

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ziemer v. Wheeler*,  
2014 BCSC 2049

Date: 20141031  
Docket: 1139170  
Registry: Prince George

Between:

**Raymond Ziemer**

Plaintiff

And:

**Harris John Wheeler, AAEA Application Assistance and  
Environmental Assessment Ltd., Aron Walter and W. Aron  
Ventures Ltd.**

Defendants

And:

**Aron Walter and W. Aron Ventures Ltd.**

Third Parties

And:

**Harris John Wheeler, AAEA Application Assistance and  
Environmental Assessment Ltd.**

Third Parties

---

Docket: 1242042  
Registry: Prince George

Between:

**Jessie Ziemer and Elliott Ziemer by her Litigation  
Guardian, Jessie Ziemer**

Plaintiff

And:

**Harris John Wheeler, AAEA Application Assistance and  
Environmental Assessment Ltd., Aron Walter and W. Aron  
Ventures Ltd.**

Defendants

And:

**Raymond Ziemer, Aron Walter and W. Aron Ventures  
Ltd.**

Third Parties

Before: The Honourable Madam Justice Watchuk

## Reasons for Judgment

Counsel for the Plaintiff Raymond Ziemer:	D. Byl
Counsel for the Third Party Raymond Ziemer:	Leslie Hibbert
Counsel for the Plaintiffs Elliott Ziemer and Jesse Ziemer:	Stanley T. Cope
Counsel for the Defendant and Third Parties, Harris Wheeler and AAEA Application Assistance and Environmental Assessment Ltd.:	Roger W. Haines
Counsel for the Defendant and Third Parties, Aron Walter and W. Aron Ventures Ltd.:	Lorne A.J. Dunn, Q.C.
Place and Dates of Trial:	Prince George, B.C. July 2-5, 2013, July 8-11 2013 September 26-27, 2013 and April 22-23, 2014
Place and Date of Judgment:	Vancouver, B.C. October 31, 2014

## Table of Contents

	Paragraph Range
<a href="#">I. INTRODUCTION</a>	[1] - [6]
<a href="#">II. THE ISSUES</a>	[7] - [9]
<a href="#">III. THE EVIDENCE</a>	[10] - [102]
<a href="#">A. The Geography</a>	[10] - [15]
<a href="#">B. Overview of the Evidence</a>	[16] - [27]
<a href="#">C. Facts Not in Issue</a>	[28] - [44]
<a href="#">D. The Witnesses</a>	[45] - [57]
<a href="#">1. Alan Flintoff</a>	[46] - [49]
<a href="#">2. Sheldon Sears</a>	[50] - [54]
<a href="#">3. Jay Greenwood</a>	[55] - [57]

<u>E. The Parties</u>	[58] - [83]
1. <u>Mr. and Mrs. Ziemer</u>	[58] - [62]
2. <u>Mr. Walter</u>	[63] - [72]
3. <u>Mr. Wheeler</u>	[73] - [83]
<u>F. Expert Evidence</u>	[84] - [102]
1. <u>Dr. Jason Droll, Ph.D.</u>	[84] - [102]
<b><u>IV. THE LAW</u></b>	[103] - [122]
A. <u>Negligence</u>	[103] - [113]
B. <u>Wildlife Accident Caselaw</u>	[114] - [118]
C. <u>Duty to Warn</u>	[119] - [122]
<b><u>V. POSITIONS OF THE PARTIES</u></b>	[123] - [128]
<b><u>VI. DISCUSSION</u></b>	[129] - [204]
A. <u>Credibility and Reliability of the Witnesses</u>	[129] - [135]
B. <u>The First Collision - Mr. Wheeler's Collision with the Moose</u>	[136] - [143]
C. <u>The Second Collision - Mr. Walter's Collision with the Moose</u>	[144] - [150]
D. <u>The Third Collision - Mr. Walter and Mr. Ziemer Collide</u>	[151] - [153]
E. <u>Duty to Warn - Mr. Wheeler's Conduct after the First Collision</u>	[154] - [191]
E. <u>Conclusions on Liability</u>	[192] - [193]
F. <u>Liability of the Corporate Defendants AAEA</u>	[194] - [204]
<b><u>VII. CONCLUSIONS</u></b>	[205] - [207]

## **I. Introduction**

[1] On the Alaska Highway between Dawson Creek and Fort St. John on February 21, 2011, Harris Wheeler as he was driving north in his 2003 Ford F350 truck hit a moose.

