

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sandhar v. Ghuman*,
2023 BCSC 779

Date: 20230515
Docket: M201801
Registry: New Westminster

Between:

Bhavanveer Sandhar

Plaintiff

And

**Harakaranbir Ghuman, Atinderpal Singh Ghuman,
and Joshua Allen Curtis**

Defendants

- and -

Docket: M209643
Registry: New Westminster

Between:

Harkaran Bir Singh Ghuman

Plaintiff

And

Parin Banu Valji and Joshua Allen Curtis

Defendants

- and -

Docket: M181322
Registry: Vancouver

Between:

Anhed Bali

Plaintiff

And

**Harakaran Bir Singh Ghuman, Atinderpal Ghuman
and Joshua Allen Curtis**

Defendants

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for the Plaintiff, B. Sandhar:	R. Patro
Counsel for the Defendants, H. Ghuman and A. Ghuman:	C. Bekkering E. Dyck
Counsel for the Plaintiff, H. Ghuman:	J. Woods Q. Johnson, Articled Student
Counsel for the Defendant, J. Curtis:	Z. Fang A. Brar
Counsel for the Plaintiff, A. Bali:	M. Bauer
No other appearances	
Place and Dates of Trial:	New Westminster, B.C. February 22-24, 2023
Place and Date of Judgment:	New Westminster, B.C. May 15, 2023

Introduction

[1] This trial involves three actions that arise out of a motor vehicle accident on April 27, 2017. By previous order, the issues of liability and damages were severed, and the actions were ordered to be tried together regarding liability.

[2] Mr. Ghuman was the driver of a Range Rover (“Rover”). Mr. Sandhar was in the front passenger seat, and Mr. Bali was in the back seat. Mr. Curtis was the driver of a Nissan Sentra (“Nissan”). Both vehicles were proceeding west on Vedder Mountain Road (“VMR”) near Cultus Lake, B.C. (“Cultus”), when Mr. Ghuman lost control of the Rover. There was no collision between the vehicles.

[3] The witnesses at trial were the four people in the vehicles. Mr. Bali was thrown from the Rover and has no memory of the accident.

Description of VMR in Accident Area

[4] The following description is based on a combination of the Google maps in evidence (one of which has a scale), the evidence of the parties, and Mr. Curtis’ description of where the centre lines on VMR change. No party took issue with Mr. Curtis’ description, and it is consistent with the photographs.

[5] This description starts at the traffic circle about 600 metres west of the Vedder Bridge. Proceeding from this point west, VMR continues for about three kilometres until there is a fork with Lumsden Road, and VMR continues west. From the fork to the accident scene, about 750 metres to the west, VMR is one lane in each direction. There is a narrow shoulder to the right of the outer white line. It is a rural area. The mountain, which is treed, is on the left. A drainage ditch, acreages, and industrial properties, are on the right. Heading west from the fork, VMR has double solid centre lines for about 200 metres. Following that, the lines change to one solid line with a broken line to the right of that solid line (“solid/broken lines”), for the next about 250 metres, ending just past the far western edge of what appears to be an RV storage facility. Following that, the lines change again and are double solid up to and after the driveway entrance of a second RV storage facility, about 300

metres away. About 100 metres east of this driveway, VMR curves slightly to the left, and becomes Yarrow Central Road. It is at about this curve where Mr. Ghuman lost control of the Rover after passing the Nissan. The Rover went into the ditch to the right, hit a tree, rolled two or three times, and came to rest up side down at the entrance to the driveway of the RV storage facility.

Evidence

Agreed Statement of Facts

[6] In the late morning of April 27, 2017, Mr. Ghuman picked up Mr. Sandhar and Mr. Bali from their homes in Richmond, B.C. At all times, Mr. Ghuman was the driver of the Rover. They drove to Cultus, arriving at approximately 4:00 p.m. After spending some time at Cultus, they drove to a McDonald's restaurant for dinner. After leaving McDonald's, they began driving home westward along VMR. The accident took place at about 10:45 p.m.

[7] Cst. Castonguay was one of the police responders. At 12:11 a.m. on April 28, 2017, he attended the Chilliwack General Hospital and spoke with Mr. Ghuman. Cst. Castonguay was physically very close to Mr. Ghuman and did not capture a scent of alcohol. He did not take a statement from Mr. Ghuman at that time.

Harakaran Ghuman

[8] Mr. Ghuman was 24 years old at the time of the accident. He obtained his driver's licence when he was 16 or 17.

[9] He and Mr. Bali have been good friends since high school. They both work at the same location of Mr. Lube. Mr. Ghuman met Mr. Sandhar through Mr. Bali about a year and a half before the accident, and had socialized with him a few times. On the day of the accident, Mr. Ghuman and Mr. Bali had the day off work. He understood from Mr. Bali that Mr. Sandhar had had a tough week and they were going to cheer him up. It was a sunny day and they decided to go to Cultus. Mr. Ghuman was driving his brother's Rover, which he had driven often. It had an eight-cylinder, 4.4 litre engine. It was "very fast and very sturdy".

[10] On the way to Cultus, they stopped at a liquor store and a 7-11 store to buy liquor and food. They had a 26-ounce bottle of Crown Royal whisky and a six-pack of beer. Mr. Bali guided Mr. Ghuman to Cultus with a GPS. Mr. Sandhar and Mr. Bali began drinking in the Rover. On the way, they stopped at a viewing point, and while there Mr. Ghuman had one beer.

[11] They arrived at Cultus at about 3:00 or 4:00 p.m. They ate snacks and sandwiches, and sat by the water and walked around. Mr. Ghuman consumed five or six one-ounce drinks of the whisky. They were at Cultus “a good amount of time”. The sun was still up when they left Cultus to go to a McDonald’s restaurant. He was comfortable driving. Mr. Ghuman said he was familiar with drinking and counted the drinks as he knew how much he could consume. Mr. Ghuman did not consume any alcohol after they left Cultus, but Mr. Bali and Mr. Sandhar did. They had a meal at McDonald’s. They were there for a long period of time. The sun was down when they left. While there, Mr. Sandhar was emotional and Mr. Ghuman took him outside for a while. When they left McDonald’s to head home, Mr. Ghuman was not feeling any effects from the alcohol.

[12] Mr. Ghuman started driving on VMR, which he had not driven on before. There are no street lights, and it was very dark. They had music playing and again Mr. Bali was guiding him with the GPS. He was driving at a constant speed. A small sedan (the Nissan), was behind them and it started tail-gating them. He does not know the Rover’s speed at that time, but given they had no reason to rush and it was very dark, he concludes it was within the speed limit which he thought was 50 km/hr. The Nissan then pulled up very close to the back of the Rover, and started honking and “high beaming” them. He cannot recall how long this lasted, but the entirety of events seems to have happened in seconds. He, Mr. Sandhar, and Mr. Bali were asking each other what the other driver wanted them to do because there was no room to pull over.

