IN THE MATTER OF AN ARBITRATION PURSUANT TO

SECTION 148.2(1) OF THE *INSURANCE (VEHICLE) ACT*,

REVISED REGULATION (1984)

BETWEEN:

C.M.S.

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

Arbitrator: Kenneth J. Smith

Dates of Hearing: August 10, 11, 12, 14, 2015

Place of Hearing: Vancouver, BC

Date of Award: November 25, 2015

Matthew Siren	Counsel for the Claimant
Richard Fister	Counsel for the Respondent

INTRODUCTION

The claimant, then 39 years of age, suffered a closed head injury and other injuries while a passenger in a single vehicle accident that occurred in the evening of January 8, 2008, on Highway 101 north of Powell River, British Columbia. He claims his injuries were caused by the negligent operation of the vehicle by the driver. Tragically, the driver, an 18-year-old woman, was killed. There were no eyewitnesses.

The claimant has no recollection of the accident or of the circumstances preceding it. As a result, the crucial factual findings must be made from circumstantial evidence and the expert opinion evidence presented by the parties.

By virtue of s. 148.2(2.1) of the *Insurance (Vehicle) Regulation*, these reasons for decision must be forwarded to ICBC for publication on its website without personal information that would identify the parties. Accordingly, I will describe them as "the driver" and "the claimant."

The claimant was the owner of the motor vehicle, a van, which the driver was operating with his consent. The driver was the holder of a Class 7L learner's driver's licence which had been issued to her about one month before the accident. Pursuant to s. 30.06(1.1) of the *Motor Vehicle Act Regulations* she was required to be accompanied when driving by a person at least 25 years of age and the holder of a valid driver's licence. The claimant satisfied these conditions.

The claimant was insured by ICBC under an owner's certificate of insurance and an underinsured motorist policy. Ordinarily, he would be entitled to recover insurance monies from ICBC in satisfaction of his damages upon proof of his claim against the driver. However, ICBC contends the claimant has forfeited coverage by breaching the conditions of his insurance relating to operation of the vehicle while under the influence of intoxicating liquor or drugs. The parties agree that alcohol and tetrahydrocannabinol ("THC" – the active ingredient of marihuana) were found in the driver's blood on analysis done following an autopsy two days post-accident. They also agree that a blood analysis done approximately 6 hours and 20 minutes after the accident disclosed alcohol in the claimant's blood.

This arbitration is to determine whether the claimant is entitled to recover. By agreement of counsel his damages, if any, are to be agreed or assessed at a later date.

ISSUES

The issues to be resolved are:

1. Whether the accident was the result of negligent operation of the motor vehicle by the driver;

2. Whether the claimant forfeited his right to insurance coverage because:

    a. he permitted the driver to operate his motor vehicle when she was under the influence of intoxicating liquor or drugs to such an extent that she was incapable of the proper control of the vehicle; or

    b. he "operated" his vehicle while he was under the influence of intoxicating liquor to such an extent that he was incapable of proper control of the vehicle; and

3. Whether the claimant was contributorily negligent.

FACTS

ICBC relies heavily on the written opinion and a video deposition of Wayne Jeffery, who was qualified as an expert "on the effects of alcohol and drugs including absorption, distribution and elimination of ethyl alcohol and drugs, the pharmacology and toxicology of drugs and ethyl alcohol, the behaviour effects of drugs and ethyl alcohol, and the impairing effects of drugs and ethyl alcohol especially on subjects' ability to drive motor vehicles."

Mr. Jeffery defined impairment as "a deterioration of judgment and attention, loss of fine co-ordination and control, increase in reaction time and a decrease in visual acuity," which starts to occur with BACs [blood alcohol concentrations] of 30 to 100 mg%. He defined intoxication as "an advanced state of impairment in which the gross physical symptoms are apparent: staggering, in-coordination, slurred speech and a general confused state," which starts to occur with BACs of 100 to 250 mg%.

Mr. Jeffery's calculation of the driver's BAC was founded on a report from the Provincial Toxicology Centre which recorded the following results obtained by the

coroner on autopsy of the driver: ethyl alcohol in the blood: 0.14%; ethyl alcohol in the urine: 0.18%; ethyl alcohol in the vitreous: 0.13%; tetrahydrocannabinol, (THC – the active ingredient in marihuana): 0.007 mg/L (7 ng/ml). Mr. Jeffery calculated that the driver had a BAC of 140 mg% at the time of the accident, which translated for an ordinary person of her weight to 3 bottles or cans of beer (12 oz., 5%) or 4.4 ounces of 40% alcohol, the content of "most hard liquors."

Mr. Jeffery's conclusion was that "with a BAC of 140 mg% and a Blood THC concentration of 7 ng/ml" the driver was "intoxicated," that she "did not possess the proper judgment, reaction time, balance, coordination, vision, speed judgment, comprehension or fine motor control to attempt to safely operate a motor vehicle," and that she was "incapable in the safe operation of a motor vehicle."