[2] The moose, dead or wounded, lay on the highway in the dark. Aron Walter, who was also driving north, hit the moose and lost control of his vehicle, a 2004 Ford F350 truck.

[3] Raymond Ziemer was driving south with his wife and baby in his 2003 Chevrolet Avalanche vehicle. His vehicle and the Walter vehicle collided head on when the Walter vehicle came across the centre line into the southbound lane.

[4] Mr. Wheeler did not take any steps to warn other motorists before his return to the scene of his collision with the moose.

[5] This trial was limited to the determination of liability. The assessment of damages for injuries sustained by the parties will follow at a later date.

[6] From these three collisions, Mr. Wheeler hitting the moose, Mr. Walter hitting the moose, and Mr. Walter and Mr. Ziemer colliding head-on ("the collisions"), and from Mr. Wheeler's actions after his collision with the moose, a number of liability issues arise.

## II. The Issues

[7] In order to determine liability for the collisions, the following issues of law with respect to the three drivers, Messrs. Ziemer, Walter and Wheeler, must be addressed:

- (a) What is the standard of care for motorists travelling on the Alaska Highway in the location where these accidents took place taking into consideration the circumstances at the time the collisions took place?
- (b) Did any driver fail to meet the standard of care for motorists travelling on the Alaska Highway in this location?
- (c) If so, had that driver exercised reasonable care, would he have been able to avoid the collision?
  - (i) For Mr. Wheeler, would he have been able to detect, then perceive and respond and successfully take evasive action to avoid impact with the upright moose that had entered the highway from the ditch on the opposite side?
  - (ii) For Mr. Walter, would he have been able to detect, then perceive and respond and successfully take evasive action to avoid the moose carcass lying in the middle of the highway?
  - (iii) For Mr. Ziemer would he have been able to detect, then perceive and respond and successfully take evasive action in response to either the moose carcass lying in the middle of the highway or Mr. Walter's vehicle?
- (d) With regard to the defendant Mr. Wheeler, did he have a duty to warn other motorists, specifically Messrs. Ziemer and Walter, of the moose carcass which constituted a hazard in the middle of the highway? Did he have a reasonable opportunity to warn other motorists? If so, but for his failure to comply with that duty to warn other motorists, would the collision has been avoided?
- (e) If more than one party has been negligent, how should liability be apportioned?

[8] The primary issues are with regard to the defendant Mr. Wheeler and the duty to warn.

[9] The factual issues to be resolved with regard to the duty to warn include the location of the Ziemer and Walter vehicles at the time of the first collision between Mr. Wheeler and the moose; and the length of time between Mr. Wheeler hitting the moose and the third collision.

## III. The Evidence

## **A. The Geography**

[10] The Alaska Highway, also known as Highway 97 (the “Highway”), starts in Dawson Creek in the north-east of British Columbia. Fort St. John, 73 km to the north, is the next major centre. Charlie Lake is 4 to 5 km north of Fort St. John.

[11] Intersecting the Highway between Dawson Creek and Fort St. John are 228 Road and 230 Road. The collisions occurred on the Highway between 228 Road and 230 Road. 228 Road is two miles or 3.2 km south of 230 Road as the roads are numbered by the old way of measuring distances.

[12] There is a dip in the Highway between 228 Road and 230 Road. The bottom of the dip is 250 to 500 meters south of the location of where the moose was hit by the Wheeler vehicle.

[13] The Highway is one-way in each direction with shoulders. It is slightly elevated from the ditches on both sides and the surrounding land. There are trees and shrubs set back from both sides of the Highway.

