IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Mills v. Seifred***,
2009 BCSC 447

Date: 20090401
Docket: M055177
Registry: Vancouver

Between:

**Bonnie Lee Mills, executor of the estate of
Darren James Cavezza (deceased),
Anthony Davis Cavezza, an infant by his Guardian Ad Litem, Bonnie Lee Mills,
Isabella Daryn Cavezza, an infant, by her Guardian Ad Litem, Bonnie Lee Mills,
Katie Dianne Cavezza, an infant by her Guardian Ad Litem, Bonnie Lee Mills,
and the said Bonnie Lee Mills**

Plaintiffs

And

Darren Seifred

Defendant

Before: The Honourable Madam Justice S.K. Ballance

Reasons for Judgment

Counsel for the Plaintiffs:	W.D. Mussio
Counsel for the Defendant:	L.G. Harris
Date and Place of Trial:	October 27-31, 2008 Vancouver, B.C.

INTRODUCTION

[1] A tragic accident took the life of Darren James Cavezza on the morning of September 1, 2005.

[2] Mr. Cavezza had been riding his motorcycle eastbound along 16th Avenue in Langley, B.C. when he collided with a westbound dump truck and transfer driven by the defendant, Darren Seifred, as it turned left intending to enter the yard of the Dawson-Brill Lumber Co. (the "Lumberyard"). The weather was sunny and clear and the roads were dry.

[3] Liability for the accident is the sole issue before the Court.

BACKGROUND

[4] 16th Avenue is a two-lane designated truck route. The Lumberyard sits on the south side of 16th Avenue. There are two entrances to it from 16th Avenue. The main entrance is the first entrance by which a westbound vehicle could access the Lumberyard (the "Primary Entrance"). The secondary entrance to the Lumberyard lays roughly 127 metres to the west of the Primary Entrance, and is the first driveway into the Lumberyard for eastbound vehicles (the "Secondary Entrance").

[5] As one approaches the Lumberyard from the east, there is a gradual incline along 16th Avenue to the crest of a hill situated approximately 150.5 metres east of the Primary Entrance (the "Westbound Hill"). A short distance, roughly 37.7 metres, to the west of the Secondary Entrance is a sign posted by the municipality for the attention of eastbound drivers denoting that trucks may be pulling onto 16th Avenue

from the south (the "Truck Sign"). The distance from the Truck Sign to the western edge of the Primary Entrance is approximately 164-165 metres. There is also a fairly steep uphill section of 16th Avenue as it moves eastward in its approach toward the Secondary Entrance. The crest of that hill lies between the Truck Sign and the Secondary Entrance (the "Eastbound Hill").

[6] The evidence indicates that the lane dividing line along 16th Avenue changes at a location just to the east of the mailbox for the civic address of 24340 16th Avenue. That mailbox is at a key point along 16th Avenue in relation to this case. For ease of reference, I will refer to it as "24340".

[7] At 24340, the two lanes on 16th Avenue are divided by a broken line. Slightly east of 24340, the divided line for eastbound traffic becomes solid; the westbound line remains unchanged. There is a further line change around the Truck Sign. There, the lanes become divided by yellow solid double lines which extend well east of the Primary Entrance.

[8] The posted speed limit for 16th Avenue is 60 km/h. The evidence establishes that the flow of traffic on that roadway ordinarily moves at a much faster pace; the majority of traffic along 16th Avenue exceeds the speed limit.

[9] The evidence shows that shortly before the accident, Mr. Cavezza pulled out from the eastbound lane to pass a group of five eastbound vehicles. At the lead, was a minivan, followed by a car driven by Natasha Toews. Behind Ms. Toews was a Peterbilt truck driven by Brian Henderson, then a car and finally, a pickup truck at the rear driven by Eric Beck.

LAY WITNESSES

Eric Beck

[10] Mr. Beck testified that he was travelling eastbound along 16th Avenue at approximately the speed limit. As he neared the base of the incline of the Eastbound Hill, his attention was attracted to the loud sound of Mr. Cavezza's motorcycle. He noticed that the motorcycle had pulled out of the eastbound lane and was travelling in the oncoming lane in order to pass. Mr. Beck confirmed that when Mr. Cavezza commenced his pass, the eastbound and westbound lanes were divided by broken lines.

[11] According to Mr. Beck, Mr. Cavezza passed him at a "great rate of speed" relative to his own speed. He "guessed" that Mr. Cavezza was doing about 60 mph (which converts to 96.56 km/h) as he passed by. He states that had Mr. Cavezza decided to return to the eastbound lane between his vehicle and the car in front, there was sufficient room to accommodate the merge.

[12] Mr. Beck testified that Mr. Cavezza continued to speed in the westbound lane after the dividing line became solid for eastbound traffic and thus, in Mr. Beck's mind, at a time when it was not safe for him to do so. When Mr. Cavezza's motorcycle was just about parallel to the front of the line of the convoy of eastbound vehicles, he disappeared from Mr. Beck's view. Mr. Beck did not witness the collision.

Brian Henderson

[13] At the time of the accident, Mr. Henderson had been a professional truck driver for more than twenty-six years. He has trained and evaluated other drivers. Mr. Henderson testified that he was travelling between 60 and 70 km/h and keeping up with the flow of traffic along 16th Avenue. In his experience, 16th Avenue is a "very fast road" where the typical speed ranges between 80 and 90 km/h.

[14] Mr. Henderson had an unobstructed view eastward along 16th Avenue from the elevated seat of his 73 foot long truck. Like Mr. Beck, he became aware of Mr. Cavezza's motorcycle by its sound. Its loud noise startled him as it "flew by" in the westbound lane. He described the sound of the motorcycle like a "jet" as it passed. Mr. Henderson's recollection is that he was more or less at 24340 when the motorcycle started to pass. The dividing line for both lanes was still broken at that point.

[15] Mr. Henderson watched Mr. Cavezza as he overtook Ms. Toews' car ahead and the minivan in the lead. He testified that it did not take the motorcycle very long to pass his and those vehicles. He estimated that the motorcycle passed him at a speed of between 100 and 120 km/h. In cross-examination, he agreed that his estimation of the range of speed of the motorcycle was basically a guess on his part.

[16] Mr. Henderson saw the motorcycle return to the eastbound lane in front of the minivan, and then lost sight of it. He then noticed the defendant's truck ahead blocking both lanes of traffic. He testified that the motorcycle "did not have a chance to make a decision" because "there was not that much distance for the speed he

was travelling". Mr. Henderson was not able to see what action the motorcyclist took as he closed in on the defendant's vehicle and was not aware whether Mr. Cavezza had even applied his brakes.

