b. imposing an incorrect standard of care;

c. finding causation based on an absence of evidence and/or on inference based on speculation and guesswork; and

d. apportioning a disproportionate amount of blameworthiness to the OCC employees.

[39] Emil advances two general grounds of appeal. Emil submits that the judge erred in:

a. misapprehending the facts and misapplying the law as it related to her conclusion on the standard of care; and

b. making findings of fact and/or inferences in the causation analysis where there was no evidence in support of such findings.

Analysis

A. Grounds of Appeal of the AGC

1. Did the Judge Err in Finding that the OCC Employees Owed A Duty of Care?

[40] The AGC submits that the judge erred in finding that the OCC employees, upon learning of the inoperative traffic lights, owed a duty of care to users of the intersection, including to Mr. Stevens, the passenger in Ms. McNally's vehicle who was injured by the accident. The AGC submits that the OCC employees could not have reasonably foreseen that if they failed in their duties, it would lead to an accident in the intersection.

[41] Whether a party owes a duty of care is a question of law: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 21, 1999 CanLII 706; *Van Tent v. Abbotsford (City)*, 2013 BCCA 236 at paras. 22–23.

[42] The judge correctly stated the principles that apply to determining whether a duty of care exists, based on the authorities interpreting *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) and *Cooper v. Hobart*, 2001 SCC 79, an approach known as the "*Anns/Cooper* analysis": Reasons at paras. 59–60. As noted by the judge, this Court has expressed the duty of care analysis as four questions:

1. Does a sufficiently analogous precedent exist that definitively found the existence or non-existence of a duty of care in these circumstances?

   If not;

2. Was the harm suffered by the plaintiff reasonably foreseeable?

   If yes;

3. Was there a relationship of sufficient proximity between the plaintiff and the defendant such that it would be just to impose a duty of care in these circumstances?

   If yes, a *prima facie* duty arises;

4. Are there any residual policy reasons for negating the *prima facie* duty of care established in question/step 3, aside from any policy considerations that arise naturally out of a consideration of proximity?

   If not, then a novel duty of care is found to exist.

   See *Waterways Houseboats Ltd. v. British Columbia*, 2020 BCCA 378 at para. 200, citing *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at para. 50.

[43] Considering the first step in the analysis, the judge found that there was case law recognizing a duty of care owed by emergency call dispatchers to a caller seeking emergency assistance. However, the case law had not yet recognized a duty of care owed by dispatchers to a broader segment of the public, specifically users of a segment of highway where the call-taker was made aware of a risk of harm to those users: Reasons at paras. 62–63, 80.

[44] The judge therefore proceeded to the next part of the *Anns/Cooper* analysis, reasonable foreseeability of harm.

[45] The focus of the AGC in challenging the judge's finding of a duty of care is, on this second step, reasonable foreseeability of harm.

[46] As explained in *Bergen v. Guliker*, 2015 BCCA 283 at paras. 66–67, at this stage the focus is on whether it is reasonably foreseeable that the actions or omissions could cause harm to the victim. The question is therefore: was it reasonably foreseeable to the OCC employees that their failures to take the necessary actions could reasonably cause harm to the users of the highway passing through the intersection?

[47] The judge noted that the test is an objective one, and without the benefit of hindsight, citing *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at para. 53. The judge observed, correctly, that only the general mechanism of injury need be foreseeable, not the precise mechanism, citing *McCormick v. Plambeck*, 2022 BCCA 219 at para. 28.

[48] The judge appropriately asked whether the harm suffered by those in the accident was reasonably foreseeable to the OCC employees: para. 65. The judge found that the accident in the intersection, causing personal injury, was reasonably foreseeable to the OCC employees: para. 70.

[49] The AGC submits that the judge wrongly inferred reasonable foreseeability from the fact that harm occurred. I disagree.

[50] The judge found that the First Call made by Mr. Galpin should have alerted the OCC employees to the fact that there were "tons" of vehicles "racing" through the intersection where the lights were inoperative: para. 69. The caller warned that an accident would occur based on the road conditions at the time. This warning was foresight, not hindsight, and it focused on a very specific location, the intersection, and very specific conduct, drivers proceeding through the intersection at highway speed without stopping, and other drivers engaging in a four-way stop procedure. The Second Call alerted the OCC employees to the fact that the hazardous conditions had not been corrected. It therefore was reasonably foreseeable that

there could be a serious accident in the intersection because of the hazardous road conditions.

[51] The argument at trial, as noted by the judge in her Reasons at para. 58, was that the OCC employees failed in their duties in two ways:

1. failing to take timely steps to notify the appropriate external agency about the inoperative traffic lights; and

2. failing to dispatch RCMP members to the intersection after the First Call.

[52] The AGC submits that the judge erred, because the evidence did not establish that there was a "foreseeable risk of unsafe driving" at the intersection due to the inoperative lights. The AGC submits that the fact that there were people driving motor vehicles, and that motor vehicles are inherently dangerous, does not give rise to a foreseeable risk of injury because of the inoperative lights.

[53] The AGC argues that had drivers been obeying all traffic laws, they would have seen that the lights were out, stopped at the intersection and initiated the four-way stop procedure. The AGC submits it was not reasonably foreseeable to OCC employees that drivers would not do so. The AGC submits that while traffic accidents are always possible when drivers do not obey the rules of the road, that possibility cannot be said to create a duty of care for the OCC employees.

[54] Further, the AGC points to the several hours that passed while the lights were inoperative, before an accident occurred, as support for the argument that the accident was unforeseeable.

[55] The problem with the AGC's argument is that it fails to recognize the important purpose of OCC employees, because it suggests that even when a known dangerous road condition is reported to them, they owe no duty of care because drivers are supposed to be alert at all times and should just self-correct in the face of an unexpected road hazard.

[56] Respectfully, this is faulty reasoning when there is evidence, as here, that drivers are not responding perfectly to the dangerous road condition.

[57] The fact that drivers are supposed to be alert at all times in case they encounter an unexpected road hazard does not relieve an authority, knowing of that hazard, of the responsibility for warning drivers or correcting road hazards.

[58] For example, in *O'Rourke v. Schacht*, [1976] 1 S.C.R. 53, 1974 CanLII 28 a sign warning of hazardous construction was knocked down as the result of an earlier accident. The police who investigated failed to ensure that the sign was replaced. The police were found liable to a driver who drove into an open culvert. This was despite there being earlier signs warning drivers of the construction, and the driver being found negligent.

[59] Importantly, on the facts of this case the driving behaviour of Mr. Sleeman and Ms. McNally that contributed to the accident in the intersection was not unusual or unpredictable. In fact, the OCC call-taker was expressly warned in the First Call that because the traffic lights were not working, there were two kinds of driving behaviours witnessed at the intersection that could lead to a serious accident: some drivers were following the four-way stop method, meaning they were stopping first, and then entering the intersection on the premise that vehicles would stop in the other directions; and other drivers were "racing" through the intersection without stopping. The word "racing", in context, suggest that drivers were not slowing down from highway speed.