Further, Mr. Jeffery's opinion was that the claimant had a BAC at the time of the accident of between 95 and 158 mg%, assuming all the alcohol he consumed had been absorbed into his blood. He estimated the amount of consumption at 3.65 to 6 bottles of beer or 5.5 to 9.1 ounces of 40% alcohol. If the claimant consumed alcohol in the thirty minutes before the accident, however, his BAC would have been lower at the time of the accident because the alcohol would not have been fully absorbed.

Mr. Jeffery's calculated results are hypothetical in the sense that they represent an attempt to match personal characteristics and situational effects of the subject drivers with calculations and averages derived from research studies of sample populations. Thus, their reliability depends on the reliability of the variables used in the calculations – on the individual facts and assumptions concerning the persons under consideration. With that in mind, I turn to a review of the relevant facts that culminated in the accident.

The claimant became acquainted with the driver's mother in the summer of 2007 through her seasonal business in the British Columbia interior. She invited him to spend Christmas with her and her family at their home in Powell River. He arrived on Christmas Eve. The driver, who resided in her own apartment in Powell River, was at the family home with her family and some friends and she and the claimant were

introduced for the first time. The claimant remained at the family home as a houseguest from Christmas Eve until the accident two weeks later.

The driver's boyfriend, a resident of Oregon, gave evidence by videoconferencing link. He recalled a telephone conversation with her at about 6:00 o'clock in the evening of the accident. He said she was at her apartment and she told him she was getting ready to go out with a friend to "a party or some such social event" in Lund, a community on Highway 101 north of Powell River and north of the accident scene. He said she referred to the friend by the claimant's first name and as an acquaintance of her family through business. That the friend was the claimant is not disputed.

The boyfriend testified that he heard a knock on her door as they were speaking and that he overheard conversation between the driver and the claimant, that the claimant handed her a drink of vodka mixed with "a clear soda of some sort," that she tasted it and asked him to add more vodka, and that he did so. He said his conversation with the driver ended shortly afterward when she and the claimant left her apartment. The claimant elicited in cross-examination that the driver told the boyfriend before he arrived that he was coming over with vodka and either Sprite or Sierra Mist to mix drinks for them.

The claimant objects to the boyfriend's evidence of the driver's statements that he mixed her a drink of vodka and that he added more vodka to the drink at her request. In his submission, this evidence does not satisfy the principled basis for the admission of hearsay evidence because, although it is necessary since the driver's evidence is not otherwise available, its reliability has not been demonstrated.

The statements in question are offered as proof of their truth. They are hearsay because they cannot be tested by cross-examination of the declarant driver: *R. v. Khelawon*, 2006 SCC 57 at para. 56. The principled exception to the hearsay rule permits admission of hearsay evidence if there are sufficient circumstantial guarantees of its trustworthiness to overcome the hearsay dangers, which lurk in the declarant's

perception, memory, narration, and sincerity: *Khelawon*, para. 2; *R. v. Baldree*, 2013 SCC 35 at paras. 31-32.

In *Khelawon*, at para. 62, the Court said that one way to overcome the inability to test hearsay evidence by cross-examination is:

> to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form. Wigmore explained it this way:
>
> > There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured. [— 1420, p. 154]

In my view, common sense dictates that the statements to which the claimant objects are themselves sufficiently trustworthy to be considered. There is no evidence from which I could reasonably infer that the driver misperceived that the claimant mixed her a drink of vodka or that she asked him to add more vodka to the drink. Her memory is not implicated since the events she described were occurring contemporaneously with her statements. Nor is there any evidence that would support a concern that she stated these matters in an unintentionally misleading way or that she said anything she knew to be false.

The claimant submits, however, that the boyfriend is biased against him and that this calls into question the reliability of his narration of the statements. The boyfriend's combative attitude during his cross-examination made it clear that he is extremely angry with the claimant because he believes the claimant to be responsible for the death of the driver. Although the demeanour of this witness might suggest an undercurrent of untrustworthiness in his testimony, demeanour is not the sole determinant of credibility; rather, his testimony must also be considered in light of "its consistency with the

probabilities that surround the currently existing conditions": *Faryna v. Chorny* (1951), 4 W.W.R. (N.S.) 171 (B.C.C.A.) at 174-175. I find that the boyfriend's testimony is consistent with the probabilities inherent in the circumstances surrounding the telephone conversation and, despite his hostility to the claimant, I am not persuaded that he falsified or coloured his evidence about the statements.

Accordingly, I am satisfied that the driver made the statements and that the circumstances in which they were made demonstrate that they are sufficiently trustworthy to admit them without contemporaneous cross-examination. Having considered them, I find them ultimately reliable because they are supported by the evidence elicited by the claimant that the driver told the boyfriend that the claimant was coming over to her apartment with vodka and soft drinks to mix drinks for them, by the driver's statement (hearsay led by ICBC but not argued to be inadmissible) that they intended to go to Lund for a party, and by the fact that both had alcohol in their blood later in the evening at the time of the accident.

Thus, I conclude that the driver consumed a mixed drink containing vodka shortly after 6:00 p.m., approximately 3 to 3½ hours before the accident. There is no other direct evidence of her consumption of alcohol that evening and no direct evidence of her ingestion of marihuana. There is no evidence of what happened to the vodka container when the driver and the claimant left her apartment. No alcoholic beverages or containers were seen later in the vehicle or at the scene of the accident.