[13] The Nissan then moved into the oncoming lane and pulled up beside the Rover. The other driver put down his passenger side window and started yelling and swearing at him and gave him the finger. Mr. Ghuman put down his window and

swore back at him. He recalls yelling to the other driver, “What are you doing? Two lanes, two yellow lanes” (later he said this as “two yellow lines”). The Nissan speeded up and then Mr. Ghuman “speeded up a little too”, and then “decided it was not worth it” and slowed down and the Nissan overtook the Rover. Until recently he thought this area of VMR has two solid lines, but agreed it has solid/broken lines.

[14] In his statement to a police officer on June 5, 2017, Mr. Ghuman stated:

... so he came beside me uh, he speeded up he came beside me and then uh, um, uh, I think he put his window down I didn't look at him cause I didn't want to start any problems, he looked at me and then he speeded up he went ahead and uh, that's like when he went ahead and in front of me then that's when he slammed on his breaks and that's when, uh, I think I was at like fifty, sixty, seventy. ...

[15] When this inconsistency was put to him on cross-examination, he said that his parents were standing in another room, a police officer coming to his home was intimidating, and the only scenario he can think of where he did not tell the officer about himself putting the window down and the swearing was because his parents were near.

[16] Once the Nissan overtook the Rover, it returned to the lane of travel one or two car lengths in front of the Rover. The driver of the Nissan then “slammed” on the brakes. Mr. Ghuman saw the brake lights come on. He is not sure of the timing, but it seems the driver did this right away after returning to the lane of travel. When asked if the Nissan's application of the brakes was a light tap or sustained applying of the brakes, he said he “just saw brakes and reacted”. Mr. Ghuman “made a split-second decision” to avoid a collision with the Nissan. He turned left and went into the oncoming lane. A curve was up ahead to the left and then he saw headlights of an oncoming car and in the same second, he decided he had to go right to return to the lane of travel to avoid a collision. He cannot say what distance the oncoming car was from him, but it appeared very close. By this time, he was ahead of the Nissan, but he lost control of the Rover and the accident happened. He does not know how he lost control. He “just remembers trying to get out of the way”. After looking at

maps, he agreed that when he drove into the oncoming lane, he crossed double solid lines.

[17] He does not recall the Rover's speed when the Nissan passed it, but agreed with his statement to the police that the Rover was travelling 50 to 70 km/hr. He does not recall the Rover's speed when it passed the Nissan. He does not recall if he applied the Rover's brakes or accelerated at any point from the time the Nissan pulled in front of the Rover until he lost control of the Rover. When it was suggested that at the point he saw the brake lights he could have braked and let the Nissan go ahead, he said he "just reacted to the situation" to avoid a collision with the Nissan. When it was suggested that once he saw the oncoming car, he could have braked and pulled in behind the Nissan, he said he did not know what was happening to his right and he reacted to avoid a collision with the oncoming vehicle. Mr. Ghuman does not recall that Mr. Sandhar or Mr. Bali were yelling at him to slow down when he was moving into the oncoming lane and then back into the lane of travel. He said "it happened so fast", and he was "just too busy trying to avoid the accident". He does not know why he could not safely return to the lane of travel, or the details of his turn to the right. Mr. Ghuman lost consciousness in the accident. When he awoke, the Rover was upside down.

[18] Mr. Ghuman initially said he had not spoken to Mr. Bali or Mr. Sandhar about the accident other than how they were recovering. He and Mr. Bali talk frequently, but they do not talk about the accident. He spoke to Mr. Sandhar two or three times, the last time three or four months after the accident. He later agreed that he may have had some discussion with Mr. Sandhar about how the accident happened, but he does not remember that.

Bhavaneer Sandhar

[19] Mr. Sandhar was 21 years old at the time of the accident. He does not recall that the purpose of the trip was to cheer him up. The day was sunny which was one of the reasons they went to Cultus. Mr. Ghuman is an acquaintance through Mr. Bali. He has not spoken with Mr. Ghuman in the last couple of years.

[20] He said he is not sure of his estimates of the times they arrived at and left locations. He and Mr. Bali starting drinking alcohol on the way to Cultus. They arrived at 3:00 or 4:00 p.m. They listened to music, took pictures of the scenery, and ate snacks. He is not aware how much Mr. Ghuman drank but it was whisky. Mr. Ghuman did not appear to be intoxicated at any point that day. Mr. Sandhar estimates he consumed six beers and six drinks of whisky. They did not have any other alcohol with them. He drank “quite a bit” and was “highly intoxicated”. Mr. Sandhar does not recall drinking after they left Cultus. There was alcohol left in the bottle of Crown Royal. They left Cultus between 8 and 9 p.m. and arrived at McDonald’s at about 9:00 p.m. It was dark when they left McDonald’s and the accident happened 10 or 15 minutes after that.

[21] The drive from McDonald’s up to the time of the accident was “normal”. They were playing music and had a GPS to navigate them. The first time he noticed the Nissan was when it was in the lane ahead of them. He does not recall how the Nissan overtook the Rover. He may have been looking at his phone at the time. Prior to then, he did not hear the Nissan honking. He does not know if the Nissan had “high beamed” the Rover. He does not recall the Nissan driver or Mr. Ghuman putting down their windows, swearing, or having an exchange. When the Nissan came into the lane, it “cut off” the Rover. At the time, the Rover was travelling 50 or 60 km/hr. From his observation, it appeared that Mr. Ghuman reacted and drove into the oncoming lane, and then tried to overtake the Nissan. That is when Mr. Sandhar saw an oncoming car and the curve ahead. Mr. Ghuman then “cut the wheel” to the right and lost control of the Rover. It all happened in the “snap of a finger”.

[22] On June 6, 2017, Mr. Sandhar gave a statement to a police officer. The relevant portion states:

... We were driving straight following the directions from the GPS and all of a sudden a car cut us off and after that I don’t remember much cause it feels like everything happened all of a sudden. The car that cut us off slammed on the brakes all of a sudden so we dodged it and were about to pass it when a car from upfront came out of nowhere cause the road started curving. When we attempted to get back into our lane we started skidding cause of the dirt

and lost control after that I don't remember anything but I was told we flipped 4 times.

[23] Mr. Sandhar said his statement that the Nissan “slammed on the brakes all of a sudden” was “more of a he said, she said”, because that is what Mr. Ghuman told him when they discussed what had happened when Mr. Ghuman came to Mr. Sandhar's home. They had spoken for one or two hours. That is when he “had the feeling that maybe” the driver of the Nissan did hit the brakes, but the only thing he actually remembers is the Nissan came in front of them and being “cut off”. He does not remember the Nissan's brake lights coming on, and he does not think the Nissan suddenly slowed down. He agreed when he told the police officer that the Rover flipped four times, he said he got that information from someone else. From his perspective, Mr. Ghuman reacted to the Nissan because it was close. He does not know why he said in the statement that he does not remember much because although there are parts he does not remember, there are some things he does. He was writing the statement with his broken arm.