[60] It would be contrary to the known danger reported to the OCC employees, for them to assume that all drivers would obey the four-way stop procedure. Even without a driver speeding on the highway (itself a foreseeable type of driving behaviour), one could predict that a driver might fail to stop at the intersection because they did not notice the lights were out and that this could lead to a serious accident.

[61] The OCC employees had all the information necessary to be able to foresee the consequences to users of the intersection, if they did not promptly fulfill their responsibilities, namely: the traffic lights would continue to be inoperative and drivers would not be warned of the hazard; and there could be a collision between a vehicle obeying the four-way stop procedure and entering the intersection and a vehicle "racing" through, not noticing that the lights were out.

[62] I also do not accept the AGC's argument that because the accident did not occur soon after the First Call, there was no foreseeability of harm. The AGC relies on *Provost v. Dueck Downtown Chevrolet Buick GMC Limited*, 2020 BCCA 86, but the facts of that case are not at all analogous. In that case a truck was stolen from a car dealership, which negligently stored it. Hours later the police attempted to arrest the car thief and engaged in a high-speed chase, contrary to public policy and a direction from a commanding officer. This Court found it was not reasonably foreseeable to the car dealership that there would be a risk of harm arising from police actions more than an hour after the theft. This Court held that it was fair and just to limit the duty of care to damage that occurs in the course of the theft or immediate flight. The reasonably foreseeable risk of injury from the negligent storage of the truck was constrained by time and by physical closeness to the location of the theft.

[63] This Court in *Provost* relied in part on the analysis of the Supreme Court of Canada in *Rankin*. That case also involved the theft of a vehicle that a business had negligently stored. Later, the thief's negligent driving caused an accident and personal injuries. The Supreme Court of Canada held that the garage business did not owe a duty of care to the person injured in the accident. In *Rankin*, at para. 26, Justice Karakatsanis noted that the risk of theft did not automatically include the risk of injury. She held that to find a duty of care going beyond the risk of theft there must be some evidence that the person in the position of the defendant ought to have reasonably foreseen the risk of injury, that is, that the stolen vehicle could be operated unsafely.

[64] Here, there was evidence that the inoperative lights posed a risk of injury to road users travelling through the intersection: the OCC employees were told about unsafe driver behaviour at the intersection with the lights out.

[65] This is distinguishable from *Provost,* where the dealer could not know that the theft of a car would lead to a negligent police chase. Here, the hazard of a driver driving through the intersection without slowing down and at highway speed (which could include drivers travelling above the posted speed limit), was known to the OCC employees as part of the dangerous road conditions that required them to act. The passage of time did not make that danger more remote. It was only happenstance that the hazard did not generate a serious accident before it did.

[66] I add that the AGC's argument on reasonable foreseeability seems to ignore entirely the purpose of traffic lights, the location of them in this case and the content of the First Call.

[67] To state it at its most obvious, traffic lights serve a very important safety function. The purpose of traffic lights at an intersection is to alert drivers travelling in one direction to slow down and stop when the lights are yellow or red, so that traffic travelling in a different direction can move safely through the intersection. The flipside of this is that the absence of yellow or red-lit traffic lights means the absence of a signal to an approaching driver that there is a need to slow down or stop before entering the intersection. While it is true that only green-lit traffic lights signal it is safe to continue through the intersection without slowing down or stopping, the absence of any lights on a highway can obviously lead to a driver assuming that they have the right-of-way and do not need to slow or stop.

[68] It is entirely reasonably foreseeable that some drivers will: speed on a highway; assume any necessary traffic lights are working; and not slow down before entering an intersection without advance warning of yellow or red lights.

[69] While it seems like common sense, there were also several witnesses at trial who agreed that inoperative lights at an intersection on a highway can be a hazardous situation.

[70] When the OCC employees learned that the traffic lights on the highway were out and some drivers were racing through the intersection, they learned that a critically important safety feature was not working and that drivers were driving unsafely because of it. That is why the road condition was reported to them; so they would take action to correct the unsafe condition. Therefore, it should have been reasonably foreseeable to them that if they did not take the appropriate action, the dangerous conditions would continue and could lead to an accident. Respectfully, that the danger the OCC employees were warned about materialized does not take the situation from being foreseeable to one that is judged with hindsight.

[71] I therefore do not accept the AGC's argument that a collision between two motor vehicles in the intersection was not a reasonably foreseeable consequence of the OCC employees failing to perform their job duties after receiving the First Call.

[72] The AGC does not dispute the judge's finding that sufficient proximity existed between the OCC employees and users of the intersection: Reasons at para. 75.

[73] The judge held that, upon learning of a road hazard, the OCC employees have a duty of care to the users of that road to take reasonable steps to make the road safe. This is not an indeterminate duty to an indeterminate class: para. 80. The judge concluded that there were no policy reasons to negate the *prima facie* duty of care: para. 81. The AGC does not dispute these findings that policy reasons did not negate the duty of care.

[74] I am therefore of the view that the trial judge did not err in finding that the OCC employees had a duty of care to road users travelling through the intersection, once the OCC employees received the notice of the dangerous situation in the First Call, to take reasonable steps towards making the intersection safe.

2. Did the Judge Err in Imposing Too High a Standard of Care?

[75] The AGC next argues that the judge erred in imposing too high a standard of care on the OCC employees. There are a few strands to this argument: the standard the judge imposed required expert evidence and there was none; the judge ignored some evidence of witnesses who worked as OCC employees; and the standard imposed by the judge was one of perfection.

[76] The arguments of the AGC that the judge erred in finding the OCC standard of care was not met, raised questions of mixed fact and law, for which the standard of review is palpable and overriding error: *Van Tent* at para. 23.

[77] The judge accepted the AGC's argument that the standard of care was that of a reasonable call-taker and dispatcher in similar circumstances, and that the standard is not one of perfection: para. 82.

[78] The judge found:

> [90] In all of the circumstances, I find that the actions of Ms. Garrett and Ms. Graham fell below the standard of care because:
>
> - they failed to contact the RTMC after the First Call to report the inoperative traffic lights at the Intersection and to inform the RTMC that there were safety concerns at the Intersection;
> - they failed to create a CAD file and dispatch an RCMP member to attend; and
> - they failed to broadcast the information they received in the First Call and the Second Call over police radio so all RCMP members would receive it.

[79] The first finding of a breach of a standard of care was conceded by the AGC. The AGC conceded that if there was a duty of care, the standard of care required Ms. Garrett to contact the third party agency responsible for maintaining the traffic lights, as soon as possible after the First Call: para. 89. The AGC does not challenge this conclusion but it says that was all that the standard of care required in the circumstances. It argues that failure to meet this standard did not cause the accident.

[80] The AGC submits on appeal that expert evidence was required for the judge to conclude the standard of care was breached in the two additional ways she found: by failing to dispatch an RCMP member to attend; and by failing to broadcast over police radio the information the OCC employees received in the First Call.