[17] Mr. Henderson heard a short tire screech which he believed came from the minivan. That sound directed his focus to Ms. Toews' car directly ahead which was also coming to a stop. Although the minivan tires emitted a screech, Mr. Henderson did not believe that the minivan had to slam hard on its brakes to come to a stop. He testified that his vehicle and the two vehicles in front of him were able to stop in plenty of time. He heard a loud bang and saw Mr. Cavezza being propelled through the air and land in the westbound lane. He understandably felt traumatized by the gruesome event he had just witnessed.

[18] Mr. Henderson initially testified that his truck had come to rest approximately next to the Truck Sign. However, upon further probing he recalled that he had in fact stopped closer to the Secondary Entrance to the east of the Truck Sign, and had later backed up to the Truck Sign in order to accommodate the arrival of emergency vehicles. Using some of the photographs of the surrounding area, Mr. Henderson showed where he and the two vehicles in front had stopped. I am satisfied on the evidence that the front of Mr. Henderson's truck came to rest at the eastern boundary of the Secondary Entrance and that Ms. Toews' vehicle and the minivan had stopped closely in front.

[19] After the accident, Mr. Henderson spoke briefly with the female driver of the minivan. She too appeared to be very shaken. For reasons not explained at trial,

she was evidently given permission by police to leave the scene before her statement or contact particulars were taken. She did not testify at trial.

[20] Mr. Henderson also spoke directly to the defendant at the scene. The defendant struck him as being in shock. He said to the defendant words to the effect that it had happened so quickly that the defendant could not have seen the motorcycle. I accept Mr. Henderson's evidence that in response, the defendant agreed that he had not seen the motorcycle.

[21] During the early stage of his cross-examination, Mr. Henderson agreed more than once that the motorcycle completed its pass of his truck and the two vehicles in front, below the crest of the Eastbound Hill. At a later juncture, however, he would not agree with that proposition. Plaintiffs' counsel took him to his statement given to the police approximately twelve days after the accident. In that statement, Mr. Henderson reported that Mr. Cavezza had overtaken his vehicle and the two vehicles ahead between the place where the dividing line is solid for eastbound traffic and broken for westbound, and where the dividing line becomes solid both ways. Based on the evidence, that point would be situated somewhere between slightly east of 24340 and the Truck Sign, which is before the crest of the Eastbound Hill for eastbound traffic. Mr. Henderson repeatedly stated that his statement to the police on this subject was "roughly" accurate, but did not, and was not asked to, elaborate on what he meant by "roughly". At a subsequent point in cross-examination, he and plaintiffs' counsel revived their exchange about where Mr. Cavezza had completed his pass. Mr. Henderson would not agree that the motorcycle had already overtaken the eastbound vehicles when he arrived at the

crest of the Eastbound Hill. Plaintiffs' counsel then directed Mr. Henderson's attention to the portion of his police statement where he appeared to inform the officer that Mr. Cavezza had passed the minivan in the lead before the crest of the Eastbound Hill:

> "Ok. I was travelling uh eastbound. There was a car in front of me and a van in front of the car and we're heading eastbound, heading up towards 248th. Ok. Roughly around the address of uh 24340 a bike flew by me. Then I reached 24436, 'cause I looked at it 'cause I saw it over and over. And flew by me, it flew by the car, and then he flew by the van and then proceeding up overtop of the next grade."

[22] At first, Mr. Henderson would not agree that this part of his statement represented an accurate description of what he had seen. However, he rather quickly clarified that he had not understood the question. Mr. Henderson readily agreed that his recollection of the unfolding of the pre-accident events were "definitely" better at the time that he provided his statement to police than they were now. He also agreed that he was trying to be as accurate as he could when reporting to the police. Mr. Henderson explained that he has tried to block the accident from his memory. In the end, he agreed that his statement to police, including the portion reproduced above and about which he was questioned in cross-examination, was accurate.

Natasha Toews

[23] Ms. Toews had been travelling eastbound directly in front of Mr. Henderson. She believes that she was moving at a speed of approximately 80 km/h which she recalled was consistent with the pace of traffic that morning. Ms. Toews drove the

route regularly and was familiar with it. She testified that it is common for traffic to speed and that the flow usually moves between 80 and 100 km/h.

[24] The noise made by Mr. Cavezza's motorcycle as it "flew past" Ms. Toews in the westbound lane made her "jump in her seat". She testified that as she climbed the Eastbound Hill in her older model vehicle, she slowed to about 73 km/h and lost sight of the motorcycle. Ms. Toews confirmed that there was enough room between her vehicle and the minivan in front for the motorcycle to have merged between them as they approached the crest of the Eastbound Hill.

[25] Once Ms. Toews reached the brow of the Eastbound Hill, she spotted the defendant's truck turning left across the eastbound lane. It occurred to her that the motorcycle must have already passed by the defendant because she assumed that the defendant would not have initiated his turn had the motorcycle been approaching. Ms. Toews was confident that the defendant's left turning truck was far enough ahead on the roadway from her, that she would not collide with it.

[26] Ms. Toews recalls hearing the screech of tires and then the sound of the impact. She slammed on her brakes abruptly and pulled over to call 911. She was spared witnessing the collision itself.

[27] Ian Carter is a retired police officer. Long after the accident, he prepared useful schematic diagrams showing distances between various landmarks along 16th Avenue and also took a number of photographs of the area.

[28] Ms. Toews spoke to Mr. Carter around October 2, 2008. At that time, she was not able to recall precisely where along 16th Avenue Mr. Cavezza had overtaken her vehicle. At a subsequent time, but before trial, Ms. Toews drove the route herself and claims that it prompted her recollection. At trial, she testified that after driving the stretch along 16th Avenue, she was able to recall that Mr. Cavezza had passed her vehicle just before she arrived at the crest of the Eastbound Hill.

[29] I found Ms. Toews to be a truthful and credible witness. However, I am concerned that her reconstruction of the place where she thinks that Mr. Cavezza passed her is simply not reliable. It is not consistent with Mr. Henderson's evidence, which I accept, to the effect that Mr. Cavezza had overtaken all of the eastbound vehicles before the crest of the Eastbound Hill. I conclude that it would be unsafe to accept her recently remembered evidence evidently triggered by revisiting the area shortly before trial.

Len George

[30] Len George is the owner of the Lumberyard. He was outside in the Lumberyard off the roadway at a distance of at least 200 feet speaking to Michael Kallen, when he heard a loud noise made by the motorcycle. They were standing closer to the Primary Entrance than to the Secondary Entrance. Mr. George assumed that it was the same motorcycle that had been driving past his work yard every morning at "an excessive rate of speed". The noise drew his attention toward 16th Avenue where he says he saw the motorcycle near the top of the Secondary Entrance. It was already in a skid. Mr. George turned his head to his right and saw

that the defendant's truck was in a committed left turn across 16th Avenue. He testified that the nose of the defendant's truck was part way into the driveway of the Primary Entrance at this point in time. His observation was that the defendant's speed entering the Lumberyard was "typical". Mr. George had not seen when the defendant had initiated his left turn. He watched the motorcycle skid and witnessed the collision.