[24] When asked to describe what he meant by “cut off”, he said that all he remembers is the Nissan came in front of them and there was not a lot of room between the Nissan and the Rover. He agreed that the first time he saw the Nissan was when it was established in the lane in front of the Rover. He assumes it had been behind the Rover and the Nissan overtook the Rover. When asked to be more specific about the space between the vehicles, he said “I say this because Mr. Ghuman reacted right away and went into the left lane to avoid impact”. Later when it was put to him that he did not actually remember being cut off, he said, “The only thing I remember is a vehicle pulling up in front of us, yes. My word is ‘cutting off’ because that is the word I am using - that it cut us off. You can put it as any word, but a vehicle came in front of us, that is what I noticed. You can create whatever you want out of it.”

[25] When the Rover moved into the oncoming lane, he saw the RPM dial of the Rover going higher, heard the revs of the engine, and could feel the Rover accelerate. He loudly and quickly said to Mr. Ghuman in Punjabi (the language they

all spoke) to “slow down” or “chill out or something like that”. He thinks Mr. Bali said the same. The curve in the road was “a ways ahead” but he cannot estimate the distance. He first saw just a headlight reflection around the curve, and then headlights coming straight. When he first saw the headlights, Mr. Ghuman was about to pass the Nissan, but had not passed it. He can not recall the distance travelled between the time of being cut off and the road curving. Mr. Ghuman “cut the wheel” to the right and lost control of the Rover. Mr. Sandhar can not give an estimate of the Rover’s speed at the time, but he does not think it was 50 to 60 km/hr.

[26] When it was put to him that it was possible that the Rover did not accelerate until he saw the lights of the oncoming vehicle, he said he was “pretty sure” that was not what happened and that the revs of the Rover were high when the Rover went into the oncoming lane, but agreed it was a possibility.

[27] The Rover started skidding, and going side to side, and then started flipping, and it landed upside down and then skidded while upside down. There was a lot of travel from the time Mr. Ghuman lost control to where the Rover came to rest. Dirt, gravel and grass were flying through the Rover and into this face. When they came to a stop, he was stuck in the passenger seat. He was helped out of the Rover, and as soon as he got up, felt dizzy and collapsed.

Anhed Bali

[28] Mr. Bali was 22 years old at the time of the accident. On the way to Cultus they went to a liquor store. He bought beer. He does not recall any other stops.

[29] They arrived at Cultus at about 2:30 or 3:00 p.m. They sat at a picnic table. He was away from the others for a time, “doing my own things, and taking pictures”. Mr. Ghuman had to make a telephone call and while he did that, he and Mr. Sandhar went to the pier and took pictures while the sun was setting. At Cultus, he drank one beer, as he is a “one beer guy”. They were all drinking whisky but he does not drink much. There was no other alcohol with them. His last memory before the accident is

of being on the pier, and his next memories are a couple of fleeting seconds after the accident when he was being cared for by first-responders. He has not talked to Mr. Ghuman about what happened in the accident.

Joshua Curtis

[30] Mr. Curtis was 17 years old at the time of the accident and had had an “N” licence for a few months. Prior to the accident, he had been at a friend’s house. He had not consumed any drugs or alcohol. He was on his way home when the accident happened. It is about a 15-minute drive. He was driving the 2001 Nissan. It was a “base model” with “no power windows or power anything”, other than it was an automatic. It had a four-cylinder 1.8 litre engine. It was not a fast vehicle.

[31] He is very familiar with VMR. The accident took place about five kilometres from his home. He was aware that the corner just east of the driveway where the Rover came to rest, is a blind corner. There are trees on the mountain side of the road to the left, and the road dips down around the corner.

[32] He first saw the Rover at a traffic circle near the Vedder Bridge. His best memory is that the Rover had on its four-way hazard lights and was either stopped for a few seconds or slowly moving. At his examination for discovery: he said that when he first saw the Rover it was moving; he was referred to an email he sent to the police the day after the accident where he said that the Rover was parked in the driving lane with its hazard lights on; and he ultimately said he could not remember whether the Rover was parked, or had on its hazard lights.

[33] When Mr. Curtis got behind the Rover, it started going down VMR. The Rover was driving “slower, faster, slower, faster”, sometimes swerving onto the shoulder. He was following it at 40 km/hr and sometimes 60 km/hr, which were the speeds of the Rover. This lasted roughly 10 minutes. He did not think that the driver was impaired. He did not know what to think. The cause could have been anything. He agreed he thought it was possible the driver of the Rover did not know VMR. He thought the Rover posed a hazard and gave it more space.

[34] He wanted to get up to the speed limit which was 60 km/hr (it is 50 km/hr at other places along VMR), and he passed the Rover on the solid/broken lines. He did not think it would be dangerous for him to pass. The Rover had not swerved into the oncoming lane. At his examination for discovery, he said that the Rover was “swerving a little bit over the road, like, over the lines a bit”. He said he was referring to the shoulder line, not the centre lines. Prior to passing the Rover, he did not flash the Nissan’s headlights or honk its horn.

[35] He passed the Rover in the oncoming lane at 60 km/h. When he started to pass, the Rover was driving about 50 km/hr. As soon as the back of the Nissan got next to the front of the Rover, the Rover all of a sudden accelerated a little bit. He knew the solid/broken lines were ending so he “gave [the Nissan] a little bit of juice”, to 62 km/hr, and got in front of the Rover. There was no interaction between him and the occupants of the Rover when he overtook the Rover. He completed the pass just before the solid/broken lines turn to double solid lines. He was “about 1.5 car lengths, maybe a little less” when he pulled in front of the Rover. The Rover was not going faster than him at that point. He was going about 60 km/hr once he got into the travelling lane. After this, the Rover started “creeping up on him pretty fast”, but he later agreed that there was never more than 1.5 car lengths distance between the Nissan and the Rover. He denied he hit the brakes of the Nissan once he got in front of the Rover.

[36] “Roughly five to 10 seconds” after the Nissan got in front of the Rover, the Rover tried to pass the Nissan. He agreed it is possible it could have been three seconds. At this point, they were driving beside the double solid lines and almost at the corner. He agreed that from the place where the Nissan finished overtaking the Rover to the upcoming corner was roughly 150 metres. At the time he saw the oncoming car, the Nissan was already going around the blind corner, and the Rover was passing it. He did not at first change the Nissan’s speed until he saw the oncoming vehicle, and then he applied the brakes and slowed. He knew that the Rover passing him around the blind corner was a dangerous thing to do. The time

between when he first noticed the Rover trying to overtake the Nissan and when he slowed down was “within the three second mark”.

[37] The Rover went by the Nissan at a fast speed. On July 15, 2017 he gave a statement to a private investigator and said the Rover “must have been going about 120 km/hr or so”. This was his guess at the time. He does not know its actual speed.

[38] When the Rover cut in, the driver lost control, the Rover went into the ditch, hit a tree, and mud flew up everywhere and onto his windshield. He saw the Rover flipping in the air, he thinks two or three times, but because of the mud he can not be sure. The oncoming car continued and he never saw it again.