[81] This argument is a rather bold one for the AGC to advance on appeal, because at trial the AGC did not seek to introduce expert opinion evidence and did not submit that the standard of care required expert evidence. In fact, the AGC submitted the opposite. At trial, the AGC successfully objected to the introduction of expert evidence sought to be tendered by Emil, on the industry standard response for police dispatch and police call centers, and related opinions. The judge's ruling that such opinion evidence was inadmissible is indexed at: 2023 BCSC 639 ("*Voir Dire* Ruling").

[82] The judge in the *Voir Dire* Ruling correctly instructed herself on the gatekeeper function in relation to expert evidence, as emphasized by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 ["*White Burgess*"]. The judge also considered other authorities which provided guidance on the use of expert evidence to determine standard of care, including *Bergen* and *Burbank v. R.T.B.*, 2007 BCCA 215.

[83] In *Bergen*, this Court commented on the question of when expert evidence is necessary to determine the standard of care. Justice Smith cited certain key principles in her review of the authorities at paras. 114–131:

- whether or not expert evidence is necessary is determined by the facts of each case;
- expert evidence may be necessary where the circumstances require specialized, scientific or technical knowledge outside the knowledge and experience of the ordinary person;
- expert evidence may be necessary when evaluating the obligations of a professional, but this is not always necessarily so; and it is rare in

non-professional negligence cases that expert evidence will be required; and,

- expert evidence may not be necessary when the matter is one which can be determined based on common knowledge and experience, having due regard for what may be taken from applicable legislation or policies governing the activity.

[84] It is clear that not all cases require expert evidence on the standard of care. Where the circumstances are within the knowledge and experience of the ordinary person, expert evidence is not necessary: *Burbank* at para. 57; *Bergen* at paras. 129–130.

[85] The judge was satisfied that the evidence of what happened and the SOP did not raise scientific or technical issues. Accordingly, she would be able to identify the standard practice of OCC employees and determine the standard of care: *Voir Dire* Ruling at para. 14. The AGC does not argue that the judge erred in her *Voir Dire* Ruling, which is not surprising since the judge ruled in the AGC's favour.

[86] In considering the trial evidence, the judge approached the standard of care analysis on the same basis she said she would do in the *Voir Dire* Ruling: by considering standard of care informed by the facts of what happened and the SOP, as well as the evidence regarding the practices of the OCC: Reasons at paras. 82–90.

[87] In my view, the judge properly approached the question of the standard of care of OCC employees. The judge did not err in concluding she did not need expert opinion evidence and in considering that the SOP, as internal policy, "may inform the content of the standard [of care] and whether it was breached": Reasons at para. 83, citing *Bergen* at para. 110.

[88] I therefore do not see any merit in the AGC's new argument that expert evidence was required in order for the judge to reach her conclusions on standard of care.

[89] The AGC also argues that there were three witnesses at trial who gave evidence as to how they would have approached similar calls, Ms. Garrett, Ms. Graham, and Ms. Karr. The AGC submits that the judge did not properly engage with this evidence. I do not see this as a fair criticism.

[90] Ms. Garrett and Ms. Graham were the two OCC employees alleged to be negligent. Ms. Karr was the executive director of the OCC at the time the accident occurred. These witnesses were not expert witnesses nor were they independent.

[91] Certainly, as the responsible OCC employees, it is not entirely surprising that Ms. Garrett and Ms. Graham did not give evidence that they should have done more than they did in the circumstances to alert police, but that hardly requires the judge to give their evidence undue weight.

[92] As the responsible supervisor at the time, Ms. Karr's evidence was not independent evidence either. Her evidence was not entirely accepted by the judge, but it is clear that the judge did take her evidence into account.

[93] For example, the AGC does not take issue with the judge's findings that there are SOPs that apply to all calls handled by the OCC, and there is no SOP specifically designed for inoperative traffic lights: Reasons at paras. 12–13. These findings were consistent with Ms. Karr's evidence.

[94] It is true that the judge did not expressly discount Ms. Karr's evidence to the effect that RCMP do not conduct traffic control or fix traffic lights that are out. This evidence, which was meant to suggest it would be pointless to alert police to the situation upon receiving the First Call, was clearly unpersuasive. The fact was that the OCC employees did alert police, but by way of such a low priority communication that it was not seen or acted upon.

[95] The judge found that call-takers and dispatchers are trained that when there is no SOP directly on point, they are to use their discretion and apply the SOP that most closely applies to the facts at hand: Reasons at paras. 13, 84.

[96] The judge found that the most analogous circumstance to the inoperative traffic lights, in the SOP, was the section dealing with “Road Hazards”: Reasons at para. 85.

[97] The judge explained the “Road Hazard” part of the manual as follows:

> [14] The OCC’s manual contains an SOP for “Road Hazards”. According to the SOP manual, this SOP applies when “calls are received of debris on any public road or where there is an obstruction to the normal flow of traffic”.
>
> [15] The Road Hazard SOP assigns the following tasks to call-takers and dispatchers:
>
> > Call Taker:
> >
> > 1. Create a Priority 2 CAD call using call type TRAFF or HAZARD
> >
> > 2. Determine location and nature of hazard
> >
> > 3. Obtain and document callers [*sic*] details
> >
> > 4. If appropriate, contact external agency for removal of obstruction (Ministry of Highways for dead animals on highways, city works crews for obstructions on city streets, etc.)
> >
> > 5. Note name of external agency and time of contact on CAD call.
> >
> > Dispatcher:
> >
> > Dispatch to general duty member
> >
> > Advise responding units of all updates
> >
> > Status keep as required.

[98] I cannot see any error in the judge’s consideration of “Road Hazards” as the most analogous section of the SOP.

[99] Additional evidence beyond the language of the manual and the SOP supported the judge’s conclusion that the situation was similar to a “road hazard”.

[100] Ms. Karr agreed in cross-examination that a call raising concerns for public safety is a police matter. Ms. Garrett admitted in cross-examination that the information in the First Call indicated that public safety could be at risk. Ms. Garrett also agreed that anything that hindered or interrupted the flow of traffic obstructed the flow of traffic.

[101] The judge noted that after the First Call, Ms. Garrett was aware that the inoperative traffic lights were creating a problem with the normal flow of traffic and that there was a risk of an accident occurring. It is a common-sense conclusion that inoperative traffic lights on a highway intersection were at least as hazardous as a situation involving some debris on the road and so at least deserved equal priority to such a situation, described in the SOP as a "Road Hazard".

[102] Ms. Karr explained that priority 1 calls are the most urgent, as usually life is in danger; priority 2 is still fairly urgent and requires a dispatch; priority 3 is routine; and priority 4 does not always require police attendance, such as a motor vehicle accident with no injuries.

[103] The judge's conclusion that the closest analogy in the SOP to the traffic light outage was to a road hazard means it deserved a priority 2 designation and required a police dispatch. The OCC employees failed to treat it this way.

[104] However, failure to follow policy does not compel the conclusion that the standard of care was breached: *Bergen* at para. 111. The judge understood this in her approach, holding at para. 87.