[31] Mr. George estimated the speed of the motorcycle to be about 100 to 110 mph (which converts to 160.93 to 177.03 km/h), but conceded that it was little more than a guess. In my view, it was an inaccurate guess. Aside from Mr. George's evidence about the motorcycle's pre-impact speed, and that of Mr. Seifred (which I have rejected, as discussed later), the preponderance of the evidence does not support a finding that the motorcycle was travelling at such a grossly excessive speed, either while it was passing the eastbound vehicles or once it had resumed its path in the eastbound lane and particularly while it was in a deceleration skid.

[32] The defendant had been a regular customer of the Lumberyard and was known to Mr. George. Mr. George admitted that he felt compassion and sorry for the defendant at the accident scene. To my mind, those are natural and expected human emotions in response to the horrifying circumstances. While I found that Mr. George's demeanour on cross-examination was needlessly antagonistic on occasion, there was no evidence indicating that his business association with the defendant influenced the truthfulness of his testimony.

Michael Kallen

[33] Mr. Kallen also knows the defendant. As he stood in the Lumberyard next to Mr. George, he cast his attention east, to his right. He recognized the defendant and saw that he was crossing the eastbound lane to access the Lumberyard through the Primary Entrance. He said “there’s Darren”, referring to the defendant.

[34] Mr. Kallen testified that the defendant’s truck was carrying a load and was moving at a “crawl” as it entered the mouth of the driveway to the Lumberyard. He next became aware of a high squealing sound. At first, he was not sure of its source. He saw the motorcycle only fleetingly before it struck the defendant’s truck. Mr. Kallen described the speed of the motorcycle as being very fast, but refused to try to estimate its speed.

[35] I have no concerns that Mr. Kallen’s personal association with Mr. Seifred impacted the veracity of his testimony at trial.

Richard Hattenhauer

[36] Messrs. Hattenhauer and Weisehahn were each following the defendant’s westbound truck. Mr. Hattenhauer was immediately behind the defendant. He had travelled the route for many years. In his experience, vehicles along 16th Avenue move at an average speed of approximately 90 km/h.

[37] As Mr. Hattenhauer climbed the Westbound Hill, he caught up to the defendant’s truck. He testified that after the defendant’s vehicle arrived at the crest of the Westbound Hill, it slowed as it moved down the other side. Mr. Hattenhauer

recalls that the left turn signal on the defendant's vehicle was activated for about 10-15 seconds before the defendant began to manoeuvre left. He backed off his distance from the defendant's vehicle in order to enable the defendant to negotiate the left turn. Mr. Hattenhauer testified that the defendant slowed to make his left turn and "probably yielded" before accelerating into it, but did not come to a complete stop. There was nothing about the manner of the left turn that appeared to him to be unsafe.

[38] While the defendant's left turn was in progress, Mr. Hattenhauer heard the sound of a loud motorcycle. He next heard a skid and then the slamming sound of the collision. He did not witness the impact.

[39] On a photograph of the view of the Primary Entrance from the east, Mr. Hattenhauer indicated that the front of the defendant's truck was across the eastbound lane and into the mouth of the driveway when he became aware the sound of the motorcycle.

Menno Weisehahn

[40] Mr. Weisehahn was driving his SUV behind Mr. Hattenhauer. He too was very familiar with the route along 16th Avenue. He testified that the pace of traffic on that roadway usually moves between 60 and 80 km/h.

[41] Mr. Weisehahn had reached the crest of the Westbound Hill and was proceeding down the other side toward the Primary Entrance. Due to the downward slope of his position, he was seated higher up than was the defendant in his truck.

He was aware of the presence of the defendant's vehicle and recalls that it was moving considerably slower than the posted speed limit. He slowed down to accommodate the defendant's left turn. Although Mr. Weisehahn stated that he believes he saw the brake lights on the defendant's truck activate, he was clear that the defendant did not come to a full stop or hesitate before he initiated his turn.

[42] Mr. Weisehahn agreed that the defendant signalled left and made a slow left turn. He guessed that it took "sort of ten seconds or a little bit more" from the commencement of the left turn until the impact. Mr. Weisehahn readily conceded that his time estimate was just a guess and explained that it was not something he thought he should remember at the time. Although he admitted it was somewhat difficult to judge, he shared Mr. Hattenhauer's recollection that the front of the defendant's truck had already crossed the eastbound lane and the fog line and was moving into the mouth of the driveway of the Primary Entrance at the time of the accident.

[43] Mr. Weisehahn's SUV has a diesel engine and is fairly loud. His windows were rolled up and he did not hear the motorcycle or see the collision. After the crash, he saw the defendant continue to pull his rig into the Lumberyard before he stopped.

Darren Seifred

[44] Mr. Seifred has been a professional truck driver since 1982. On that fateful morning, he was driving his MACK dump truck which was towing a transfer trailer. Together the truck and transfer unit is approximately 68 feet in length. Mr. Seifred

had collected two loads of sand before heading to the Lumberyard. The total weight of his vehicle carrying the load was about 52 tonnes.

[45] Mr. Seifred testified that he was moving at roughly 20 km/h as he climbed the incline of the Westbound Hill. As he descended that hill and approached the Primary Entrance, he claims that he looked west and saw only the minivan which was "well down the next hill". He had a clear, unobstructed view westward along 16th Avenue. Mr. Seifred estimated that the minivan was a distance of 300 metres or more away from him at that stage. He believed that he had ample time to turn left across 16th Avenue. He activated his left turn signal and believes that he may have switched on a device that retards the engine, before he manoeuvred left.

[46] Mr. Seifred admits that he negotiated the left turn without stopping. He was aware that a line of traffic behind him would be waiting on his turn and explained that he was somewhat concerned that if he came to a complete stop, those vehicles might try to pass him in the eastbound lane on his left. After he spotted the minivan, Mr. Seifred says that he looked into the Lumberyard driveway, "glanced all around" and looked behind to ensure that a vehicle to his rear had not moved into the eastbound lane to overtake him. He then proceeded into his turn.

[47] According to Mr. Seifred, he became aware of the motorcycle when the front wheels of his truck had inched onto the gravel at the start of the driveway to the Primary Entrance. He described the motorcycle as "moving like a jet" and said that it was in a skid as it approached. He estimated that Mr. Cavezza was travelling over 200 km/h at the time. Mr. Seifred knew that a collision was inevitable and looked

away to brace for the hit. He felt the impact as Mr. Cavezza's motorcycle struck the rear dual wheels of his truck.