[39] After the accident, Mr. Curtis stopped, called 911 and went to help. He thought the front passenger had been drinking. He saw a 26-ounce bottle of Crown Royal that was about half full.

Positions of Parties

[40] In summary, Mr. Ghuman submits that liability for the accident should be apportioned 50/50. He submits that either: there is no basis upon which the Court can determine the facts necessary to apportion fault, and as a result liability should be apportioned equally pursuant to s. 1(2) of the *Negligence Act*, R.S.B.C. 1996, c. 333; or, if the Court can determine degrees of fault, liability should still be apportioned equally. Mr. Ghuman submits that his actions should be considered in the context of the “agony of collision”. Mr. Ghuman’s defence counsel adopts these submissions, with the exception that if the Court can find the facts, liability should be apportioned 60/40 in favour of Mr. Ghuman. Mr. Sandhar submits that fault should be apportioned 25/75 in favour of Mr. Curtis. Mr. Bali submits that fault should be apportioned 90/10 in favour of Mr. Ghuman. Mr. Curtis submits that Mr. Ghuman is 100% responsible for the accident. He argues there is an intervening event, being a clear causal break between the Nissan returning to the lane of travel and Mr. Ghuman’s alleged decision to overtake the Nissan.

[41] The parties agreed prior to the trial that the alleged contributory negligence of Mr. Bali (whether he was wearing a seatbelt) is deferred until the damages trial. The alleged contributory negligence of Mr. Sandhar and Mr. Bali (getting into the Rover when Mr. Ghuman had been drinking alcohol) was withdrawn. Despite that “agony of collision” was not specifically pled by Mr. Ghuman, and “*novus actus interveniens*” was not specifically pled by Mr. Curtis, the parties agreed this could be argued by both as if the pleadings had raised these issues.

Analysis

Credibility and Reliability

[42] The Court can accept some, all, or none of the evidence of a witness. I am guided by the factors and approach in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–187, aff’d 2012 BCCA 296, leave to appeal to the SCC ref’d, 35006 (7 March 2013). This includes: the ability and opportunity of a witness to observe events; whether the witness’ evidence is consistent or inconsistent with other independent evidence; whether the witness changes his or her evidence or has said something different on a previous occasion; whether the evidence seems reasonable or unlikely; and any motive to shade evidence or lie. An approach suggested in *Bradshaw* is described as follows:

[187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a ‘stand alone’ basis, followed by an analysis of whether the witness’ story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the “preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions” (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). ...

[43] In the summaries of evidence above I did not detail every minor inconsistency argued by the parties. Minor inconsistencies between testimony and a previous statement, such as the colour of the Nissan in a short interaction on a dark road, or

whether the drive from Mr. Curtis' friend's house to his home is 15 minutes or 25 minutes, in the circumstances of this case, are not significant. Given the passage of time and the events of that evening, these types of inconsistencies are understandable and are not material to the issues to be decided.

[44] While I found that both Mr. Ghuman and Mr. Curtis tended to portray events in the light most favorable to their own interests, and there are parts of each of their testimony that I do not accept, I generally preferred Mr. Curtis' evidence over that of Mr. Ghuman for reasons which I summarize here and detail further below.

[45] First, Mr. Ghuman's narrative of events and his explanation that he was forced to "just react", rather than braking and merging behind the Nissan (twice), yet ended up passing the Nissan some distance down VMR at what I find was a high speed, is improbable on a stand-alone basis. On the other hand, Mr. Curtis' version of how the accident took place, generally makes sense in the context of other evidence, and appears probable on a stand-alone basis.

[46] Second, while Mr. Sandhar's evidence requires caution because of his alcohol consumption, it generally was consistent with Mr. Curtis' evidence and not Mr. Ghuman's evidence. I found Mr. Sandhar's evidence to be the most objective and disinterested. He did not appear to portray evidence in a negative or positive light to favour or discredit either driver. He was candid with respect to the limitations of his memory. Overall, despite the alcohol consumption, I found Mr. Sandhar to have given more reliable evidence than Mr. Ghuman. To the extent Mr. Sandhar at one time corroborated part of Mr. Ghuman's evidence (the Nissan slamming on its brakes), Mr. Sandhar made it clear that he did not actually recall that event, and was influenced by his one to two-hour discussion with Mr. Ghuman prior to Mr. Sandhar's statement to the police. I appreciate that Mr. Sandhar was not entirely truthful to the police, but my assessment is that he was trying to be truthful when giving evidence.

[47] Third, Mr. Ghuman's evidence is not consistent with objective evidence of distances travelled and speeds, and what he claims to have yelled to the driver of the Nissan during the alleged exchange ("two yellow lines" when he now agrees it

was not solid double lines). On the other hand, Mr. Curtis' evidence of the movements of the vehicles is generally consistent with objective evidence of distances travelled and speeds.

[48] Fourth, Mr. Ghuman made a prior inconsistent statement on a material point, being the alleged exchange between him and Mr. Curtis. Mr. Curtis also made prior inconsistent statements, but they are less significant to the critical facts that must be determined. For example, whether the Rover was stopped or slowly moving at the traffic circle is not material to the determination of what took place on the 750 metres of VMR just prior to where the Rover came to rest. As another example, although he told the investigator that the Rover's speed was 120 km/hr, he did not testify to that in direct examination, and agreed that he did not actually know the speed, but said it was high. The high speed of the Rover is consistent with Mr. Sandhar's evidence and the fact of the violent crash.

[49] All of the witnesses provided evidence that bore on the amount of alcohol consumed by the Rover occupants. All parties argued how this may affect the reliability of evidence. Mr. Curtis argued that while there was not sufficient evidence to conclude that Mr. Ghuman was intoxicated, the Court should also not conclude that he was completely sober at the time of the accident.

[50] The uncontradicted evidence is that the Rover occupants had a total of 32 servings of alcohol in their possession. The Crown Royal bottle was half full after the accident so about 19 servings were consumed. Mr. Sandhar said he had about 12 servings. Mr. Bali said he had one beer and some whisky but does not drink much. Mr. Ghuman said he had one beer and five to six servings of whiskey at Cultus, and did not drink after that. The evidence is consistent with the remaining alcohol, and I accept it.

[51] The timing of when they departed Cultus, and hence the time over which the alcohol was consumed was vague. The agreed statement of fact is that they arrived at approximately 4:00 p.m. Mr. Bali took pictures on the pier just before sunset and I accept that as reliable evidence. Sunset in late April in this area of B.C. is after 8:00

p.m., so I find that Mr. Sandhar is likely correct that they left Cultus between 8 and 9 p.m. and arrived at McDonald's about 9:00 p.m. I conclude that the period over which Mr. Ghuman consumed alcohol was four to five hours, and that for Mr. Sandhar it was longer. During that time, they ate food.