> [87] Even if Ms. Garrett had not followed the Road Hazard SOP, I find that a reasonably prudent call-taker, in the face of a caller advising them that the lights were out, "tons" of people were "racing" through the Intersection, and an accident was going to occur, would have taken two steps as soon as reasonably practical: (i) they would have created a CAD file which would result in a general duty police officer being dispatched to the scene, and (ii) they would have contacted the RTMC in order to ensure that the lights were fixed. Neither of these steps was taken by Ms. Garrett. As such, she fell below the standard of care.

[105] It was open to the judge to conclude, based on the evidence, that some immediate notice should also have gone out from the OCC employees after the First Call, so as to alert RCMP and so they could attend on the scene.

[106] Further, it is consistent with the procedure in the SOP for a call-taker to create a CAD file that would result in a police officer being dispatched to the scene when

they are unsure about whether the occurrence is a police matter: Reasons at para. 16.

[107] The judge also found that Ms. Graham, as the dispatcher, fell below the standard of care of a reasonable dispatcher. The judge held:

> [88] With respect to Ms. Graham, I find that a reasonably prudent dispatcher would have, after they received the internal message from Ms. Garrett about the traffic safety concerns at the Intersection, sent a message over police radio (as opposed to an MDT message) so that RCMP officers would have received the message immediately and one of them could have attended the scene and assessed the public safety risks. Further, when Ms. Graham did eventually contact the RTMC, after Ms. Garrett failed to do so, she ought to have advised the RTMC that not only were the lights out at the Intersection, but cars were racing through and there was a risk to public safety. This would have alerted the RTMC to the need to set up some form of traffic control at the Intersection.

[108] The above conclusions were supported by the evidence and were also open to the judge to make.

[109] The AGC submits that the judge's findings raised the standard of care to one of perfection. I do not agree. The key to the judge's findings is that the information received by the OCC employees alerted them to the fact that there was a dangerous road condition on a highway, which if left untended could result in a serious accident. This required them to act promptly, both to ensure that the proper road maintenance authorities were notified, and to ensure that the RCMP were notified by radio so that a police officer could attend immediately to assess the situation.

[110] It would not be onerous or difficult for the OCC employees to take prompt steps to notify the proper parties of the road hazard. The judge did not suggest a standard of perfection or misapprehend the evidence as to the requirements of their jobs.

[111] In my view, the appellant has not shown that the judge made a palpable and overriding error in concluding that the OCC employees breached the standard of care.

3. Did the Judge Err in Finding the OCC Employees' Conduct Caused the Accident?

[112] The AGC does not take issue with the judge's recitation of the legal principles concerning the determination of causation. The judge held:

> [91] There are two separate concepts relevant to establishing causation in negligence, sometimes referred to as "factual" and "legal" causation. Factual causation is usually considered through the lens of the "but for" test: but for the defendant's negligence, would the plaintiff have suffered a loss? Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury—in other words, that the injury would not have occurred without the defendant's negligence: *Clements v. Clements*, 2012 SCC 32 at para. 8.
>
> [92] Legal causation is established when the plaintiff has proven that the defendant was the proximate cause of the loss, in other words, the damage was not too remote from the factual cause, or the damage suffered was reasonably foreseeable: *Borgfjord v. Boizard*, 2016 BCCA 317 at para. 56.

[113] The judge found on a balance of probabilities, that but for the negligence of the OCC, the accident would not have occurred: para. 99. She also found that it was reasonably foreseeable, and not too remote from the actions and omissions of the OCC employees, that an accident could occur: para. 98.

[114] The judge's findings as to the cause of the accident are findings of fact, for which the standard of review is palpable and overriding error: *Van Tent* at para. 24.

[115] The AGC submits that the judge erred in her finding that the OCC employees' omissions in part caused the accident because she based her conclusion on speculation rather than evidence.

[116] The AGC's argument that the judge based her findings on speculation seems to be premised on the fact that there was no direct proof from witnesses as to what would have happened had the allegedly negligent omissions of the OCC employees not occurred. For example:

- no one asked an employee of Cobra, if they had received a call at 1:36 p.m. about the traffic lights being out, could they have arrived within

less than 90 minutes and what they would have done if they had arrived earlier;

- no police officers testified that if they had arrived earlier, they would have initiated traffic control;
- no one testified that a police vehicle would have remained on scene;
- no one testified that Protech would have arrived on time to control traffic; and,
- no one asked Mr. Sleeman if he would have noticed a police vehicle and slowed down if one was present.

[117] The problem with this aspect of the AGC's argument is that it suggests that in applying the "but for" test of causation, the judge is not entitled to draw her own inferences from the evidence but instead must rely only on the evidence of witnesses who themselves have speculated as to what would have happened had the standard of care been met.

[118] I am not persuaded by this argument.

[119] As the Supreme Court of Canada said in *Clements v. Clements*, 2012 SCC 32, the causation test of whether "but for" the defendant's negligence, the injury would likely not have happened, is a test that must be applied in a "robust common sense fashion", and it may be established by inference only: paras. 9–11.

[120] I would add that it will be a rare case where determining causation does not require some inference-drawing. The exercise of the trial judge will involve an analysis of what actually happened (after an allegedly negligent act or omission), and then consideration of the hypothetical of what likely would have happened had the standard of care been met. While the surrounding evidence will assist the judge in the latter exercise, since the standard of care was not met, no one can know with

certainty what would have happened “but for” the negligence. Ultimately it is the trial judge’s task alone to draw the necessary inferences.

[121] There were several pieces of evidence that supported the inferences drawn by the judge on causation:

- approximately 90 minutes passed between the time of the First Call to the OCC at 1:36 p.m. and the accident;
- multiple police officers from the Mission RCMP took only 2 minutes to get to the intersection once the accident was reported;
- had Cpl. Sukkau, the watch manager at the RCMP Mission detachment on the day of the accident, received a message from dispatch that people were not following the four-way stop procedure, he would have expected officers to attend the scene;
- one driver reported cars racing through the intersection, and the Dashcam Video also showed multiple cars on the highway racing through the intersection at high speed, seemingly without slowing;
- drivers usually slow down in the presence of a police car on the side of the road;
- simply stopping a police vehicle and putting the lights on is an effective method of traffic control, as other drivers pay attention to a police vehicle;
- lights being out at that intersection would pose a potential danger or hazard;
- the Cobra electricians took only 75 minutes to get to the intersection once they were finally notified about the lights being out. The Cobra trucks are large yellow trucks with flashing amber lights on top; and,

- had Mr. Sleeman decreased his speed even by a slight amount, it would have avoided the accident.

[122] Given that the accident occurred approximately 90 minutes after the First Call, there was time to avoid it happening had the OCC employees acted promptly at 1:36 p.m. after receiving the First Call. The omissions of the OCC employees meant that there was an absence of any vehicle equipped with flashing lights that could have alerted drivers to there being some sort of hazard and caused them to slow down.