[48] Mr. Seifred confirmed that after the collision, he continued driving his vehicle into the Lumberyard. He stated that afterward, he started to "fall to pieces". He was not able to explain why he did not stop his truck at impact, except to say that he was stunned and in shock. I accept that.

[49] A great deal of Mr. Seifred's evidence focused on whether and when he saw the motorcycle prior to the collision. As mentioned earlier, Mr. Henderson testified that at the scene the defendant stated that he had not seen the motorcycle. Mr. Seifred claims to have no recollection of speaking with Mr. Henderson after the accident, although he does not deny that may have occurred. He agreed that he may have told Mr. Henderson that he did not see the motorcycle before impact, but has no specific memory of doing so.

[50] With regard to when Mr. Seifred first noticed the motorcycle, he testified that as he moved left across the eastbound lane, he looked out his front passenger window and saw it "barrelling down" upon him in its proper eastbound lane of travel "getting larger as it got closer". He stated that when he first spotted it, the motorcycle was alongside the Secondary Entrance. He had not seen it out his front window when he peered westward down 16th Avenue in anticipation of initiating his turn and noticed the minivan. Mr Seifred did not hear the motorcycle engine or the sound of it skidding.

[51] Constable Steiger took Mr. Seifred's statement at the accident scene. In response to a question about when he first saw Mr. Cavezza, he answered: "just before he hit me". In cross-examination, Mr. Seifred testified that this description referred to Mr. Cavezza being near the Secondary Entrance when he first saw him, just a "few seconds" before impact.

[52] In his evidence-in-chief and in cross-examination, Mr. Seifred maintained that he had seen only the minivan travelling toward him in the eastbound lane just before he negotiated his left turn. In answer to a direct question posed later in cross-examination, he testified that he had also seen the other vehicles, referring to the vehicles travelling behind the minivan, coming at him. When asked at his examination for discovery whether he saw any vehicles other than the minivan and the motorcycle when he was making his turn, Mr. Seifred replied "just the ones behind me"; he did not mention seeing the other eastbound vehicles. At trial, Mr. Seifred did not provide a plausible explanation for his inconsistencies on this vital subject pertaining to the degree of his attentiveness to the surrounding circumstances just prior to the accident.

[53] Mr. Seifred was cross-examined at length about the speed at which he made his left turn. He contradicted himself about whether he was moving at 10 mph or 10 km/h. Initially at trial, he agreed that his speed had been 10 mph. He then suggested that he was probably going more slowly, indicating that he had been travelling at 10 km/h. At the accident scene Mr. Seifred told police that he had been turning left at a pace of "ten miles an hour, approximately". At trial he wondered aloud why he had been thinking in terms of miles as compared to kilometres. During

the ensuing exchange with plaintiffs' counsel, I found Mr. Seifred's answers to be both confusing and incomplete. In the end, he stated that he did not know exactly how fast he had been travelling but appeared to agree with his report to police that it was approximately 10 mph. I find that Mr. Seifred made his left turn at a speed of about 10 mph.

[54] Mr. Seifred was not wearing his seatbelt at the time of the accident. Nor had he completed a mandatory pre-trip inspection report for his truck and transfer. Additionally, the inspection decal for his vehicle had expired months earlier.

[55] The accident occurred within the patrol area of Constable Laquerre. He arrived at the scene promptly and arranged for an inspector to perform an onsite mechanical inspection of the defendant's truck and transfer. The inspection took close to one hour. The inspector identified a number of deficiencies and Mr. Seifred's vehicle failed the inspection. According to Constable Laquerre, the noted deficiencies included the following: a visible excessive gap at the pintle lock securing the transfer to the truck; a secondary attachment cable between the truck and transfer was frayed; the four brake lights on the truck and those on the transfer were not operational; and the camel back suspension appeared to be worn out. The inspector completed a formal report recording these problems and others, and handed a copy to the defendant at that time. The report indicated that Mr. Seifred's truck and transfer were "out of service" and directed that they be removed from the road immediately.

[56] When Mr. Seifred left the Lumberyard after the accident, he returned to his yard just a few minutes away. He says he emptied his load of sand, reconnected his brake light wire and replaced two rear wheels. He then took his vehicle for inspection by a certified vehicle inspector who passed it and issued a fresh inspection decal. According to Mr. Seifred, the following day he discovered that his rear axle had been smashed in the accident and attended to its repair at a subsequent date. Nearly a year later, on August 16, 2006, Mr. Seifred was issued a ticket in relation to the accident notifying him he had been charged with offences under the ***Motor Vehicle Act***.

[57] It is conceded by plaintiffs' counsel that the accident was not caused by a mechanical failure of the defendant's vehicle. There was controversy at trial over the receipt into evidence of the inspection report and the testimony concerning the mechanical deficiencies of the defendant's vehicle immediately after the accident. In my view, the evidence is admissible for the purpose of assessing Mr. Seifred's credibility. However, it is not probative of any predisposition to drive carelessly on Mr. Seifred's part so as to legitimately found an inference that such sloppiness may have played a role in relation to the accident, as is urged by plaintiffs' counsel. Consequently, the evidence was not admitted for that purpose.

[58] Approximately two weeks after the accident, Mr. Seifred gave a statement to a representative of the Insurance Corporation of British Columbia ("ICBC"). He informed that representative that he did not receive "any tickets at all" in respect of the accident. Technically speaking, that statement was accurate because, at that time, Mr. Seifred had not received an actual ticket and did not receive one until

almost one year later. Even so, I find that Mr. Seifred was not entirely forthcoming to the ICBC representative. He chose not to reveal that his vehicle had failed the onsite inspection due to multiple infractions and was ordered off the road. The explanation offered by Mr. Seifred at trial was that he had understood that the question about whether he received a ticket was asking whether he had received any "fines", which he had not, and that he had not mentioned the poor inspection report because he had not been asked directly about it. His explanation was unsatisfactory. My impression is that Mr. Seifred deliberately attempted to skew his answer to ICBC in terms that were favourable to him. He did not avail himself of the opportunity at trial to own up to his less than candid exchange with the ICBC representative.

[59] There were other problematic features of Mr. Seifred's testimony. For example, when evaluated against the evidence of speed given by the other lay witnesses, other than Mr. George, and the expert testimony of Donald Rempel (summarized below), it is clear that Mr. Seifred's estimation of Mr. Cavezza's speed is extremely exaggerated. I conclude that he intentionally overstated it.

[60] In assessing Mr. Seifred's evidence as a whole, I am left with deep concerns about his overall credibility. I consider it unsafe to give any weight to his evidence that tends to implicate Mr. Cavezza as being at fault for the accident or that suggests that the defendant's actions in relation to his left turn were undertaken prudently.