[52] Mr. Sandhar's estimate of the arrival time at McDonald's is consistent with Mr. Ghuman's evidence that they were at McDonald's for a long period of time. The accident was at about 10:45 p.m., and they left McDonald's 10 to 15 minutes before then. I conclude they were at McDonald's about one and a half hours. During that time, they had dinner. Mr. Ghuman did not consume alcohol. Mr. Sandhar did not recall consuming any alcohol, but Mr. Ghuman said he did in the parking lot. Cst. Castonguay spoke to Mr. Ghuman in the hospital about one and a half hours after the accident. He was physically very close to Mr. Ghuman and did not capture the scent of alcohol.

[53] I conclude that while the evidence establishes that there should be caution regarding Mr. Sandhar's evidence by reason of his alcohol consumption, the same concerns do not apply to the reliability of Mr. Ghuman's evidence for that reason.

Findings of Fact

[54] I turn now to the findings of fact. I will determine these in three chronological groups: prior to any passing; the Nissan passing; and the Rover passing.

Prior to any Passing

[55] Mr. Sandhar and Mr. Ghuman testified that until they encountered the Nissan, the drive on VMR was uneventful. Mr. Ghuman was driving appropriately, they were following a GPS, and VMR was very dark. Mr. Ghuman was not familiar with the road. Mr. Curtis characterized the driving, which he said he observed for 10 minutes, as erratic, a hazard, with varying speeds and swerving onto the shoulder.

[56] I accept that the Rover may have at times slowed to 40 km/hr or sped up to 60 km/hr while driving along VMR. A pause or slowing down at a traffic circle may be consistent with someone who is unfamiliar with exits. A slowing at times on VMR

may be consistent with someone who is unfamiliar with a dark road with little shoulder. Further, Mr. Curtis testified that the speed limit along VMR varies from 50 to 60 km/hr, and he agreed that it was possible that the driver of the Rover was unfamiliar with VMR.

[57] However, I do not accept Mr. Curtis' characterization that this was erratic and hazardous driving, that it included swerving onto the shoulder, and that he observed it for a lengthy period of time. First, Mr. Curtis gave prior inconsistent evidence regarding his observations of the Rover at the traffic circle. Second, he gave prior inconsistent evidence regarding his observations of the Rover on VMR. I do not accept as reasonable his explanation that when he said at examination for discovery that the Rover was serving over the "lines" this referred only to the shoulder line and not past the centre line. This shows some looseness in evidence. Third, Mr. Curtis also testified that he followed the Rover for 10 minutes. The distance from the traffic circle to where the double lines become solid/broken lines is about 3.2 km. Using an average speed of 50 km/h, it would take less than four minutes to travel that distance. Mr. Curtis' characterization of the driving of the Rover is an example where Mr. Curtis portrayed events negatively to discredit Mr. Ghuman's driving.

The Nissan Passing

[58] Mr. Ghuman testified that the driver of the Nissan was honking his horn and "high-beaming" him, and that when the Nissan passed, there was a rude exchange between the drivers. Mr. Curtis denies all of it. I find the truth is between these two extremes.

[59] I find that Mr. Curtis likely high-beamed the Rover. I conclude from Mr. Curtis' characterization of the Rover's driving that he was frustrated and impatient as a result of having to drive for over three kilometres behind a vehicle that was at times driving below the speed limit. As he said, he wanted to get up to speed and pass. A flash of high beams would be consistent with this frustration and impatience. Mr. Sandhar did not recall honking or high beaming, but was likely looking at his

phone. He could hear a honk even if he was looking at his phone, but would not necessarily see a flash of high beams.

[60] I find that Mr. Curtis started the pass as soon as he could, at the beginning of the solid/broken lines. There is no evidence to the contrary, and Mr. Ghuman agreed that when the Nissan was passing they were at the solid/broken lines.

[61] I find that Mr. Curtis did not put down his windows and swear at Mr. Ghuman and that there was no rude exchange between the parties. However, I find it is likely that the two drivers at least looked at each other. First, Mr. Ghuman omitted to say anything about the swearing and gesturing in his statement to the police, and said only that “he thinks” the other driver put his window down and that he did not want to even look at him. Second, as noted above, Mr. Ghuman said he yelled to the Nissan driver that he was passing on two solid lines yet agreed it was actually solid/broken lines, so what he claims he yelled is not consistent with where the vehicles were driving. Third, Mr. Ghuman’s evidence is not corroborated by Mr. Sandhar who testified that he did not even notice the Nissan until it was in front of the Rover, and he did not recall any exchange with the driver of the Nissan. Given Mr. Ghuman’s description, this is something I would expect to stand out in Mr. Sandhar’s mind, even when intoxicated. Fourth, the Nissan did not have power windows, and I find it is unlikely that Mr. Curtis would be passing the Rover and at the same time reaching across the car to put down the window. Just as Mr. Curtis portrayed Mr. Ghuman’s driving prior to the passing in a negative light, this is an example where Mr. Ghuman negatively portrayed events to discredit Mr. Curtis’ driving. I acknowledge that by doing so Mr. Ghuman also negatively portrayed himself, but his narrative provides an explanation for his evidence that the Nissan subsequently slammed on the brakes.

[62] Both Mr. Ghuman and Mr. Curtis testified that when the Nissan passed the Rover, Mr. Ghuman sped up. I accept this evidence to which both drivers agree. No explanation was given by Mr. Ghuman as to why he would do such a thing, but I conclude it was likely because Mr. Curtis had flashed the Nissan’s high-beams and

the drivers at least looked at each other while the Nissan was passing. Mr. Curtis testified that in response, he sped up, and completed the pass. I find that better sense prevailed on Mr. Ghuman, temporarily, and that he did not persist in speeding up. I conclude this because Mr. Ghuman was in a more powerful vehicle and had he wanted to prevent the Nissan from passing, he likely could have done so.

[63] Both Mr. Ghuman and Mr. Curtis testified that when the Nissan returned to the driving lane, the Nissan was close, being about 1.5 car lengths in front of the Rover. Mr. Sandhar also said the Nissan was close. I accept this evidence.

[64] Mr. Curtis testified that he completed his pass of the Rover at about the end of the solid/broken lines. Mr. Ghuman agreed that when the Nissan was passing the Rover, they were at the solid/broken lines. I have considered that there was a period during the pass when both the Rover and Nissan sped up which would lengthen the time that it would take to complete the pass, but neither Mr. Ghuman nor Mr. Curtis suggested that the pass was prolonged for any significant distance or period of time. I therefore find that the pass was completed at about the end of the solid/broken lines.

[65] Mr. Curtis did not know the speed of the Nissan when it returned to the driving lane, but I conclude that initially at least, it had to be faster than the Rover because the Nissan was able to pass the Rover. This is also consistent with Mr. Ghuman's evidence that he had slowed down from his acceleration. Once the Nissan was established in the lane, I find that both vehicles, at least temporarily, were travelling between 60 and 70 km/hr, which is consistent with both Mr. Ghuman's and Mr. Curtis' evidence.