The evidence does not disclose where the claimant and the driver went and what they did following the telephone conversation until they encountered Mr. H. near his residence just off an old mining road a short distance from its intersection with Highway 101 north of Powell River and north of the accident scene.

Mr. H. is a cabinetmaker. He has a shop located about 15 to 20 yards from his residence. The residence and shop are at the top of an access road which connects below with the mining road. At the time, Mr. H.'s friend Stan, who was suffering from a brain injury, was residing with him.

Mr. H. initially said he always finished working in his shop by 8:00 o'clock and that he did so that evening. However, he qualified this evidence in cross-examination, conceding the possibility that he stopped working later that evening since he was attempting to finish a job for certain named customers so that he could get away to join his wife on a three-month vacation in celebration of their anniversary, and since Stan, who did not usually go to bed before 9:00 o'clock, was lying in his bed when he returned from the shop. When asked if it could have been closer to 9:00 o'clock than to 8:00 o'clock when he left his shop, Mr. H. said, "No, I don't think so. I don't know. That's a tough one." When asked again later, he said, "I don't think Stan would let me stay out there past 8:00. But like you said, I was working for [the named customers], right, so who knows."

Mr. H's memory of the encounter was obviously imperfect. As he explained, it occurred "a long time ago." I conclude that Mr. H. does not recall the time at which he left his shop that evening.

Rather, Mr. H.'s evidence that he always stopped working by 8:00 o'clock is evidence of habit, that is, evidence that he repeatedly acted in a certain way in given circumstances from which it might be inferred that if the circumstances were repeated he likely acted in conformity with his past practice: see *Kerr (Litigation Guardian of) v. Creighton*, 2008 BCCA 75 at para. 24, citing *R. v. Watson* (1996), 30 O.R. (3d) 161 (C.A.) at 173-174. However, his evidence of his intention to complete a job for certain customers so that he could join his wife on vacation takes the circumstances of this particular evening out of the usual and diminishes the evidentiary value of his habit. On the other hand, his evidence that Stan was lying in his bed when he returned from the shop and that Stan did not usually go to bed before 9:00 o'clock lends weight to the possibility that on this evening he left his shop later than he usually did.

Recognizing that it is implicit in Mr. H.'s evidence that Stan sometimes went to bed before 9:00 o'clock, it is my view that the best estimate that can be made on the evidence is that Mr. H. probably left his shop that evening sometime later than 8:00 o'clock, likely between about 8:30 and 9:00 o'clock.

As he walked back to his residence from the shop Mr. H. saw a flashlight on the lower part of his access road. He called out and a female (the driver) responded that they were "stuck on a rock down below" and asked him for help. He said he would be down. He got Stan from the bedroom where he was lying on his bed and they travelled down in Stan's truck. When Mr. H. and Stan arrived, the driver had walked back down the access road to a large "turnaround" clearing on the side of the mining road, a distance of about 70 yards from where Mr. H. had first seen her. As I understood him, she had done so quickly since she got there before he and Stan arrived in the truck. According to Mr. H., the part of his access road she had walked over was dark, overgrown, and slushy – "not great walking conditions," he said.

Mr. H. said the van was "high-centred" on its bumper on a rock approximately 20 feet into the clearing from the mining road itself. The claimant was in the driver's seat of the van. It was dark and the only illumination for what ensued was provided by the driver's flashlight and by the headlights of the van and Stan's truck.

There was a gate across the mining road just past the clearing and, from the conversation at the scene and from the circumstances, it was Mr. H.'s recollection that the driver and the claimant had come upon the gate as they drove up the mining road and had backed into the clearing to turn around when the back bumper of the van became stuck on the rock. The claimant said "she" had "put it on the rock."

Mr. H. recognized the driver from her place of work in a local fast-food restaurant and he stood close to her as they had a short conversation. He smelled no alcohol on her. Her speech was not slurred. The back and side doors of the van were open and he looked inside as he was talking to her. He smelled no "pot" and did not see any alcoholic beverages in the van. He observed her as she walked around the clearing and she did not stumble. He gave no evidence that she displayed any sign of intoxication.

Mr. H.'s evidence concerning the condition of the claimant was contentious. Sometime following the accident, he attended on the RCMP and provided a statement, which was reduced to writing. When counsel for ICBC asked whether he had refreshed

his memory from the statement, he responded “slightly” in a tone and manner that, considered in the context of his previous answers to questions concerning the statement, suggested he meant something considerably less robust than “yes.” Counsel attempted to lead him to agree that the claimant said he was “drunk” but he made it clear that he has no recollection of the claimant having said this. The statement did not become part of the evidentiary record. However, the question whether the claimant said he was “drunk” was revisited in cross-examination and, while Mr. H. repeated that he did not recall the claimant saying this, he now recalled that as he and Stan were driving back to his residence they were discussing a comment by the claimant to this effect and were trying to understand why the claimant would have said such a thing. Mr. H. said this “boggles me to this day” because he did not smell any alcohol on the claimant and he “didn’t see anything.” He said the claimant’s speech was not slurred. He could not understand why the claimant would have made such a remark because, as I understood him, the remark was inconsistent with his observations of the claimant. Nevertheless, Mr. H.’s recollection of this conversation with Stan satisfies me that the claimant remarked to the effect that he was affected by alcohol, although it is not clear exactly what he said.