[123] In the present case, there was evidence to support the inferences drawn by the trial judge that had the OCC employees met their duty of care within minutes of the First Call, other events would likely have happened, for example:

- Police officers would have attended the intersection within minutes; police officers would have witnessed the same dangerous conditions observed by Mr. Galpin and captured in the Dashcam Video, with some vehicles speeding through the intersection unaware of the lights out; a police officer would have at a minimum turned on flashing lights and parked near the intersection because of the dangerous situation; and this in turn would have alerted all approaching drivers who were speeding, like Mr. Sleeman, to slow down; and,

- Cobra, Emil, and/or Protech would have attended the scene, with some form of traffic control, within 90 minutes and prior to the accident.

[124] It was a capable inference for the judge to draw that if Mr. Sleeman had been alerted to something like rotary lights flashing on a police or other vehicle near the intersection, it is likely he would have slowed down somewhat and his reduction in speed, even a minor reduction, would have prevented the accident.

[125] As the judge noted on the expert evidence, “[a]ll that needed to happen for the Accident to be avoided, therefore, is for there to have been some police presence to cause a slowing of traffic”: para. 97.

[126] Where “but for” causation is established by inference only, the defendant has the option of calling evidence that the accident was inevitable, and would have happened in any event: *Clements* at para. 11. For example, in the case of alleged medical malpractice, a defendant might call evidence that the plaintiff had a congenital defect that caused the tragic medical event, and therefore what the defendant doctor did or did not do was irrelevant. However, of course, on the facts of this case, the AGC was unable to show the accident was inevitable regardless of whether the OCC employees had met the standard of care.

[127] The arguments of the AGC amount to suggestions that alternative inferences could have been drawn by the trial judge based on some of the evidence: that a police vehicle would not have stayed at the intersection because they would have seen drivers obeying the four-way stop; that it would be either too distracting to drivers or too dangerous for a police vehicle to put lights on or to park at the side of the road near only one side of the intersection; that Cobra or Protech would not have arrived in time at the intersection before an accident, or Mr. Sleeman would not have decreased his speed. The judge considered some of these inferences and rejected them: paras. 93, 96.

[128] When more than one inference is capable of being drawn on the evidence, it is not the task of the appeal court to substitute its own inferences for those drawn by the trial judge. As stated by the Supreme Court of Canada in *Housen v. Nikolaisen,* 2002 SCC 33, which was also a motor vehicle accident case:

> [56] Furthermore, the narrowly defined scope of appellate review dictates that a trial judge should not be found to have misapprehended or ignored evidence, or come to the wrong conclusions merely because the appellate court diverges in the inferences it draws from the evidence and chooses to emphasize some portions of the evidence over others.
>
> …
>
> [58] As noted by McLachlin J. in *Toneguzzo-Norvell*, supra, at p. 122 and mentioned above, “<u>the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact</u>”. In that case, a unanimous Court found that the Court of Appeal erred in interfering with the trial judge’s factual findings, on the basis that it was open to the trial judge to place less weight on certain evidence and accept other,

> conflicting evidence which the trial judge found to be more convincing (*Toneguzzo-Norvell*, at pp. 122-23).
>
> [Emphasis added.]

[129] Further, it cannot be assumed that the judge overlooked or misapprehended portions of the evidence that might have supported the inferences that the AGC wished to be drawn. The judge was not required to list every alternative possible scenario that would support a conclusion that causation was not established. In *Housen*, the Court upheld the trial judge's conclusions on causation on the grounds that she based her factual findings on a review of the evidence in its entirety, and did not misapprehend or neglect the evidence before her:

> [72] As noted above, this Court has previously held that "an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre, supra*, at para.15). In the present case, it is not clear from the trial judge's reasons which portions of the evidence of Mr. Laughlin, Craig and Toby Thiel and Paul Housen she relied upon, or to what extent. However, as we have already stated, the full evidentiary record was before the trial judge and, absent further proof that the omission in her reasons was due to her misapprehension or neglect, of the evidence, we can presume that she reviewed the evidence in its entirety and based her factual findings on this review. This presumption, absent sufficient evidence of misapprehension or neglect, is consistent with the high level of error required by the test of "palpable and overriding" error. We reiterate that it is open to the trial judge to prefer the testimony of certain witnesses over others and to place more weight on some parts of the evidence than others, particularly where there is conflicting evidence: *Toneguzzo-Norvell*, *supra*, at pp. 122-23. The mere fact that the trial judge did not discuss a certain point or certain evidence in depth is not sufficient grounds for appellate interference: *Van de Perre*, *supra*, at para. 15.
>
> [73] For these reasons, we do not feel it appropriate to review the evidence of Mr. Laughlin and the lay witnesses de novo. As we concluded earlier, the trial judge's finding of fact that a hidden hazard existed at the curve should not be interfered with. The finding of a hidden hazard that requires a sign formed part of the basis of her findings concerning causation. As her conclusions on the existence of a hidden hazard had a basis in the evidence, her conclusions on causation grounded in part on the hidden hazard finding also had a basis in the evidence.
>
> [Emphasis added.]

[130] The AGC focuses solely on the negligence of the drivers to argue that the accident that ultimately happened was too remote from the OCC employees'

omissions. However, a plaintiff does not need to show that the defendant's conduct is the sole cause of the injury, just a necessary cause: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at para. 17; *Clements* at para. 8. As explained in *Athey*:

> [17] It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.
>
> [Emphasis added.]

[131] I return to the judge's finding that an accident was reasonably foreseeable, and not too remote from the actions and omissions of the OCC employees: para. 98. This conclusion was consistent with the evidence of the specific information that the OCC employees received in the First Call, including that drivers were "racing" through the intersection.

[132] In my view, the AGC's argument fails to meet the standard for appellate interference. There was evidence to support the judge's findings. I am not persuaded that the judge made a palpable and overriding error in concluding that but for the negligence of the OCC employees, the accident would not have occurred.

4. Did the Judge Err in Apportionment?

[133] The next ground of appeal advanced by the AGC, should it be unsuccessful in advancing the above grounds, is that the judge erred in apportioning 40% liability to it.

[134] When several tortfeasors cause a plaintiff loss, a judge must apportion the degree to which each person is at fault pursuant to the *Negligence Act*, R.S.B.C. 1996, c. 333.

[135] The AGC accepts that the judge correctly stated the legal principles that apply to apportionment of liability. The absence of legal error in the underlying judgment means that this Court should not interfere with the division of liability, absent a "very strong and cogent reason to do so": *Van Tent* at para. 25.

[136] The judge understood that apportionment of liability requires assessing the degree of blameworthiness of each negligent party, citing *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 at para. 19, 1997 CanLII 2374 (C.A.). Further, the judge noted that the factors that may be relevant were cited in *Singh v. Lepitre*, 2019 BCSC 1728 at para. 112 as follows:

1. the nature of the duty owed by the tortfeasor to the injured person;
2. the number of acts of fault or negligence committed by a person at fault;
3. the timing of the various negligent acts (for example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as result of the initial fault);
4. the nature of the conduct held to amount to fault (for example, indifference to the results of the conduct may be more blameworthy; similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis);
5. the extent to which the conduct breaches statutory requirements (for example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy);
6. the gravity of the risk created;
7. the extent of the opportunity to avoid or prevent the accident or the damage;
8. whether the conduct in question was deliberate, or unusual or unexpected; and
9. the knowledge one person had or should have had of the conduct of another person at fault.