[14] The area north and south of the locations of the collisions has the following landmarks and topography. South of 228 Road is the crest of a hill known as Tower Hill. From the crest of Tower Hill and past 228 Road until a short distance before 230 Road the Highway is straight. As shown in an aerial photograph of the area, it curves very slightly to the west as it approaches 230 Road. The top of the major hill in the area, Taylor Hill, is 2 km north of 230 Road.

[15] From the top of Taylor Hill, the Highway descends to the town of Taylor and the bridge which crosses the Peace River. Fort St. John is 14 km north of Taylor.

## **B. Overview of the Evidence**

[16] The three collisions occurred as follows.

[17] On the evening of February 21, 2011, Mr. Wheeler was driving north on the Alaska Highway towards Taylor, Fort St. John and then to his home at Charlie Lake, north of Fort St. John. He was close to home having driven from Calgary, Alberta that day.

[18] A moose came across the Highway from his left and collided with the front left of his truck. Mr. Wheeler hit the moose, it went down, and Mr. Wheeler kept driving for a short distance, about 100-150 yards, before he stopped on the side of the road. He stopped to check his vehicle for damage and ensure that it was roadworthy and able to be driven.

[19] Mr. Wheeler got back into his vehicle after checking for damage. He continued to drive north. An important factual issue is how far north Mr. Wheeler drove before he turned around to

return to the location where he had struck the moose.

[20] Mr. Walter left his home on 228 Road to drive north to Taylor for a floor hockey game. He was driving north on the Highway after Mr. Wheeler had driven the same route. There is also a factual issue as to how far Mr. Walter was driving behind Mr. Wheeler.

[21] As Mr. Walter drove north from 228 Road towards 230 Road, he struck the moose which was lying on the road and lost control of his vehicle. He veered into the southbound lane and collided with the Ziemer vehicle head on.

[22] Mr. Ziemer was driving south on the Highway having left Fort St. John and Taylor and driven up Taylor Hill. As he was driving, Mr. Ziemer saw vehicles in the pullouts on both sides of the road at the top of Taylor Hill. He recalls seeing headlights of one vehicle approaching as he continued to drive south. The next thing he remembers is those headlights jumping into his lane.

[23] Three individuals who arrived at the scene of the Walter-Ziemer collision (also referred to as “the third collision”) were witnesses in the trial: Alan Flintoff, Sheldon Sears, and Jay Greenwood. Mr. Flintoff worked for Schlumberger Sun Oil Company, and was leading a convoy of six vehicles north. Mr. Sears resides at Mile 22 of the Alaska Highway and travels daily to his job as a mechanic in Taylor. Mr. Greenwood also works in the oil industry and resides in Charlie Lake. He knew Mr. Wheeler.

[24] Mr. Flintoff telephoned 911 at 7:15 p.m. The call lasted for 10 minutes and 54 seconds. Prior to the end of that telephone call, Mr. Wheeler returned to the scene of the third collision. Mr. Greenwood saw him return, noting that Mr. Wheeler was not there when he, Mr. Greenwood, arrived at the scene. Mr. Wheeler located Mr. Flintoff a couple of minutes before the end of Mr. Flintoff’s conversation with the 911 operator.

[25] The first emergency responder on the scene was the Fort St. John RCMP at 7:39 p.m.

[26] When Mr. Wheeler returned to the scene, he identified himself as the person who had struck the moose. It is disputed how much time passed before Mr. Wheeler returned to the scene.

[27] All individuals involved in the collision survived. The persons injured in the third collision were attended to at the scene and then taken by ambulance. All of the parties except for the infant Ziemer gave evidence in the trial.

### **C. Facts Not in Issue**

[28] The evidence with regard to the following facts was generally consistent or was not in issue.

[29] The time of the Walter-Ziemer collision was after 7:00 p.m. and close to 7:15 p.m.

Mr. Ziemer estimated the time at about half an hour after they left Fort St. John at 6:45 p.m.

Mr. Flintoff's 911 call commenced at 7:15 p.m. On Mr. Walter's evidence, Mr. Flintoff arrived within a minute or so after the third collision.