At some point, the claimant also said that he was the driver’s “uncle” or “cousin” and that he was teaching her to drive.

Mr. H. said a rear wheel of the van had “dug a small hole and … was off the ground” so the wheel had no traction. I conclude that the claimant had attempted and failed to drive the van off the rock. Mr. H. and Stan tried to push the van off but were unsuccessful. They had a rope with them, which the claimant attached to the van after stating that he knew how to tie the necessary knot. Then, Mr. H. said, they attached the other end of the rope to the truck and they gave the van “a little tug and it popped right off.” Mr. H. did not see any damage to the van.

ICBC contends that the backing of the van onto the rock is evidence that the driver was intoxicated. However, in the darkness the rock would not likely have been easily visible to any driver backing up a vehicle. Further, it was in a clearing intended for

turning around so its presence would not likely have been anticipated. As well, the absence of observable damage to the van and the relative ease with which it was removed from the rock suggest that the driving that put it there was not reckless or otherwise egregious. Moreover, the driver had subsequently walked about 140 yards in "not great walking conditions" with no apparent difficulty and she displayed no sign that she was intoxicated in her dealings with Mr. H. Accordingly, I do not accept this contention.

Once the van was off the rock, the driver and the claimant drove away down the mining road toward Highway 101. The claimant was driving. They did not say where they were going.

The elapsed time between when Mr. H. first saw the flashlight and when the driver and the claimant left him and Stan was about 20 minutes. I conclude that they drove away sometime between about 8:45 pm and 9:15 pm.

It is an agreed fact that the accident occurred at "approximately 9:32 pm." No explanation for the apparent precision of this estimate was provided. I infer it was derived from the police accident report, which records that the accident was reported to the police at "21:32" hours. This report must have been made by someone after the accident had occurred. It follows that the effect of the agreed fact is that the accident occurred prior but close to 9:32 pm.

Thus, the accident happened roughly 15 to 45 minutes after the driver and the claimant left the turnaround on the mining road. There is no evidence to indicate where they went during this period of time. However, that the driver was at the wheel when the van crashed establishes that they stopped sometime after they left to permit her to get into the driver's seat. Given the window of time available, I think it is unlikely that they drove north to Lund, a distance of about 8 km, and then back south to the accident scene, a round trip of about 30 minutes. The accident occurred about 9 km south of Mr. H's residence, approximately a 12 minute drive. It is possible that they stopped briefly to allow the driver to change seats and then drove south directly to the accident scene. It is also possible that they parked somewhere for a short period of time, perhaps on the

mining road, before carrying on to the accident scene and that they consumed some alcoholic drink while parked. However, the evidence does not raise any of these speculative possibilities to the level of proof on a balance of probabilities and their movements and activities in the minutes preceding the accident remain unexplained.

Highway 101 is a paved highway with, at the material time, one northbound and one southbound lane at the scene of the accident. The van was proceeding on a downgrade along a straight stretch in the southbound lane toward Powell River when it left the road, crossed a ditch, and struck a tree. The highway was wet, it was dark, and there was no artificial lighting at the scene. The applicable speed limit was 60 kph, as indicated by a sign posted 5.3 km north of the accident scene. A warning sign for southbound traffic posted 2.5 km north of the scene said “40 kph for 2 km.”

Emergency services personnel arrived shortly after the accident was reported. They found the deceased driver belted into the driver’s seat and the claimant lying between the driver’s seat and the passenger’s seat with his feet toward the dash and his head on the bench seat behind. The seat belt on the passenger’s side was fully retracted and undamaged, from which I conclude that the claimant was not wearing the belt at the time of the crash. An attending police officer noted an “odour of liquor” on the claimant but was unable to detect an odour on the driver. The “jaws of life” were used to extract the occupants from the van. On subsequent inspection it was found that the van’s defroster was on and that the windshield wipers were set on “intermittent” from which I infer that the windshield was or had been “fogging up” and it was or had been raining.

Craig Luker, a forensic engineer with a specialty in accident reconstruction, gave expert opinion evidence by way of written opinion and deposition. I accept the following.

After traversing a series of what the police records describe as “serpentine” turns in the highway, which I conclude were the reason for the 40 kph warning sign posted 2.5 km north of the scene, the vehicle emerged from a left turn and had proceeded a short distance along the straight stretch when its right-side wheels moved from the

pavement to the gravel shoulder. Its speed at that time was between 61 and 65 kph. It travelled for about one second parallel to the pavement with its right wheels on the shoulder. Then it rotated sharply clockwise as it left the roadway. Over a distance of about 14 meters its rate of rotation slowed such that it was travelling at a tangent of 16.5 degrees away from the direction of the roadway. The initial rotation resulted from a clockwise turn of the steering wheel of approximately 135 to 180 degrees. The vehicle hit the tree at a speed of between 52 and 60 kph.