[137] The factors considered in apportioning liability were set out by the judge:

> [135] Many of these factors are not applicable in this case, but I do find a number of factors relevant in apportioning liability more to certain defendants than to others. Some of the factors I have considered in apportioning liability are as follows:
>
> (1) With respect to the OCC:
>
> (i) The important public safety mandate of the OCC;

(ii) The apparent indifference of both Ms. Garrett and Ms. Graham to the very real public safety risk identified in the First Call;

(iii) The fact that there were two calls to the OCC before any steps were taken to address the public safety risk created by the inoperative traffic lights, and even once the RTMC was called, the OCC did not inform them of the fact that vehicles were not observing the four-way stop procedure, potentially necessitating traffic control;

(iv) The fact that the OCC made two significant errors, specifically failing to promptly advise the RTMC of the inoperative lights so that Cobra could be dispatched, and failing to create a CAD file that would result in RCMP members receiving a radio call alerting them to the inoperative lights.

(2) With respect to Mr. Sleeman, he was driving 40 km/h over the speed limit immediately prior to the Accident. Had he been travelling even 20 km/h over the speed limit, the Accident would not have occurred. His excessive speed is a significant factor in apportioning blame for the Accident.

(3) With respect to Emil, Emil's blameworthiness is high because the company appears to have taken no steps to train or equip its employees to engage in the important public safety work of traffic control required of it in the face of road hazards.

(4) With respect to Ms. McNally, she was negligent insofar as she left a place of safety and attempted a left-hand turn onto a busy highway where it would have been clear to her that some westbound vehicles were not using the four-way stop procedure. However, in my view, she was considerably less blameworthy than Mr. Sleeman or either of the institutional defendants.

[138] The AGC argues that the judge did not properly conduct an assessment of relative blameworthiness. The AGC submits that Mr. Sleeman was the most blameworthy because he was excessively speeding and failed to pay attention to what was happening with other vehicles at the intersection.

[139] The AGC points to s. 148 of the *Motor Vehicle Act,* R.S.B.C. 1996, c. 318 to support the argument that Mr. Sleeman was excessively speeding. That provision creates an offence of driving a vehicle on a highway at a speed greater than 40 km/h over the applicable speed limit. The AGC suggests that the judge failed to consider factors identified in *Singh* such as the nature of the duty that Mr. Sleeman owed to

other drivers; the number of acts of fault; the nature of his conduct; gravity of the risk he created; and the opportunity he had to avoid the accident.

[140] Respectfully, it is clear that the judge was aware of the factors mentioned in *Singh*, and emphasized those that were particularly relevant in her analysis. The judge was alive to the nature of Mr. Sleeman's conduct and his multiple errors: see for example her Reasons at para. 53. It cannot be said that the judge misapprehended the evidence or erred in principle in her assessment of Mr. Sleeman's relative liability.

[141] As for Ms. McNally, the Dashcam Video identified that she stopped completely and paused for some time before entering the intersection. It appears that she was attempting to comply with the four-way stop procedure that some other vehicles were following. She clearly miscalculated that all other vehicles were stopped or stopping, but I am not persuaded that the judge made a palpable and overriding error in not assigning greater blameworthiness to her.

[142] The AGC also submits that the judge was wrong to suggest that the OCC employees were "indifferent to the risk", or to suggest that the public safety mandate of the OCC should be considered. The AGC says that the two OCC employees were simply engaged in triaging risks according to their experience.

[143] However, having read the transcript of their evidence and mindful that the judge was able to observe their testimony, it was open to the judge to conclude that the OCC employees in question displayed relative indifference to the hazard reported in the First Call. It could be fairly said that in their evidence, Ms. Garrett and Ms. Graham downplayed the risk of a serious accident.

[144] Further, in my view the judge did not mix up the public mandate of the OCC with vicarious liability of the Crown for acts or omissions of a public servant. Rather, the judge was acknowledging that in light of the fact that the very function of the OCC employee's job is aimed at public safety, it was especially aggravating that the two employees appeared indifferent to the risk.

[145] The assignment of relative blame for the accident is a matter of perspective. The OCC were the first in the chain of events of causation that led to the accident. The OCC employees also had the most time available to take actions that could have prevented the accident, which occurred approximately 90 minutes after the First Call.

[146] The judge's assessment of relative blameworthiness was based on her view of the evidence. It is not for this Court to substitute its own view of apportionment of liability in the absence of a palpable and overriding error, and no error has been shown. I would not accede to this ground of appeal.

B. Grounds of Appeal of Emil Anderson

[147] The same legal principles regarding appellate review, standard of care and causation, as have already been touched on, apply to the analysis of Emil's grounds of appeal and I will not repeat them.

[148] While Emil states a number of grounds of appeal, its arguments can be divided into errors related to the findings on standard of care, and errors related to the finding of causation.

1. Did the Judge Err in Finding Emil to have Breached a Standard of Care?

[149] Emil accepts, on appeal, that the judge did not err in reciting the principles governing the standard of care of a road maintenance contractor, as set out at paras. 101–102:

> [101] The standard of care of a road maintenance contractor is reasonableness. A road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety. What is a reasonable state of repair is a question of fact, depending upon all of the surrounding circumstances: *Benoit v. Farrell Estate*, 2004 BCCA 348 at para. 39.
>
> [102] In *Harrington v. Sangha*, 2011 BCSC 1035, Justice Willcock, as he then was, discussed the manner in which the terms of a road maintenance contract informs the standard of care:
>
> > [142] While the contract may inform the standard of care, it is not determinative. Breach of the contract is not, in itself, proof of

> negligence because the Crown may require a contractor to perform services to a higher standard than the Crown would itself be obliged to discharge. The law does not impose a higher standard of care upon contractors than the courts would impose upon the Crown, simply because of the provisions of the contract....

[150] The judge found that the minimum standard of care required by Emil's employee, Mr. Stammers, was two-fold:

> (a) Upon discovering the inoperative traffic lights at the Intersection, pull over at the nearest safe place (most likely Nelson Street) and call dispatch to report the situation; and
>
> (b) Perform initial traffic control, as required by the contract, by, for example, pulling over to the side of the road just behind the Intersection and turning on his emergency lights.
>
> Reasons at para. 116.

[151] Emil raises multiple criticisms of the judge's findings on its standard of care. Emil argues that the judge put too much weight on the evidence of the terms regarding road maintenance specifications and highway traffic control in Emil's contract with the Province (the "Contract Specifications"). Emil says the judge erred in not addressing why she rejected other evidence explaining how those Contract Specifications are in fact implemented. Emil further argues that the judge imposed too high a standard of care on it. In addition, Emil says that the judge erred in imposing a standard of care without expert opinion evidence that precisely supported the judge's conclusions.