The Rover Passing

[66] The two vehicles were now travelling a close distance from each other along the solid double lines, which start about 200 metres east of the curve. While in my view, this distance between the vehicles at that speed is too close, it would not have by itself caused a problem if both vehicles continued at the same speed. However,

Mr. Ghuman testified that this is when Mr. Curtis slammed on his brakes, and he was forced to “just react” and steer into the oncoming lane. He then saw the headlights of an oncoming car coming from the curve up ahead which seemed very close. Although he does not recall accelerating, he was again forced to react, and the Rover passed the Nissan, he cut to the right, and lost control of the Rover. Mr. Curtis denied slamming on the brakes. He testified that after he passed the Rover, the vehicles continued for another five to 10 seconds, possibly three seconds, until he could hear the roar of the Rover’s engine as it was passing him at high speed. Up to three seconds later, when he saw the oncoming headlights, he slowed the Nissan.

[67] I find that Mr. Curtis did not slam on the Nissan’s brakes once it was in front of the Rover. It follows that I find that Mr. Ghuman was not forced to react by driving into the oncoming lane. Rather, I find that shortly after the Nissan passed the Rover, perhaps as little as a couple of seconds, Mr. Ghuman made a separate decision to pass the Nissan. He did so by passing on solid double lines, and at high speed. Unfortunately, as he was passing, there was an oncoming vehicle around the blind corner. When the Rover was already in the course of its pass, Mr. Ghuman saw the headlights of the oncoming vehicle. He continued the pass and swerved to the right to avoid a head-on collision, and lost control of the Rover. My reasons are below.

[68] First, Mr. Curtis’ evidence that he did not slam on the Nissan’s brakes was not undermined in cross-examination.

[69] Second, Mr. Ghuman did not remember if he applied his brakes. That would be the immediate reaction if the Nissan did suddenly slow, and is something I expect he would remember. He also did not remember accelerating, yet the Rover ended up passing the Nissan at high speed. While I appreciate he did not deny that he did either of these, it is incongruous that he would remember the slamming of the Nissan’s brakes, yet have no specific memory of what he did in response other than turning into the oncoming lane and “just reacting”. In my view, that lack of memory is more likely an inability to rationalize negligent driving.

[70] Third, Mr. Sandhar's evidence does not support Mr. Ghuman's version of events. In his statement to the police, Mr. Sandhar's said that the other driver slammed on his brakes. However, at trial, it was clear that this was not what Mr. Sandhar recalled but what Mr. Ghuman had told him. I accept Mr. Sandhar's evidence on this point. I find that prior to Mr. Sandhar giving his statement to the police (he and Mr. Ghuman did so within a day of each other), Mr. Ghuman attended Mr. Sandhar's home to discuss his version of how the accident happened. Contrary to Mr. Ghuman's initial evidence that he did not discuss the details of how the accident happened with Mr. Sandhar (he later admitted the possibility), I find that he did discuss what his statement either had been or was going to be. As Mr. Sandhar testified, even though he did not recall brake lights, or that the Nissan suddenly slowed, after Mr. Ghuman talked with him for one to two hours, that is when he "got the feeling that maybe" this might have been what had happened.

[71] Fourth, Mr. Sandhar also testified that he does remember that the Nissan "cut off" the Rover. The important issue is what exactly that means, and on what observations that conclusion is based. In my view, Mr. Sandhar's statement to the police that the Nissan "cut off" the Rover and that the Rover "dodged" it, was part and parcel of his statement that the Rover slammed on its brakes. Further, when Mr. Sandhar was cross examined about being cut off, it was clear that this conclusion was based on nothing more than the fact that the Nissan was close in front of the Rover, and he saw Mr. Ghuman "react" by turning into the oncoming lane. He did not recall the Rover slowing, and although Mr. Sandhar said he would not have seen Mr. Ghuman apply the brakes, in my view he would have felt a sudden braking to avoid the Nissan if that is what happened. Instead, Mr. Sandhar testified that when Mr. Ghuman turned into the oncoming lane, he could see, hear and feel the Rover accelerate. I accept that evidence.

[72] Fifth, I find that the Rover passed the Nissan at high speed. Mr. Curtis said it was at a fast speed. He could hear the roar of the engine. Mr. Sandhar could see, hear and feel the acceleration and told Mr. Ghuman urgently to slow down and he thinks Mr. Bali said the same. Mr. Curtis' and Mr. Sandhar's description of what

happened when Mr. Ghuman lost control is of a violent and forceful accident which is consistent with excessive speed.

[73] Sixth, Mr. Ghuman's evidence is not consistent with the objective evidence of the time it would take to travel distances, whereas Mr. Curtis' evidence is consistent. On Mr. Ghuman's description, everything happened very fast. Mr. Ghuman was not sure of the timing of the driver of the Nissan slamming on its brakes, but it seemed to him the driver did this right away after coming into the lane of travel. Mr. Ghuman said he immediately reacted by turning into the oncoming lane, and then saw the oncoming vehicle and immediately reacted to it. Given the location of where Mr. Ghuman lost control, this timing would only make sense if the two vehicles were then very close to the curve, which would have to mean that the Nissan did not complete its pass near the end of the solid/broken lines but up to 150 metres to the west. Mr. Curtis testified that the time between the Nissan passing the Rover and the Rover passing the Nissan was between five and 10 seconds, although he agreed three seconds was a possibility. This timing only makes sense if the Nissan completed its pass of the Rover close to the end of the solid/broken lines, with some distance to the curve. I have already found that the Nissan completed its pass about the end of the solid/broken lines.

[74] On the Google map in evidence, I measured the distance between the end of the solid/broken lines to the curve to be about 200 metres, and that is the measurement I have at the beginning of these reasons. It was put to Mr. Curtis that the distance from the end of the broken line to the curve is about 150 metres and Mr. Curtis agreed that it was approximately that. The curve is not acute, so it depends on where one considers the curve to start. I accept that it could be 150 metres. In my view, the difference is not significant for this analysis. If the distance is 200 metres, at 60 km/hr, it would take about 12 seconds to travel the distance to the curve; at 70 km/hr, it would take about 10 seconds; and at 100 km/hr it would take about 7 seconds. If the distance is 150 metres, at 60 km/hr it would take 9 seconds to travel the distance to the curve; at 70 km/hr it would take about 7.5 seconds; and at 100 km/hr, it would take about 5.5 seconds. These calculations are more

consistent with Mr. Curtis' estimate of timing of events, and with Mr. Ghuman deciding to pass the Nissan after the Nissan passed the Rover.

[75] Mr. Sandhar did not give the time between the Nissan completing the pass and the Rover steering into the oncoming lane. The first time he saw the Nissan it was established in the lane in front of the Rover. Mr. Sandhar had time to see, feel and hear the Rover accelerate and to tell Mr. Ghuman to slow down, which would have taken a second or two. He thinks Mr. Bali did the same. When he first saw the headlights, Mr. Ghuman was about to pass the Nissan, but had not yet passed it. Mr. Sandhar also described first seeing the reflection of the headlights rounding the curve and then the headlights straight on. At that point, the curve was "a ways ahead" but he could not estimate distance. I appreciate that Mr. Sandhar testified that it all happened in the "snap of a finger", and that Mr. Ghuman's evidence was similar. Given the aftermath, I accept that the events may seem to have taken place in the fraction of a second, but in my view, the events Mr. Sandhar described must have taken more time than that, and likely took at least a few seconds.