EXPERT EVIDENCE

[61] Each side led expert opinion evidence from engineers experienced in accident reconstruction. As mentioned, Donald Rempel gave expert evidence for the plaintiff; Bradley Heinrichs provided an opinion for the defence. Both experts relied on the contents of certain RCMP documents and photographs of the collision, and personally surveyed and took measurements at the accident scene.

[62] The parties agreed to the following facts, which were relied on by the experts:

1. The grade of 16th Avenue near the accident scene for eastbound travel is 3%.

2. The skid marks left at the scene by Mr. Cavezza's motorcycle were 55.65 metres in length (182 feet).

3. The RCMP measured the co-efficient of friction of the roadway at the accident scene. The dynamic test resulted in a co-efficient of friction of .85; the static test yielded .8.

[63] In his report, Mr. Rempel focused on the timing of Mr. Seifred's left turn across the path of Mr. Cavezza's motorcycle. It addressed the critical timing issues of the distance at which Mr. Cavezza could have been seen by Mr. Seifred just before he committed to his left turn, and provided a time/distance analysis for the relative positions of the vehicles when the turn was initiated.

[64] With the assistance of a simulated accident computer program, Mr. Rempel performed an analysis to establish the approximate path of Mr. Seifred's truck through the turn and its position on impact. One of the assumptions he relied on is that the defendant's truck turned left at a steady speed of 10 mph. I have found that to be a sound assumption.

[65] The experts agree that the defendant approached the driveway of the Primary Entrance at a 45 degree angle. The defendant, however, would not agree that he cut the entrance at that angle. He suggested that it was much closer to a 90 degree turn. Mr. Seifred's evidence on this point was emblematic of his inclination to minimize his own potential failings in relation to the accident. I accept the evidence of the experts that shows that Mr. Seifred's vehicle entered the mouth of the driveway of the Primary Entrance at 45 degrees.

[66] Another component of Mr. Rempel's analysis considered the distance at which Mr. Cavezza would have to be in order to be out of Mr. Seifred's line of sight just before he commenced his left turn. In Mr. Rempel's opinion, at the point in time when Mr. Seifred became committed to his turn, the motorcycle and rider would have been substantially visible to him from about 260 metres away. That is a considerable distance west of the Truck Sign. Mr. Rempel explained that by "substantially visible" he meant that all parts of the motorcycle and rider vertically above the top of the front tire, including the headlight, would be seen from that distance. In other words, in Mr. Rempel's assessment, the motorcycle would have had to be more than 260 metres from impact to have been completely out of Mr. Seifred's view when he became committed to turn left.

[67] Mr. Rempel also evaluated the amount of time before impact that Mr. Seifred could have applied his brakes in order to stop before substantially entering into the eastbound lane, and how long that was prior to impact. His evaluation allowed for a 1 second perception/response time, to take into account that as Mr. Seifred prepared to turn, he would anticipate the prospect of approaching vehicles. He determined that a period of 5 seconds was a reasonable time estimation.

[68] Mr. Rempel explained that, based on the foregoing, the motorcycle would have had to move at a very high average speed, in the area of about 187 km/h, to travel 260 metres in the 5 second interval. Using those variables, he noted that if the motorcycle was not there to be seen by Mr. Seifred at 5 seconds prior to impact, then it was moving at an average speed in excess of 187 km/h. Mr. Rempel ultimately concluded that in order for the motorcycle to be out of Mr. Seifred's view at 5 seconds prior to impact, its initial speed had to be more than 190 km/h. That, in turn, would correspond to collision speeds of between 150 to 180 km/h. Mr. Rempel went on to provide perspective on the improbability that Mr. Cavezza had been travelling at the lightning speed of 190+ km/h.

[69] Mr. Rempel directed his mind to potential scenarios immediately preceding the accident. One of them supposed that when Mr. Seifred initiated his left turn, the minivan was visible at the Truck Sign located about 164 metres from the point of impact, and the motorcycle was not present ahead of it. Another potential setting he considered had the motorcycle ahead of the minivan in the eastbound lane at a position closer to impact than the Truck Sign, when Mr. Seifred made his turn. In laying out the various scenarios, Mr. Rempel referred to a European study by the

Association of European Motorcycle Manufacturers conducted over a three year period in respect of 921 motorcycle accidents spanning five countries. One of the findings of that study was that the drivers of other vehicles involved in collisions with motorcycles had a high frequency of "traffic scan errors", which refer to situations where the driver simply does not see the oncoming motorcycle. The numbers tabulated in that study were astounding. Traffic scan errors in accidents involving a motorcycle and another vehicle were made by the "other" driver in 70% of the cases studied.

[70] Another approach taken by Mr. Rempel in reconstructing the manner in which the accident may have unfolded was to assess the speed of the motorcycle at impact. In Mr. Rempel's view, there was no capacity to evaluate the motorcycle's impact speed from the observed damage, short of undertaking a complex evaluation involving elaborate testing, which was not done in this case. He concluded there was no basis in the physical evidence to evaluate the speed of the motorcycle, and that it could not be legitimately inferred that the impact speed was high.

[71] Mr. Rempel presented a time and distance table consisting of variables such as impact speeds, motorcycle braking performance (i.e. rates of deceleration during the skid), initial motorcycle speeds and Mr. Cavezza's reaction time, to evaluate where the motorcycle was from the standpoint of when Mr. Cavezza perceived the impending hazard of the defendant's vehicle in his lane. This analysis assumed that the skid mark left by the motorcycle corresponds with the onset of braking, even though a short interval of braking probably occurred before the skid was made. Mr.

Rempel believes that the variables he used cover the broad range of what is conceivable and that they likely capture the actual circumstances of the collision.

[72] Among the notable results is that the initial speed of the motorcycle is limited to about 145 km/h. They also indicate that the initial motorcycle speeds were likely within the 80 to 120 km/h range which corresponds to a motorcycle position broadly between 100 and 150 metres from impact when Mr. Seifred started to turn. Put another way, Mr. Rempel's data tends to focus on Mr. Seifred electing to turn in the presence of Mr. Cavezza's motorcycle that was available to be seen at between 100 and 150 metres from impact, travelling between 80 and 120 km/h.

[73] Assuming the minivan was at the Truck Sign, Mr. Rempel's reconstruction puts the motorcycle in front of the minivan when Mr. Seifred started to turn. Assuming further that Mr. Rempel's table includes the actual collision circumstances, which he considers likely, then the motorcycle was within the defendant's view at 5 seconds prior to impact unless, at that time, it was behind the minivan in the eastbound lane. In Mr. Rempel's opinion, the placement and direction of the initial motorcycle skid indicates that it was in stable travel in alignment with 16th Avenue when the emergency brake application was made. To his mind, that is consistent with the motorcycle having established itself in the eastbound lane in a stable mode of travel ahead of the minivan before he began to skid. That opinion together with the lay evidence which I accept, effectively dispels any likelihood that Mr. Cavezza was travelling behind the minivan at 5 seconds prior to impact.