[152] Emil says that the judge did not properly appreciate Emil's expert opinion evidence as to applicable industry standards, as well as lay evidence as to the actual practices followed by Emil and the MOTI. Emil filed the expert opinion of J.P. Wrobel on road maintenance industry standards, and called him as an expert to testify at trial. Also, Emil called similar evidence from some lay witnesses.

[153] In essence, Emil submits that if the judge had appreciated the evidence of Mr. Wrobel and some of the other lay witnesses at trial, including employees of MOTI, she would have concluded the following: that all an Emil employee, such as

Mr. Stammers, has to do when encountering an unsafe road situation is to "mobilize" traffic control by reporting the situation higher up the chain. Then if the person up the chain considers that traffic control is necessary, it will be authorized and a subcontractor will be "mobilized", and it might take some hours for the subcontractor to show up; that it would not be safe for a single road maintenance employee such as Mr. Stammers to provide traffic control on his own; and that a traffic light outage is not a hazard requiring anything other than calling the electricians.

[154] However, as I read the judge's reasons, the judge well appreciated the thrust of Emil's evidence supporting its theory that it met the standard of care: Reasons at paras. 118, 120. The judge was not required to list every piece of evidence that supported Emil's theory.

[155] The judge's reasons adequately explain why she did not accept the evidence supporting Emil's theory of the standard of care. As the judge noted, Emil's submissions as to its standard of care meant that it could never provide traffic control in a timely manner when a hazard is detected on highways under its care. The judge found that this would be rendering Emil's public safety responsibilities nugatory: Reasons at para. 120.

[156] The judge expressly considered Mr. Wrobel's evidence: Reasons at paras. 108–115. One obvious problem with Mr. Wrobel's evidence was that he did not appear objective. For example, despite agreeing that the industry standard response would be for Mr. Stammers to have reported the inoperative traffic lights after first coming upon them, Mr. Wrobel went out of his way to justify why Mr. Stammers did not do so. Mr. Wrobel first took the position that it was unnecessary because the MOTI already knew about it (a point about causation, not standard of care) and then he took the position that Mr. Stammers had no safe place to pull over and make a call. As the judge found, Mr. Stammers could have pulled onto Nelson St. at the intersection, to report the lights out. Mr. Wrobel also suggested that it was reasonable for Mr. Stammers to leave the site to check

whether other traffic lights were affected. Yet Mr. Stammers did not give evidence that this is why he did not stay at the intersection.

[157] The judge noted that she did not find Mr. Wrobel's opinions particularly helpful in determining the standard of care: Reasons at para. 114. On appeal, Emil submits that the judge did not explain how flaws in Mr. Wrobel's opinions regarding Mr. Stammer's obligations to report a hazard, related to his opinions regarding Emil's obligations to take some additional measures when encountering a hazard. In response, counsel for Mr. Sleeman suggests that in fact, Mr. Wrobel came across very poorly as a witness; he not only appeared loyal to and defensive of Emil, in cross-examination he was non-responsive to reasonable hypotheticals.

[158] In my view the judge did not need to provide a greater explanation for why she did not find Mr. Wrobel's evidence persuasive. In *White Burgess,* the Supreme Court of Canada emphasized that impartiality, independence and absence of bias are fundamental qualities of expert evidence: para. 109. When an independent expert appears to lack objectivity on one opinion, it may undermine his evidence as a whole.

[159] The judge based her findings on the standard of care in part by informing herself of Emil's Contract Specifications. However, she also considered the Contract Specifications in context of the evidence at trial as to some of the other practices of Mr. Stammer, and was mindful of her self-instruction that terms of a contract are not determinative: Reasons at para. 102. The judge did not need expert opinion evidence to consider the Contract Specifications, which could be understood by the ordinary person. It was open to the judge to not accept Mr. Wrobel's opinions as to how to interpret the Contract Specifications.

[160] The judge considered the Contract Specifications dealing with routine maintenance: Reasons at paras. 103–104. These terms required it to "perform initial traffic control" in response to all situations on the highway that "are unsafe or have the potential to become unsafe"; and stated that the contractor "must initiate traffic control… upon detection or notification of a hazard or potential hazard". Further the

"performance time frames" in the contract stated: "[t]he Contractor must perform traffic control immediately, from the time the deficiency was detected by or reported to the Contractor". In addition, the Contract Specifications dealing with highway patrol provided that the contractor must "take immediate and appropriate action during patrols to protect Highway Users from unsafe situations".

[161] Mr. Stammers did not know about these Contract Specifications, and had not been trained to provide initial traffic control upon encountering a road hazard.

[162] There were additional Contract Specifications that may have been relevant, but the judge did not find it necessary to refer to all of them. For example, the Contract provided that "all foreman areas", of which the area in question was one, "are fully equipped with the required signs and traffic control devices to effectively address any circumstance requiring traffic management".

[163] It was open to the judge to take the Contract Specifications into account, and to reject the suggestions by some witnesses that the traffic light outage was not hazardous and that ordinary standards of practice would permit Emil to take hours to provide traffic control in the face of a road hazard, through its use of a subcontractor.

[164] Importantly, the judge was critical of Mr. Stammers for not appreciating that the situation at the intersection was unsafe. It is clear from Mr. Stammers' conduct and evidence that because he witnessed vehicles obeying the four-way stop procedure, he did not consider the situation to be hazardous.

[165] There was plenty of evidence to support the conclusion that the traffic lights being out at the busy highway intersection constituted a hazardous situation, even if one did not witness vehicles racing through the intersection. Several witnesses testified that the situation posed a hazard, or couched their language by describing it as a "potential hazard" which in the circumstances amounts to the same thing. While some witnesses did not think so, even the president of Emil, Mr. Hassel, admitted on his examination for discovery, read-in at trial, that the lights being out at the intersection was a hazardous situation calling for traffic control to be engaged.

Mr. Wrobel also admitted that inoperative lights at the intersection were a "potential" public safety risk, which as the judge noted, would appear to be obvious: Reasons at para. 115.

[166] Emil suggests that it would have been unsafe for Mr. Stammers with a single truck to do any initial traffic control. Emil's argument suggests that traffic control can only mean a full team of flaggers at each approach to an intersection. But the Contract Specifications do not suggest this is so and it is within common experience to know there are other means to exercise some degree of control over traffic, including the use of traffic cones and signage: see for example the discussion in *Mochinski v. Trendline Industries Ltd.* (1996), 23 B.C.L.R. (3d) 291, 1996 CanLII 932 (C.A.) at paras. 29–30, 33.

[167] Emil further argues on appeal that the judge imposed a higher standard of care on Emil than would be owed by MOTI itself. Emil submits that the judge failed to consider the wider context informing the standard of care, including Emil's budgetary constraints and limited resources. In my view this argument ignores the fact that the evidence did not support a conclusion that Emil's decision to do nothing in the face of the traffic light outage was a resource issue. The judge's findings were as to the minimum standard of care required, based on a reasonableness standard in face of a known hazard: para. 116.