In Mr, Luker's opinion, the 16.5 degree departure angle was inconsistent with the driver having simply "drifted off the outside of the curve." He considered that the slowing of the initial rate of rotation resulted from "counter steering" coupled with likely braking "part way through her motion on the shoulder." He said, "The physical evidence clearly demonstrates that [the driver] was taking significant avoidance manoeuvres as this incident unfolded."

Mr. Luker was unable to determine why the loss of control began, but offered two "plausible" explanations. He said,

> First, the documented tire marks began about 23 metres after the vehicle had exited the preceding curve. The fact that the final motion off the roadway began on the straight stretch is inconsistent with [the driver] losing control in a single motion purely because of excessive speed in the corner. However, the first plausible explanation is that she started to lose control in the curve because of excessive speed and began a series of corrections and over corrections until finally leaving the roadway in the straight stretch.
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> The second plausible explanation is that [the driver] successfully negotiated the curve but simply drifted within the lane causing the vehicle's right side tires to fall of the road edge and onto the shoulder. There was an abrupt edge to the asphalt and her tires' interaction with this edge may have initiated a similar correction and over correction sequence of events that ultimately led to this collision. This is particularly likely given [the driver's] lack of experience as a driver.
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> In summary, while I cannot provide a definitive opinion as to what caused this collision, the physical evidence demonstrates that [the driver] was actively engaged in avoidance attempts as this event unfolded.

Mr. Luker's comment that the driver lacked experience was supported by the evidence. The driver's grandmother, a retired professional truck driver, testified that she

gave the driver one driving lesson, at the driver's request, on December 18th. She said it lasted approximately 30 minutes, about 20 minutes of which consisted of her giving the driver instructions while parked at the airport and about 10 minutes of which consisted of actual driving. The driver started at the airport and drove down a little-used back road to Highway 101 and then along the highway for about 2 minutes to her home. All the while, the grandmother gave her instructions on highway driving. It was dusk when they began the lesson but dark when they reached Highway 101 and the grandmother said that, although she intended to take over the wheel at that point, she let the driver continue because she was "doing so good." She said traffic from the ferry was coming but the driver nevertheless did "really good" over the two-minute drive on the highway.

The grandmother also testified that when the driver was young (younger than 16 or 17, but she was not asked to be more precise) "they" gave her an "old clunker" automobile that she often drove on her grandparents' 80-acre farm when she was visiting with them in the summers. She said they gave her the vehicle "so she would have something to do with her friends." She said "the car didn't go very fast" and the driver was "just tooling around the property with her and her girlfriend and a dog in the back." As a result, she said, the driver "knew how to manoeuvre a car."

The claimant testified that, during his brief visit as a houseguest at the family home, he had accompanied the driver on four or five occasions while she drove his van after he picked her up when she got off work. These occasions were in the afternoons and evenings and he did not recall any that occurred after dark. He did not recall giving her any particular instructions. He said she "knew how to drive" and characterized his role as merely accompanying her because she had to have an adult driver with her. He said she was a good driver and that he always felt comfortable with her driving.

The evidence given by the driver's grandmother, mother, and boyfriend establishes that the driver was a social drinker. There was no evidence, however, that she used marihuana prior to the day of the accident.

DISCUSSION

1. Was the accident caused by the negligence of the driver?

The law governing the question whether the accident was caused by the negligence of the driver in the circumstances presented here is set out in *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, 1998 CanLII 814 (S.C.C.). In its consideration of the ancient maxim *res ipsa loquitur* ("the thing speaks for itself") The Court said,

> 20 ... It has been held on numerous occasions that evidence of a vehicle leaving the roadway gives rise to an inference of negligence. Whether that will be so in any given case, however, can only be determined after considering the relevant circumstances of the particular case.

The Court added,

> 24 Should the trier of fact choose to draw an inference of negligence from the circumstances, that will be a factor in the plaintiff's favour. Whether that will be sufficient for the plaintiff to succeed will depend on the strength of the inference drawn and any explanation offered by the defendant to negate that inference. If the defendant produces a reasonable explanation that is as consistent with no negligence as the *res ipsa loquitur* inference is with negligence, this will effectively neutralize the inference of negligence and the plaintiff's case must fail. Thus, the strength of the explanation that the defendant must provide will vary in accordance with the strength of the inference sought to be drawn by the plaintiff.

Mr. Luker's evidence establishes that the precipitating causative factor was likely excessive speed in the circumstances or momentary inattention by the driver, or a combination of both. Accordingly, I conclude that the claimant has established a *prima facie* case of negligence.

ICBC contends that the evidence that the steering wheel was turned between 135 and 180 degrees and the absence of any strong evidence of braking suggest an inference "that something other than the negligence of [the driver] may have been responsible for the accident." ICBC suggests the "something" may have been that the claimant interfered with the driver's operation of the vehicle. It bases this submission on

evidence that suggests that the claimant had an inappropriate romantic infatuation with the driver, including evidence of the wide disparity in their respective ages, that he had recently suffered a marriage breakdown, that he poured her an alcoholic drink about three hours before the accident and that they had both consumed more alcohol later, that a bouquet of roses was found in the vehicle after the accident, and that he was found in the vehicle in a position that indicated he had not been restrained by the passenger's seatbelt when the vehicle struck the tree. The suggestion, as I understand it, is that something she said or did, perhaps rejecting his advances, precipitated some sort of dangerous action by him that effectively wrested control of the vehicle from her.