[76] Finally, I turn to findings of fact regarding Mr. Curtis' actions when he realized that the Rover was passing the Nissan. Mr. Curtis testified and I find that: he was aware that a blind corner was up ahead; he knew it was possible that the driver of the Rover was unfamiliar with VMR; and he knew that the Rover passing him at this location was dangerous. I find that he did not slow the Nissan after he realized the Rover was passing it until he saw the oncoming vehicle lights. He stated, and I find that this was up to three seconds after he was aware the Rover was passing the Nissan.

Legal Framework

[77] Users of a highway have a common law duty to exercise due care for others and themselves in all of the circumstances. The statutory provisions of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [MVA] are not a complete code: *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21. The MVA supplements the common law duty to exercise due care: *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 21, citing

Cook v. Teh (1990), 45 B.C.L.R. (2d) 194 (C.A.). While the relevant provisions of the *MVA* inform the negligence analysis, a breach of a provision “does not in and of itself give rise to a cause of action”: *D’Amici v. Fahy*, 2020 BCCA 89 at para. 50.

[78] Section 144(1) provides:

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

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

[79] More specific relevant sections of the *MVA* provide:

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

- (a) a solid double line, the driver of a vehicle must drive it to the right of the line only ...

...

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

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

(2) Except when overtaking and passing on the right is permitted, a driver of an overtaken vehicle, ...

- (b) must not increase the speed of the vehicle until completely passed by the overtaking vehicle.

...

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

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

[80] The agony of collision which is a doctrine applicable to the standard of care in emergency situations, was described in *Brook v. Tod Estate*, 2012 BCSC 1947, aff’d 2013 BCCA 503, as follows:

[26] Mr. Tod's counsel stresses the law in relation to the agony of collision which would exonerate Mr. Tod of mistakes which he made in an emergency

situation. In *Van Zanten v. Bruhs*, 1991 CanLII 1023 (BCSC), Mr. Justice A.G. Mackinnon referred to *Carswell's Manual of Motor Vehicle Law*, Volume III, 3rd edition, at page 22, where there is a discussion of agony of collision. These words are found:

In a number of cases concerning what is commonly called 'agony of the collision,' it has been pointed out that a driver acting in an emergency created by another vehicle or by some extraneous fact cannot be expected to exercise nice judgment and prompt decision, and mere errors of judgment in such circumstances may often be excusable ... Where an emergency arises, it is not necessary for a driver to possess extraordinary skill, presence of mind, poise or self-control, and his failure to act as an ordinary person in an emergency is not held to be negligence. He is not necessarily required to adopt the most prudent course and is entitled to a reasonable time, depending on the circumstances, to exercise his judgment as to what steps should be taken to avoid a collision [citations omitted.]

[81] A plaintiff bears the onus of establishing on a balance of probabilities that “but for” an alleged breach of the standard of care, the damages (in this case the accident) would not have taken place: *Clements v. Clements*, 2012 SCC 32 at paras. 8-9. A plaintiff is not required to establish that the defendant’s tortious act was the sole cause of the accident so long as it is part of the cause beyond *de minimus*: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–17, 1996 CanLII 183.

[82] The principle of *novus actus interveniens*, or intervening events leading to a break in the chain of causation, was summarized in *Safdari v. Buckland*, 2020 BCSC 769:

[135] ... The chain of causation will be broken where an intervening event, rather than the defendants' conduct, is considered the proximate or legal cause of the subsequent injury. This principle, known as *novus actus interveniens*, recognizes that defendants should not be held liable for objectively unforeseen consequences of their actions: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 87; and *Yoshikawa v. Yu*, [1996] 8 W.W.R. 239 at para. 21, 21 B.C.L.R. (3d) 318 (C.A.).

[136] The question of whether an intervening event breaks the chain of causation is a question of fact and it may depend on whether the plaintiff acted unreasonably: *Hussack* ...

Was Mr. Ghuman negligent?

[83] Based on the findings of fact, I find that Mr. Ghuman breached the standard of care required of him in several ways.

[84] First, it was a breach of the standard of care for him to accelerate when the Nissan was passing the Rover (s. 157(2)(b)). The effect of the Rover speeding up was to make it more dangerous and difficult for the Nissan to pass. However, while I find that action contributed to the Nissan returning to the lane of travel only 1.5 car lengths in front of the Rover, I do not find that there is a causal relationship between this act of Mr. Ghuman and the accident. This is because I do not find that the Nissan passing the Rover and the Rover passing the Nissan were one continuous “chain of causation”. I have found that the Nissan did not slam on its brakes and therefore there was no need for Mr. Ghuman to drive into the oncoming lane to avoid colliding with it. Rather, for all the reasons discussed above, I have found that after the Nissan passed the Rover, perhaps as little as a couple of seconds later, Mr. Ghuman made the separate decision to pass the Nissan, and it was only when the Rover was in the course of its pass of the Nissan, that the lights of the oncoming vehicle were observed.

[85] Mr. Ghuman’s counsel argued that even if Mr. Curtis did not slam on the brakes, Mr. Ghuman could still have reacted because the Nissan returned to the lane of travel too close to the Rover. Therefore, counsel argues that it was reasonably foreseeable that Mr. Ghuman could have reacted by driving into the oncoming lane, and that this started the chain of causation. However, that was not Mr. Ghuman’s evidence. He did not testify that because the Nissan was 1.5 car lengths in front of him, he was startled and had to suddenly drive into the oncoming lane. He testified that it was because the Nissan slammed on its brakes that he reacted, and I have rejected that evidence. I therefore reject this argument.

[86] Second, it was a breach of the standard of care for Mr. Ghuman to decide to pass the Nissan because: he passed on a double solid line (s. 155(1)(a)), and when it was unsafe to do so and without due care and consideration (s. 159 and s. 144(1)(a) and (b)); he did not have a clear view for a safe distance because the corner was up ahead (s. 160); once he saw the oncoming vehicle, he did not immediately brake and return to the lane of travel but decided to try to complete the pass, which only brought him closer to the oncoming vehicle; and he drove at an

excessive rate of speed for the conditions (s. 144(1)(c)). I find that all of these actions by Mr. Ghuman caused the accident.

[87] Mr. Ghuman argues the doctrine of the agony of the collision after being overtaken by the Nissan. Given my findings that Mr. Curtis did not brake or cause any emergency situation to which Mr. Ghuman reacted, I do not find this applies. Any emergency situation during the Rover's pass of the Nissan, was created by Mr. Ghuman's own negligent decision to pass the Nissan.

Was Mr. Curtis negligent?

[88] Based on my findings of fact, I find that Mr. Curtis breached the standard of care in two ways.