[74] The basic approach of Mr. Heinrichs, the expert called by the defence, was to assess the pre-skid speed of Mr. Cavezza's motorcycle. In that context, he studied the factors of vehicle engagement, point of impact and the skid length. The police photographs of the skid marks show that the skid progressively darkens and then remains fairly uniform in appearance. Relying on the assumption that Mr. Cavezza had braked initially only with the rear wheel, and after that braked fully, meaning that he applied optimal front and rear braking over the remaining darker portion of the skid, Mr. Heinrichs deduced that Mr. Cavezza was probably travelling between 93-108 km/h before skidding. The core premise underlying Mr. Heinrichs' analysis is that the darker section of the skid resulted from optimal two-wheel braking of the motorcycle.

[75] In rebuttal, Mr. Rempel noted that a prime difficulty in assessing the motorcycle speed is that it is not possible to know how effectively Mr. Cavezza braked while on approach to the impact. Mr. Rempel persuasively clarified that the progressive darkening of a skid mark during the initial interval of brake application is a typical feature of skid marks and does not indicate that the motorcycle driver varied his braking. He testified that the motorcycle skid likely became darker due to the heat from the braking tires. Mr. Heinrichs agreed that was possible.

[76] Mr. Rempel clarified that optimal braking is braking that falls just short of skidding. Particularly persuasive was his observation that a motorcycle that slows with optimal two-wheel braking which Mr. Heinrichs attributes to the darker segment of the skid, would not be skidding at all. Accordingly, in Mr. Rempel's opinion, there was virtually no possibility that Mr. Cavezza braked with optimal two-wheel braking

at any time during the skid interval. He effectively discredited Mr. Heinrichs' suggestion of a link between the dark section of the skid and optimal two-wheel braking, and the so-called light section and rear only braking. I accept Mr. Rempel's opinion that the light skid interval is linked to relatively effective braking and not the darker segment. That is the exact opposite of the key assumption relied on by Mr. Heinrichs. Indeed, in cross-examination, Mr. Heinrichs agreed that the patch of skid laid down by Mr. Cavezza indicates that he locked up his rear tire and had not been braking optimally.

[77] Mr. Rempel remarked further that at some point before colliding with the truck, Mr. Cavezza would have realized that the impact was imminent and applied maximum "panic" braking of both sets of brakes which would lock up the front tire. He did not believe that Mr. Cavezza had used this maximum braking at the start of the skid, explaining that had he done so, the motorcycle would not likely have remained upright until impact. Mr. Heinrichs agreed that engaging the front brakes too quickly would have likely caused the motorcycle to become unstable. I accept Mr. Rempel's opinion that Mr. Cavezza did not apply maximum front braking from the start of the skid interval.

[78] A significant variable in estimating the pre-impact speed of the motorcycle is the deceleration rate, or the "g" force, at play. Mr. Heinrichs' estimation of the probable travelling speed of the motorcycle at between 93 to 108 km/h before skidding, used deceleration rates of .7 g to .9 g. Mr. Rempel is critical of the deceleration rates used by Mr. Heinrichs in his speed calculations. It is his opinion that because the long patch of skid made by the motorcycle indicates that Mr.

Cavezza was not applying optimal braking, his deceleration must have been poor. He points out that one of the studies relied on by Mr. Heinrichs involved an accomplished riding instructor of the motorcycle school of the Los Angeles Police Department who was braking on a very sticky service with a higher co-efficient of friction than that measured in this case. Even in those circumstances, the professional motorcycle rider could not achieve a deceleration of .7 g; he was only able to attain a .61 g deceleration for front and rear lock braking. There was credible evidence also that if only the rear brakes had been applied, then the deceleration rate could be much lower at .35 g or possibly as low as .3 g. Mr. Heinrichs' calculations are based on the footing that Mr. Cavezza was able to achieve a level of deceleration superior to that attained by the professional in that study. Yet, in cross-examination Mr. Heinrichs conceded that the lower force of .6 g represented a more reasonable middle ground rate of deceleration.

[79] In cross-examination, Mr. Heinrichs was asked to recalculate his figures using deceleration rates, ranging between .5 g and .6 g, which I am persuaded are more realistic. His revised calculations indicated a range of pre-impact speeds in the mid to high 80 km/h range at the 20 km/h impact speed, and between 91-95 km/h at the 40 km/h vehicle impact speed.

[80] Defence counsel contends that the reports of the experts are of relatively limited value and that the case at hand ultimately falls to be decided on the evidence of the lay witnesses. In this vein, he describes Mr. Heinrichs' report as superfluous and characterizes Mr. Rempel's estimation of the range of the pre-impact speed of

the motorcycle as defying common sense. I do not share defence counsel's criticism of Mr. Rempel's opinion concerning the pre-impact speed of the motorcycle.

[81] For the most part, Mr. Rempel's opinions were not directly challenged by Mr. Heinrichs or shown on cross-examination to be faulty in any substantive way. I accept Mr. Rempel's opinion evidence and prefer it over that of Mr. Heinrichs to the extent of any disagreement.

DISCUSSION

[82] I am satisfied that the preponderance of the evidence supports the inference that, in all probability, Mr. Cavezza completed his pass of the five vehicle convoy before he crested the Eastbound Hill. I find that Mr. Cavezza then rejoined the eastbound lane in front of the minivan just before he arrived at the crest of the Eastbound Hill.

[83] The lay witness evidence that I accept addressed Mr. Cavezza's speed as he passed them in the oncoming lane. I conclude that during his passing sequence he was racing along at a speed between approximately 95 and 100 km/h. By the time he had completed his passing manoeuvre and re-established himself in the eastbound lane at the front of the pack, he was out of their view. None of them were able to testify about his speed once he was repositioned in the lead. I think it is reasonable to infer that when Mr. Cavezza was overtaking the five eastbound vehicles, he was accelerating and, in all likelihood, did not maintain that accelerated speed once he had merged into the eastbound lane. In any event, the most reliable evidence about Mr. Cavezza's speed as he proceeded along the straight eastbound

stretch heading towards the collision, comes from the experts. Based on that evidence, I conclude that the probable speed of Mr. Cavezza once he was in front of the minivan in his proper lane of travel was between 85 and 95 km/h.