However, there is a difference between inference and speculation. The proper approach to drawing inferences from circumstantial evidence is set out in *R. v. Smits*, 2012 ONCA 524:

> [62] ... The following comments from Watt J.A. in his text *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 2011), at p. 43, illustrate the approach that must be taken:
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> > Where evidence is circumstantial, it is critical to distinguish between inference and speculation. *Inference* is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. There can be *no* inference without objective facts from which to infer the facts that a party seeks to establish. If there are *no* positive proven facts from which an inference may be drawn, there can be no inference, only impermissible speculation and conjecture.

The facts urged upon me by ICBC are not facts from which I could "logically and reasonably" draw an inference that the accident was the result of the claimant's interference with the driver's operation of the vehicle. To do so would be mere speculation and conjecture.

Since ICBC has not produced a reasonable explanation for the accident that is consistent with it having occurred without negligence by the driver, the claimant's *prima*

facie case has not been negated. Accordingly, I conclude that the accident was caused by the negligent operation of the vehicle by the driver.

2. (a) Did the claimant forfeit his right to insurance coverage under his owner's certificate and under his underinsured motorist insurance because he permitted the driver to operate his motor vehicle when she was under the influence of intoxicating liquor or drugs to such an extent that she was incapable of the proper control of the vehicle?

Section 55 of the *Insurance (Vehicle) Regulation* provides,

> **55**...
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> (5) An insured named in a certificate ... must not permit the vehicle described in the certificate ... to be operated by a person … that breaches a condition of this section or Part 6.
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> ...
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> (8) An insured shall be deemed to have breached a condition of ... Part 6 where
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> (a) the insured is operating a vehicle while the insured is under the influence of intoxicating liquor or a drug or other intoxicating substance to such an extent that he is incapable of proper control of the vehicle ....

Part 6, s. 75(b) of the *Insurance (Vehicle) Act*, RSBC 1996, c. 231 states,

> **75** All claims by ... the ... insured are invalid and the right of ... an insured ... to insurance money under the plan or an optional insurance contract, is forfeited if
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> ...
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> (b) the insured violates a term or condition of ... the plan or the optional insurance contract ....

Thus, if the claimant permitted the driver to operate his vehicle while she was "incapable of proper control of the vehicle" for the reason stipulated in Reg. 55(8) he was in breach of Reg. 55(5) and, by operation of s. 75(b) of the *Act*, all his claims are invalid and his right to insurance money is forfeited.

The law governing whether the driver was incapable of proper control of the vehicle by reason of the influence of alcohol or drugs is summarized in *MacGregor v. Insurance Corporation of British Columbia*, 1993 CarswellBC 796, [1993] B.C.J. No. 161, 14 C.C.L.I. (2d) 195 (S.C.):

> 4 The authorities make it clear that the insurer must prove the incapacity on a balance of probabilities: see *Kulbaba v. Insurance Corp. of British Columbia* (1981) 32 B.C.L.R. 189 (S.C.). Proof of impairment or of an illegal level of alcohol in the blood is not, by itself, sufficient. Nor is proof of drinking and negligence enough. The insurer must establish that in all the circumstances of the particular case there was an incapacity to exercise proper control. In *Caissie v. Insurance Corp. of British Columbia*, unreported, Van. Registry No. CA008908, dated May 24, 1989, the B.C. Court of Appeal approved the test as stated by McKenzie J. in *Schedeger v. Insurance Corp. of British Columbia*, [1982] I.L.R. 1-1562 (B.C. S.C.) as follows:
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> > Negligence on his part might be of such a nature and degree that, in conjunction with independent evidence of impairment, it might provide proof on a balance of probabilities that incapacity to exercise proper control in fact existed. The question here is whether the evidence demonstrates, on a balance of probabilities, that the negligent acts were of such a nature and degree as to be explainable only by compelling the inference that the influence of alcohol caused the negligent acts and that the effect of the alcohol was to render him incapable of proper control. This can be tested by asking whether the collision would have been avoided if the plaintiff had been sober. [Emphasis added]

The passage I have emphasized places a high burden of proof on ICBC.

There is a difference between impairment and incapacity. Impairment is a state of diminished or weakened ability to operate a motor vehicle. As Mr. Jeffery stated, it is "a deterioration of judgment and attention, loss of fine co-ordination and control, increase in reaction time and a decrease in visual acuity." Incapacity, on the other hand, is synonymous with inability – the driver must be shown to have been unable to exercise proper control. Thus, as stated in *McGregor*, proof of impairment or proof of

drinking and negligence alone are not enough to establish incapacity.

Mr. Jeffery associates incapacity with intoxication, which he said, as I have already noted, is “an advanced state of impairment in which gross physical symptoms are apparent: staggering, in-coordination, slurred speech and a general confused state.” As I understand Mr. Jeffery’s opinion, the driver’s BAC alone did not render her intoxicated and incapable. Rather, it was the combination of the BAC and THC that did so.