[89] First, in my view, it was below the standard of care for him to return to the lane of travel only 1.5 car lengths in front of the Rover (s. 157(1)(b)). As noted above, Mr. Ghuman's actions in speeding up while the Nissan was passing the Rover contributed to this situation. However, consistent with the findings I made about causation with respect to the first of Mr. Ghuman's breaches, I find there is no causal connection between the Nissan passing and returning to the lane of travel, and Mr. Ghuman's subsequent decision to pass the Nissan. This is not a situation similar to *Link v. Insurance Corporation of British Columbia*, 2014 BCSC 1765, aff'd 2015 BCCA 509, where an unsafe pass "precipitated a chain of events" which culminated in the accident. In that case, the defendant's vehicle passed the plaintiff's vehicle in snowy conditions at speed, when the road was not ploughed and was full of snow. By doing so, it created a "rooster tail" of snow that flew on to the plaintiff's windshield causing him to lose visibility, and creating an urgent situation. The plaintiff reacted to this situation by tapping his brakes and lost control in the snow. That was a reasonably foreseeable reaction, and it is distinguishable from the circumstances in this case. Based on my findings of fact, there was no emergency created by Mr. Curtis returning the Nissan to the lane of travel close to the Rover, and Mr. Ghuman did not react to it. Rather, he subsequently decided to pass the Nissan. In my view, it was not objectively foreseeable that Mr. Ghuman would do so,

over double solid centre lines, on a dark road, with an upcoming corner, and at excessive speed.

[90] Counsel argued that Mr. Curtis breached the standard of care by his decision to pass the Rover. Counsel argued that because Mr. Curtis thought the driver of the Rover was demonstrating hazardous driving, Mr. Curtis should never have “engaged” with the Rover. I do not accede to this argument. I have rejected that the Rover was displaying hazardous driving, but even if it had been, the fact remains that the Nissan did complete the pass. The chain of causation ends there for the same reasons as above. Mr. Ghuman’s subsequent decision to pass the Nissan was not related to the position of the Nissan when it returned to the lane of travel. It is not objectively foreseeable that because Mr. Curtis decided to pass the Rover in the permitted location, and with then no near or visible on-coming vehicle, that the driver of the Rover would subsequently decide to pass the Nissan in a dangerous and prohibited location.

[91] Second, Mr. Curtis breached the standard of care when it took him up to three seconds to slow after he realized the Rover was trying to pass the Nissan. He knew that the driver of the Rover had sped up when he tried to pass the Rover. Once a driver is put on notice that another driver is not obeying the rules of the road, a reasonable driver ought to exercise increased caution, and pay close attention to the other vehicle and be prepared to stop or give it a wide birth: *Salaam* at para. 29; *Doyle v. Hubick*, 2022 BCSC 309 at paras. 116–120; *Varga v. Kondola*, 2016 BCSC 2406 at paras. 118–124. In my view, Mr. Curtis ought to have had a heightened awareness of where the Rover was.

[92] Mr. Curtis knew it was possible that the driver of the Rover was unfamiliar with VMR. He knew that the upcoming corner was blind. He thought that the Rover attempting to pass him on the blind corner was dangerous. It took up to three second before he slowed. A driver will not be found to be negligent simply because he failed to take extraordinary steps to avoid an accident: *Salaam* at para. 25. However, in my view, applying the brakes immediately when he realized that the

Rover was passing the Nissan in a dangerous situation, is not an extraordinary step: *Doyle* at para. 119.

[93] The occupants of the Rover have the onus of establishing on a balance of probabilities that but for Mr. Curtis' not slowing earlier, the accident would not have taken place. Causation need not be proven with "scientific precision", and the trier of fact should take a "robust and pragmatic" approach to the facts and may draw inferences based on "common sense": *Snell v. Farrell*, [1990] 2 SCR 311 at p. 330-31.

[94] Mr. Ghuman did not testify that the Nissan not slowing was the reason he lost control of the Rover. As part of his justification for not immediately braking and returning to the lane of travel, he said he did not know what was happening to his right. However, Mr. Sandhar testified that when he first noticed the reflection of the headlights, the Rover was about to pass the Nissan, but had not yet done so. Mr. Curtis also testified that at the time he saw the oncoming car, and then applied the Nissan's brakes, the Rover was passing the Nissan. I conclude from Ms. Sandhar's and Mr. Curtis' evidence that the Nissan was likely somewhere close beside the Rover when the headlights were first seen by both Mr. Sandhar and Mr. Curtis. Mr. Curtis knew that the Rover was attempting to pass the Nissan up to three seconds before. I conclude that the Nissan would not have been close beside the Rover at the time the headlights were first seen if Mr. Curtis had immediately slowed when he first realized the Rover was attempting to pass the Nissan. In those up to three seconds, at 60 km/hr, the Nissan would have travelled up to 50 metres. At 70 km/hr, it would have travelled up to 58.5 metres. The Nissan would of course have travelled part of this distance when slowing, but I find that if Mr. Curtis had immediately slowed, the Rover would have been past the Nissan when the headlights were first seen, with more room to merge into the lane of travel and negotiate the curve with less speed. Using a robust and pragmatic approach, for the above reasons I find that Mr. Curtis' action in not slowing earlier also caused the accident.

Apportionment of Fault

[95] The relevant portions of the *Negligence Act* are:

1(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.

4(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....

[96] In *Randhawa v. Evans*, 2020 BCCA 292, the Court summarized the applicable principles for apportionment of fault under s. 1 of the *Negligence Act*:

[22] In *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 (C.A.), this Court emphasized that the inquiry under s. 1 is focussed exclusively on the degree to which each party's conduct represented a departure from the expected standard of care. It is not an inquiry into other considerations that might connect the actions of one party more closely than the other with the damage that occurred. Mr. Justice Lambert, for the majority, said:

[19] ... The Negligence Act requires that the apportionment must be made on the basis of "the degree to which each person was at fault". ...In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.

...

[24] In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties.

[23] In *Alberta Wheat Pool v. Northwest Pile*, 2000 BCCA 505, Finch J.A. (as he then was) explained that fault or blameworthiness covers a continuum of conduct:

[46] 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.

[97] Contrary to the submissions of Mr. Ghuman, I find that there are bases upon which I can determine different degrees of fault, and they are reflected in my findings. Considering only those breaches which I have found are causative of the accident, I find that the relative degrees of fault are 80% to Mr. Ghuman and 20% to Mr. Curtis. Mr. Ghuman's conduct represented a much greater departure from the expected standard of care than Mr. Curtis, and is more blameworthy. It is his conduct in deciding to unsafely pass which initiated the chain of events, and his decision to continue with passing that made the situation worse. His actions created a much greater degree of risk. Mr. Curtis did try to ameliorate the situation when he saw the oncoming headlights, but it was too little too late, whereas Mr. Ghuman's actions created a large risk which unfortunately materialized.

Order

[98] Liability for the April 27, 2017 accident is apportioned as 80% to Mr. Ghuman and 20% to Mr. Curtis.

"Norell J."