[84] Speed removes options for effective collision avoidance manoeuvres. Counsel for Mr. Seifred argues that Mr. Cavezza's speed and nothing that Mr. Seifred did or omitted to do, caused the accident. He points out that the experts agreed that had Mr. Cavezza been travelling at the posted speed limit, he could have avoided his own death. Defence counsel also emphasizes the expert evidence which indicates that if Mr. Cavezza had braked optimally he could have avoided his death, even had he been moving at a speed as high as 94 km/h. As to this latter matter, the skid mark is ample evidence of the fact that Mr. Cavezza did not brake optimally. In this context, optimal braking is essentially tantamount to perfect braking. That Mr. Cavezza did not apply his brakes in a perfect way does not constitute negligence.

[85] In ***Canada v. Saskatchewan Wheat Pool***, [1983] 1 S.C.R. 205, the Supreme Court of Canada established that the breach of a statute does not amount to negligence *per se* nor is *prima facie* evidence of negligence. The Court concluded that the nature and degree of a party's fault, as distinct from a statutory breach, should govern the imposition of civil liability. Consequently, the bare fact that Mr. Cavezza was exceeding the speed limit does not, of itself, amount to negligence.

[86] In this case, despite the fact that the users of the particular roadway generally exceed the speed limit, there can be no doubt that Mr. Cavezza's excessive speed

marked a departure from the expected standard of care and played a causative role in the occurrence of the accident. Counsel for the plaintiffs concedes there is an element of contributory negligence on the part of Mr. Cavezza due to his high speed. He submits, however, that Mr. Seifred's conduct was also negligent and considerably more blameworthy and that Mr. Seifred should therefore assume the significant share of liablility.

[87] Plaintiffs' counsel contends that the crossing by Mr. Seifred of the yellow solid double line is the critical feature of his negligence. In this regard, counsel has drawn the Court's attention to ss. 155 and 156 of the ***Motor Vehicle Act***, RSBC 1996, c. 318 which stipulate, in relevant part, as follows:

> **155** (1) Despite anything in this Part, if a highway is marked with
>
> (a) a solid double line, the driver of the vehicle must drive it to the right of the line only,
>
> **...**
>
> **156** If the driver of a vehicle is causing the vehicle to enter or leave a highway and the driver has ascertained that he or she might do so with safety and does so without unreasonably affecting the travel of another vehicle, the provisions of sections 151 and 155 are suspended with respect to the driver while the vehicle is entering or leaving the highway.

[88] In ***Dickie Estate v. Dickie*** 1991 5 B.C.A.C. 37 (B.C.C.A.), the plaintiff was in the process of making a u-turn when he was struck by the defendant's vehicle travelling at the grossly excessively speed of approximately 137 km/h. In negotiating his u-turn the plaintiff had crossed over the solid double lines. At trial, the judge concluded that the defendant's speed was the sole cause of the accident and found

no contributory negligence on the part of the plaintiff. The defendant appealed on the question of contributory negligence. The Court of Appeal found that the trial judge had erred in principle in failing to assess any degree of negligence against the plaintiff on the issue of keeping a proper lookout.

[89] In allowing the appeal, Hollinrake, J.A., speaking for the Court, made the following instructive remarks at paras. 12 and 13:

> [The plaintiff] was engaging in a manoeuvre that was fraught with danger. He placed himself and the oncoming drivers in a position of risk. That being so, in my opinion, the law required of him a very high degree of care which would manifest itself in a sharp lookout before he crossed over the solid double line into the northbound lanes on the causeway. There was nothing to prohibit [the plaintiff] from seeing the oncoming [defendant] vehicle before his vehicle entered the northbound lanes of travel.
>
> **...**
>
> In my opinion, on these facts the only possible inference is that [the plaintiff] failed to keep a lookout which the law required of him in these circumstances. If he had been keeping such a lookout I think the inference is irresistible that as a reasonable driver he would have become aware that the [defendant] vehicle was exceeding the speed limit by a margin such as to make it dangerous for him to proceed into the northbound lanes.
>
> In my opinion, [the plaintiff's] failure to keep the lookout that the law required of him in these circumstances was negligence which played an effective part in producing the collision.

[90] Counsel for the plaintiffs also relies on the decision of our Court of Appeal in ***Redlack v. Vekved***, 1996 Carswell BC 2179 (B.C.C.A.) [***Redlack***], for the proposition that a *prima facie* presumption of negligence is triggered against Mr. Seifred by virtue of the fact that he crossed the solid double lines and into the opposite lane of travel. In ***Redlack***, the defendant driver encountered black ice and

skidded off the roadway injuring the plaintiff passenger. The Court of Appeal effectively, though not explicitly, invoked the maxim of *res ipsa loquitur* and held that a *prima facie* case of negligence arises against the driver of a motor vehicle that goes off the road or into the oncoming lane of traffic. In my view, the ratio in ***Redlack*** was not intended to encompass the factual situation in this case. Moreover, since the decision of the Supreme Court of Canada in ***Fontaine v. Insurance British Columbia (Official Administrator)***, [1998] 1 S.C.R. 424 [***Fontaine***], it is of doubtful authority. In ***Fontaine***, the Court rejected the argument that an inference of negligence will arise as a matter of law whenever a vehicle leaves the roadway in a single car accident. It concluded that the law would be better served if *res ipsa loquitur* was treated as expired. The British Columbia Court of Appeal recently revisited the validity of *res ipsa loquitur* in ***Nason v. Nunes***, 2008 BCCA 203, 82 B.C.L.R. (4th) 1. There the Court made a passing reference to ***Redlack*** and stated that its earlier decision in ***Savinkoff v. Seggewiss*** (1996), 77 B.C.A.C. 98 (B.C.C.A.), which had been relied on in ***Redlack***, had been superseded by ***Fontaine.*** It follows that ***Redlack*** has likewise been superseded.

[91] I have considered the balance of the case authorities provided by the parties. While some general propositions are endorsed, the decisions are largely fact-specific and for that reason are of limited use.

[92] Counsel for the plaintiffs did not contend that Mr. Seifred's statement to Mr. Henderson to the effect that he had not seen the motorcycle, constitutes an admission by Mr. Seifred and should be received in evidence as proof that he did not see the motorcycle. Before the Court embarks on an analysis concerning the

admissibility of such a statement, there is a preliminary threshold issue as to whether Mr. Seifred actually uttered the statement, and if he did, whether in the context of making it he uttered any other qualifying remarks. I accept Mr. Henderson's evidence that Mr. Seifred made such an utterance. However, given that he was in some measure of shock when conversing with Mr. Seifred and in light of the fact that Mr. Seifred had begun to "fall to pieces", I conclude there was no admission by Mr. Seifred of failing to see the motorcycle to which I would attach any weight.