[168] Emil did not call evidence as to budgetary constraints and such evidence would seem inconsistent with the practices as described by Mr. Stammers. For example:

- Mr. Stammers had some equipment and signs in his truck to deal with some road hazards, such as an "accident ahead" sign, a "crew and equipment working" sign, a "stop, slow" paddle, a portable "stop" sign as well as traffic cones. Mr. Stammers regularly cleared the road of debris, by parking on the side of the road and running into traffic. He would typically set up his work sign and traffic cones when doing so. This was in addition to the rotating light and flashing arrow on his large, orange truck. It seems

obvious that these modest resources allowed Mr. Stammers to initiate some measures to impact traffic immediately and when considered necessary to deal with a hazardous road condition.

- Mr. Stammers was asked about what he would do if he came across a sinkhole in the middle of the intersection. He testified that he could have pulled over and parked on top of an island at the intersection, in order to run in and out of traffic to fix the sinkhole. Logically there is no reason he could not have pulled over in the same place, and put on his flashing lights, to warn drivers there was something unusual or a problem at the intersection, namely the traffic light outage. This also would have been a form of some traffic control.

- Mr. Wrobel acknowledged that had Mr. Stammers put up one of the warning signs it might have affected traffic behaviour on the day of the accident.

- There was evidence that many drivers slow down upon seeing a police vehicle. It would be logical to infer from this evidence, and from the evidence of Mr. Stammers' practice when removing road debris, that had Mr. Stammers put on his flashing lights, it would have caused drivers to slow down as they approached the intersection.

[169] The Contract Specifications, as mentioned above, cannot be sensibly read as suggested by Emil. Given the speed at which motor vehicles can travel on highways and the potential lethal nature of road hazards, it makes little sense to read the Contract Specifications calling for traffic control "immediately from the time the deficiency was detected", as meaning Emil's obligation is limited to assembling a full team of flaggers from a subcontractor, however long that might take.

[170] In my view, Emil's criticisms of the trial judge distil to a complaint that the judge did not prefer some evidence over contrary evidence. As I have already noted, this does not justify appellate interference.

[171] The judge was of the view that had Mr. Stammers properly appreciated that the intersection was unsafe, Emil's standard of care required Mr. Stammers to take some immediate steps to warn drivers by initiating some form of initial traffic control. There was evidence to support this conclusion.

[172] I would therefore not accede to the arguments that the judge erred in her findings regarding Emil's standard of care.

2. Did the Judge Err in Finding Emil's Failures Caused the Accident?

[173] The judge did not find that Mr. Stammers' failure to promptly report the traffic light outage caused or contributed to the accident: para. 124. This was because there was evidence that the accident was reported by the OCC employees to the MOTI and Cobra quite close in time to when Mr. Stammers went through the intersection that day.

[174] However, the judge reached a different conclusion regarding Mr. Stammers' failure to take steps to initiate some form of traffic control, something that would have slowed traffic down. The judge held:

> [127] In my view, had Mr. Stammers been trained and resourced to provide initial traffic control upon encountering a road hazard, as required by the Specifications and as a necessary component of the standard of care required of Emil, the Accident would not have occurred. For example, Mr. Stammers could have been provided with adequate signage that he could have put into the eastbound and westbound lanes, warning of a road hazard ahead.
>
> [128] Even absent additional resources and training, there were steps that Mr. Stammers could have taken on October 10, 2016 that likely would have avoided the Accident. He drove a large yellow truck with an arrow board and flashing lights. Simply pulling over to the side of the road with his flashing lights on would have alerted drivers to a hazard and, in all likelihood, would have caused Mr. Sleeman to slow down at least to the 100 km/h required in order for the Accident to be avoided. Mr. Stammers did not do this because he was never told that Emil was obliged to provide traffic control upon discovery of a road hazard.
>
> [129] The fact that Mr. Stammers did nothing upon encountering a hazardous intersection, while perhaps reflective of his inadequate training and resources, allowed the Intersection to remain without any sort of traffic control, warning, or alert in place. Had Mr. Stammers performed initial traffic control, the Accident would not have occurred.

[175] Emil argues that the judge's conclusions regarding causation are speculative and lack evidentiary foundation, and are contrary to some of the evidence at trial.

[176] Again, much like the AGC's argument in relation to causation, this argument fails to acknowledge that the judge's findings of causation must necessarily be based on inferences, as no one can know with certainty the hypothetical of what would have happened "but for" the failure to meet the standard of care. The judge had more than one inference available to her, and recognized that the question of causation was a "challenging" one: para. 126.

[177] Emil points to the evidence of some witnesses that: the traffic light outage was not a hazard; it would have been unsafe for Mr. Stammers to pull over to the side of the road or to initiate traffic control by himself; motor vehicles might not slow down upon seeing the lights of the Emil truck flashing; and drivers might be distracted if the Emil truck pulled over and put flashing lights on. Emil also points to Mr. Sleeman's evidence which suggests he was not paying attention as he approached the intersection. Emil submits that the judge must have drawn her conclusions from hindsight.

[178] However, the fact that there was some evidence that might have supported a different inference does not lead to the conclusion that the judge made a palpable and overriding error. There was evidence to support the judge's conclusion including:

- Mr. Stammers had signs in his truck and flashing lights on top of his orange truck;
- Mr. Stammers was able to use these tools to protect himself when he removed debris from the road. It is logical to conclude that these tools help to alert drivers to unusual conditions, and these tools work to slow traffic down;
- The inference that had Mr. Stammers used the tools available to him, Mr. Sleeman would have seen the Emil vehicle and slowed down, was

logical. Mr. Sleeman's speeding as he approached the intersection was in part because he made assumptions based on the lack of warning lights, which suggests he was paying some attention. The inference that he would have paid attention to flashing lights on Mr. Stammer's truck, or other warning signs, and then slowed down, was open to the judge to make; and

- There was evidence that had Mr. Sleeman's speed only slightly decreased as he approached the intersection, from 120 km/h to in the range of 109 km/h or 100 km/h, the accident would not have occurred.

[179] I am not persuaded that there is any ground for interference in the judge's findings on causation.

Disposition

[180] In summary, I agree with the respondents that the judge did not err in finding the OCC employees and Emil in part liable for the accident that occurred. The traffic light outage at the intersection of a busy highway and side-street presented a dangerous situation to users of that part of the road. I see no error in the trial judge's findings that the failures of the OCC employees and Emil to meet the standard of care required of them, in relation to this hazardous road condition, were contributing causes of the terrible accident that occurred when one driver drove through the intersection and into the car of a vehicle trying to turn left. The judge also did not err in apportioning 40% liability to OCC.

[181] I would dismiss the appeal.

"The Honourable Justice Griffin"

I agree:

"The Honourable Mr. Justice Abrioux"

I agree:

"The Honourable Justice Skolrood"