There are potential flaws in the foundation upon which Mr. Jeffery constructed his opinion that the driver was incapable.

Mr. Jeffery agreed that the ideal or “gold standard” source of blood for BAC analysis is the femoral vein. The driver’s blood analyzed by the coroner was drawn from her stomach, her vitreous, and her urine. Her stomach contained 100 mg of a brownish fluid that Mr. Jeffery agreed could have contained alcohol and, if it did, that the alcohol could have diffused into her blood between the time of death and the blood analysis, producing a higher BAC than would have been present at the time of death. As well, Mr. Jeffery agreed that putrefaction of a dead body can begin about one day post-mortem, that putrefaction creates alcohol, and that if putrefaction had begun in the driver’s body when her blood was analyzed two days post-mortem the BAC result would have been higher than her BAC would have been at the time of death.

Mr. Jeffery was confident that diffusion of alcohol from the stomach and putrefaction had not occurred because of the relationship between the results obtained by the coroner from the stomach, vitreous, and urine. He explained that because of the way the body absorbs and eliminates alcohol the BAC in the femoral vein, the vitreous, and the urine will differ at a given time. For example, the absorption and elimination of alcohol in the vitreous will lag behind the absorption and elimination in the femoral vein such that, in the case of recent drinking while the femoral blood is absorbing alcohol, the BAC in the vitreous will be lower than the femoral BAC, and when the femoral blood is eliminating alcohol after peak absorption, the elimination in the vitreous will lag behind

and the vitreous BAC will be the higher of the two. Mr. Jeffery said there is a formula for calculating BAC from a vitreous sample but he did not use it because the three coroner's results support one another and give him confidence that his calculated BAC at the time of the accident is reliable.

Regarding marihuana, Mr. Jeffery stated, I infer on the basis of research studies, "Significant performance impairments are usually observed for at least 1-2 hours following marijuana use, and residual effects have been reported up to 24 hours." Further, he said, "Marijuana has been shown to impair performance on driving simulator tasks and on open and closed driving courses for up to approximately 3 hours." It was Mr. Jeffery's opinion that the driver had ingested marihuana from 4 to 6 hours and perhaps longer before her death. This suggests the adverse effects of marihuana on the driver might have dissipated by the time of the accident.

It was also Mr. Jeffery's opinion that, while both alcohol and THC adversely affect attention, alcohol is associated more with impairment of judgment and motor coordination than THC, "which has a more direct effect on time perception (time appears to pass more slowly) and space perception (alteration of depth perception).

These matters suggest there may be weaknesses in the foundation of Mr. Jeffery's ultimate opinion that the driver was incapable and, while his opinion gives pause, its reliability is undermined by its inconsistency with evidence that suggests that the driver's personal characteristics and the circumstances of her particular situation do not mesh with the norms and averages to which Mr. Jeffery compared her.

I am satisfied that the driver's ability to drive was adversely affected by her consumption of alcohol, but none of the overt signs of the advanced state of impairment identified by Mr. Jeffery in his definition of intoxication were exhibited by her in Mr. H.'s presence shortly before the accident. I find it unlikely that she progressed from the condition described in her meeting with Mr. H. to the condition postulated by Mr. Jeffery in his opinion in the short window of time between her encounter with Mr. H. and the accident.

Moreover, and more importantly, the nature and degree of the careless acts and omissions that precipitated the crash do not reflect the marked departure from the norm that one would reasonably expect to see if the driver had been intoxicated and incapable of the proper control of the vehicle. Mr. Luker's "plausible" explanations for why the van left the highway are commonplace even in the absence of the consumption by drivers of intoxicating liquor or drugs – the driver was adhering closely to the speed limit, she was inexperienced, it was dark, the highway was wet, and she strayed slightly onto the gravel shoulder after emerging from a corner. There is nothing outrageous or excessive in this conduct.

Further, the fact that the driver had just successfully negotiated the series of "serpentine" turns over a distance of about 2 km that were the subject of the speed warning seems contrary to the assertion that she was incapable of the proper control of the vehicle. As well, she exercised control in the seconds after the van left the paved highway – she was "counter steering" and probably braking and, as Mr. Luker said, she was "actively engaged in attempting to avoid the crash." That she apparently turned the steering wheel hard right seems unusual with the benefit of hindsight. However, she was a newcomer to highway driving and found herself in a situation fraught with danger so her failure to employ a more effective evasive manoeuvre, if there was one available to her, is not surprising.

In my view, neither the nature nor the degree of her negligent acts and omissions were egregious – they do not compel the inference that the influence of alcohol (and marihuana) was their cause. Her impairment likely contributed to the ineffectiveness of her attempts at corrective action. However, in my view ICBC has not shown that her impairment was the precipitating cause of the crash. Rather, the poor driving conditions and the driver's inexperience were the primary causes of her loss of control.

Accordingly, ICBC has not discharged its burden of proof that the driver was under the influence of intoxicating liquor or drugs to such an extent that she was incapable of the proper control of the vehicle when the vehicle left the highway.