[93] A recurring theme voiced by the defence was that Mr. Cavezza's dark motorcycle travelling on a grey road was "black on black" and, in that sense, was camouflaged and hence difficult to spot from afar. There was no cogent evidence to support that line of argument. Moreover and in any event, it did not discredit Mr. Rempel's persuasive opinion concerning the probable distance of Mr. Seifred's sightline. The plaintiffs have shown that Mr. Cavezza was in Mr. Seifred's sightline for considerably more than the "fleeting instant" suggested by defence counsel. I find that it is more probable than not, that when Mr. Seifred looked westward along 16th Avenue just prior to launching into his left turn and saw the minivan, it was at least as far away as the Truck Sign. At that moment, Mr. Cavezza was travelling in the eastbound lane ahead of the minivan and was there to be seen by Mr. Seifred before he initiated his left turn. Unfortunately, Mr. Seifred did not see Mr. Cavezza approaching until both men had reached a point of no return.

[94] Also in evidence was video footage attempting to reconstruct the motorcycle approaching the accident scene at various speeds. Although not essential to my

findings, it rather compellingly showed that at 100 km/h, the Cavezza motorcycle would have been there to be seen from Mr. Seifred's vantage point for many seconds.

[95] Although Mr. Seifred did not turn left quickly, he was concerned, and probably somewhat distracted, about having the traffic behind him pile up and therefore chose not to come to a complete stop and likely did not even hesitate before turning. Instead, he swooped across the eastbound lane taking the driveway of the Primary Entrance at a 45 degree angle. Mr. Seifred was expected to exercise a very high degree of care and caution in crossing over the yellow double solid lines. The preponderance of the evidence persuades me that he failed to do so. He did not take sufficient time or care to keep a sharp lookout at the oncoming traffic just before committing to the left turn. Consequently, he did not see Mr. Cavezza's motorcycle which, I conclude was there to be seen, coming upon him quickly and which made it obviously dangerous for Mr. Seifred to proceed with his left turn. The significantly long skid mark left by the motorcycle indicates that Mr. Seifred's manoeuvre unreasonably affected the travel of Mr. Cavezza's motorcycle.

[96] In summary, the conduct of each of Mr. Cavezza and Mr. Seifred was negligent and combined to cause the accident.

[97] Where, as here, the fault of two or more persons combine to cause a loss, liability will be apportioned. Apportionment is governed by the ***Negligence Act,*** R.S.B.C. 1996, c. 333. The relevant provisions are set out below:

> **s.1 Apportionment of liability for damages**
>
> (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
>
> (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
>
> (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.
>
> **s.4 Liability and right of contribution**
>
> (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.
>
> **…**
>
> **s.6 Questions of fact**
>
> In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

[98] In assessing apportionment, the court examines the extent of blameworthiness, that is, the degree to which each party is at fault, and not the degree to which each party's fault has caused the loss. Put another way, the court is not assessing degrees of causation, rather, it is assessing degrees of fault: ***Cempel v. Harrison Hot Springs Hotel Ltd.***, [1997] 43 B.C.L.R. (3d) 219, 100 B.C.A.C. 212 [***Cempel***]; ***Aberdeen v. Langley (Township)***, 2007 BCSC 993 [***Aberdeen***]; reversed in part, ***Aberdeen v. Zanatta***, 2008 BCCA 420.

[99] In ***Alberta Wheat Pool v. Northwest Pile Driving Ltd.***, [2000] 80 B.C.L.R. (3d) 153, 2000 BCCA 505, Finch, J.A. (now the Chief Justice), for the majority of the Court of Appeal, explained this important principle at paras. 45-47:

> In my view, the test to be applied here is that expressed by Lambert, J.A. in ***Cempel***, *supra*, and the court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each.
>
> Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

[100] In ***Aberdeen***, Groves J. provided insight into the difficulty that the court faces in quantifying the concept of blameworthiness under the ***Negligence Act***. At para. 62 he endorsed the enumeration of factors in assessing relative degrees of fault set out by the Alberta Court of Appeal in ***Heller v. Martens***, 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 a 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...
>
> [Authorities omitted.]

[101] To the foregoing factors, Groves J. added the following at para. 67:

> 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.

[102] After surveying the authorities, Groves J. summarized at para. 67 the approach to be taken in assessing the relative degree of blameworthiness of the parties:

> Thus, the key inquiry in assessing comparative blameworthiness is the relative degree by which each of the parties departed from the standard of care to be expected in all of the circumstances. This inquiry is informed by numerous factors, including the nature of the departure from that standard of care, its magnitude, and the gravity of the risk thereby created.

[103] On appeal, the decision in ***Aberdeen*** in relation to the issue of contributory negligence was remitted for retrial. However, the Court of Appeal did not criticize Mr Justice Groves' careful summation of the governing legal principles on apportionment.

[104] Mr. Cavezza continued in the oncoming lane at an excessive speed in order to pass a trail of vehicles long after the dividing line for eastbound traffic had become solid. He persisted in doing so on his approach to the Eastbound Hill, which would

have hampered his view of oncoming traffic, and after the appearance of double solid lines which would tell him that the oncoming traffic had impaired visibility his way. He did not take advantage of the openings in the line of eastbound vehicles to merge earlier; had he done so, there would have been no accident. Instead, Mr. Cavezza chose to merge near the brow of the Eastbound Hill and once in the lead, maintained an excessive speed. In assessing the degree of Mr. Cavezza's blameworthiness, I have borne in mind the fact that traffic as a whole speeds along that segment of 16th Avenue. Even so, it cannot be overlooked that Mr. Cavezza's deliberate conduct violated, in a substantial way, the expected standard of care of a user of that road in those circumstances. He showed a reckless disregard for the safety of fellow users and created a substantial level of risk for himself and others.

[105] Turning to Mr. Seifred's fault, the law imposes upon him a very high degree of care to observe caution in crossing double solid lines. Although he was not speeding, he did not come to a complete stop or likely even hesitate prior to crossing the oncoming lane and cut the driveway at a 45 degree angle. Mr. Seifred travelled 16th Avenue frequently and is taken to know that speeding vehicles along that route were more the rule than the exception. Had he kept the sharp look-out reasonably expected of him, he would have seen Mr. Cavezza advancing in the eastbound lane and would not have initiated his turn in such patently unsafe circumstances. Mr. Seifred breached his duty to take reasonable care to a severe degree and created a grave risk for himself and a fatal one for Mr. Cavezza.

[106] In all the circumstances, I consider Mr. Seifred's conduct more blameworthy than Mr. Cavezza's. I apportion liability 65% against Mr. Seifred and 35% against Mr. Cavezza.

[107] Counsel are at liberty to make submissions on costs if they are not able to agree. Counsel for the plaintiffs is to file his written submissions by May 15, 2009. Counsel for the defendant will have 30 days after receipt to file his submissions. Plaintiffs' counsel will then have an additional 15 days to file any reply.

"S.K. Ballance"

The Honourable Madam Justice S.K. Ballance