It follows that ICBC has not established the second element of this alleged breach, as it must, that the claimant knew or ought to have reasonably foreseen, in all the circumstances, that the driver would operate his vehicle while under the influence of intoxicating liquor or drugs to such an extent that she was incapable of its proper control: see *Co-operative Fire & Casualty Co. v. Ritchie* (1983), 150 D.L.R. (3d) 1, 2 C.C.L.I. 215 (S.C.C.) at pp. 6-7, folld*. Ondrik v. Goodwin Estate* (1986), 21 C.C.L.I. 47 (B.C.C.A.) and *Nielson v. Insurance Corporation of British Columbia* (1997), 37 B.C.L.R. (3d) 223, 43 C.C.L.I. (2d) 294, 1997 CanLII 3454 (B.C.C.A.) at para. 16.

(b) Did the claimant operate his vehicle while he was under the influence of intoxicating liquor to such an extent that he was incapable of proper control of the vehicle?

ICBC invokes s. 1(1) of the *Insurance (Vehicle) Regulation* which defines "operate" as including "to have care, custody or control of the vehicle." In ICBC's submission, the claimant was intoxicated to such an extent that he was incapable of the proper care, custody, or control of his van when he was supervising the driver after having given her permission to operate the vehicle.

I cannot accept this submission. Mr. Jeffery did not opine that the claimant was incapable and the evidence does not support such a conclusion. It is therefore not necessary to address whether the claimant could be found to have had care, custody, or control of the van while the driver was operating it.

3. Was the claimant contributorily negligent?

In *Bradley v. Bath*, 2010 BCCA 10 at para. 25, the Court adopted the following description of contributory negligence from John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 302:

> Contributory negligence is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's default, in bringing about his injury. The term "contributory negligence" is unfortunately not altogether free from

> ambiguity. In the first place, "negligence" is here used in a sense different from that which it bears in relation to a defendant's conduct. It does not necessarily connote conduct fraught with undue risk to *others*, but rather failure on the part of the person injured to take reasonable care of himself in his *own* interest. ... Secondly, the term "contributory" might misleadingly suggest that the plaintiff's negligence, concurring with the defendant's, must have contributed to the *accident* in the sense of being instrumental in bringing it about. Actually, it means nothing more than his failure to avoid getting hurt ... [Emphasis in original.]

ICBC contends that the claimant was contributorily negligent in two ways: first, that he permitted the driver to operate his van in circumstances in which he knew or should have known that due to her inexperience she was not capable of the safe operation of the vehicle and, second, that he rode with her when he knew or should have known that her ability to operate the van was impaired by alcohol. Thus, ICBC's position is that the claimant assumed a risk of foreseeable harm.

The claimant contends there should be no finding of contributory negligence. He submits it cannot be concluded that the driver's impairment was causally related to the accident or that he knew or should have known that her ability to operate his motor vehicle was impaired to the extent that there was a risk of harm in riding with her. He relies particularly on Mr. H.'s evidence that shortly before the accident the driver displayed no signs of intoxication.

However, in my view, although the driver's impairment has not been shown to be a precipitating cause of the crash, it was a contributing cause in that it likely contributed to the ineffectiveness of the corrective manoeuvres attempted by the driver after she lost control of the vehicle.

It was Mr. Jeffery's opinion that the driver had ingested the marijuana 4 to 6 hours or perhaps longer before the accident. The claimant joined her at her apartment at about 6:00 o'clock, approximately 3 ½ hours before the accident. There is no evidence from which I could conclude that the claimant knew the driver had used marihuana.

However, despite Mr. H.'s observations, the claimant knew, because he was with her, that the driver had consumed a significant amount of alcohol during the evening. Since the driver was not of legal age to purchase alcohol, and since there is no evidence to suggest she did not remain with the claimant throughout the time between when they left her apartment and the crash, I conclude that the claimant provided her with the alcohol she consumed. He was a middle-aged man with a familiarity with the effects of the consumption of intoxicating substances and he must have known that the liquor with which he provided the driver would impair the ability of an 18-year-old novice driver to operate his vehicle.

Further, the claimant knew the driver was an inexperienced learner driver yet he permitted her to drive on a dark and wet night on a winding two-lane highway at a time when he knew or should have known her ability to drive would be impaired by alcohol.

I conclude that the evidence establishes contributory negligence by the claimant on both grounds asserted by ICBC.

The degree of contributory negligence depends on an assessment of relative degrees of fault or blameworthiness, not of relative degrees of causation: *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 (C.A.), 1997 CanLII 2374 at paras. 18-19. The assessment must be made objectively. There is no legal rule dictating how fault should be apportioned. It is a question of fact in each case. One guiding principle is that the negligence of the driver was the prime negligence since, without it, the claimant would not have been injured. In view of the circumstances I have outlined, the claimant's degree of fault is high. I fix it at 40%.

SUMMARY

In summary, the accident was caused by the negligence of the driver, ICBC has

not proven that the claimant was in breach of the conditions of his insurance and he has therefore not forfeited coverage, and the claimant was 40% contributorily negligent.

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Kenneth J. Smith, Arbitrator