[30] Mr. Flintoff estimated the time for him to travel north from the crest of Tower Hill to the location of the collision at two minutes. However, because the distance from the crest of the hill to the collision is approximately 4,367 meters according to the evidence of Ray Williams who is an accident investigator, at Mr. Flintoff's speed of 90 km/h the time to travel this distance would be 2.8 minutes, to which I would add time to slow and stop.

[31] After Mr. Flintoff arrived at the scene, he waved through two of the convoy vehicles before placing the call to 911. It is not known to any certainty the total length of time it took Mr. Flintoff to drive from the crest of the hill, stop his vehicle, direct traffic for his convoy, and place the 911 call. On the evidence, it would have been approximately four minutes total. I find that the time of the third collision was therefore approximately 7:11 p.m.

[32] The time of the first collision between Mr. Wheeler and the moose is a fact to be determined below on an analysis of the evidence.

[33] It was fully dark at the time of all three collisions. There was no artificial lighting at the location of the collisions.

[34] The weather was clear and cold (-10°C) but it was not yet snowing. Light snow started falling shortly after the third collision. There was snow, described as swirling snow, on the side of the road. The highway conditions were good winter driving conditions. Weather was not a factor in the collisions.

[35] The speed limit was 100 km/h on the Highway between 228 Road and 230 Road. All three vehicles were being operated at or below the speed limit. Mr. Wheeler was travelling at 90 km/h to 95 km/h. Mr. Ziemer was travelling at 100 km/h or slightly below as was his standard practice. Mr. Walter was likely travelling at 90 km/h although it is possible that it was slightly in excess of 90 km/h. The witnesses, Mr. Greenwood, Mr. Sears and Fire Chief Mike Ryder routinely travel through the area at 100 km/h, the speed limit, day or night. They, who are experienced drivers and experienced in this area, were all of the view that the speed limit was a reasonable and safe speed for this location in these conditions. Excessive speed was not a factor in the collisions.

[36] The location of the third collision was the subject matter of the testimony of a number of witnesses. Mr. Sears said that the moose carcass was 250 to 500 meters north of the bottom of the dip in the road and that the third collision was about 250 meters south of 230 Road with some distance between the moose and the third collision. Mr. Greenwood estimated the distance from

the third collision to 230 Road at 500 meters. Mr. Williams gave evidence that the collision between Mr. Walter and Mr. Ziemer occurred approximately 750 meters south of 230 Road.

[37] I accept the evidence of the accident investigator, Mr. Williams, as he examined the site in the daylight although his examination was four months later. I find that the location of the third collision was approximately 750 meters south of 230 Road. As these two roads are numbered according to the old mileage system, they are exactly 2 miles or 3.2 kilometers apart. The location of the third collision was therefore approximately 2,450 meters north of 228 Road.

[38] The site of Mr. Wheeler's collision with the moose was approximately 60 feet or 18 meters south of the third collision. That is the distance at which Mr. Ziemer estimates seeing Mr. Walter's headlights jump into his lane.

[39] The location of the moose carcass after it was hit by Mr. Walter was, as described by Mr. Flintoff, on the centerline straddling both sides. It is uncertain where the moose carcass was after it was hit by Mr. Wheeler and before it was hit by Mr. Walter. It is probable that most of the carcass was located in the northbound lane.

[40] With regard to the location of animal warning signs, the evidence was that the closest animal warning signs for both north and southbound traffic were at the top of Taylor Hill which is north of the location of the collisions. There were no signs indicating that drivers should reduce their speed. There are also four or five animal warning signs from the location of the collisions south to Dawson Creek. However, the evidence is that there are wildlife signs all over northern BC, everywhere, even on logging roads. Mr. Dean Daniel who is Operations Manager of the Ministry of Transportation and Infrastructure travels the roads in the south Peace area to patrol and inspect for anything out of the ordinary, including inspections for wildlife issues. He confirmed that animal warning signs are located throughout the Peace River area fairly frequently to indicate that wildlife cross all of the roadways and care is required.

[41] With regard to whether there is a propensity for moose or wild animals in the area of the collisions, the evidence was consistent that the location of the Walter-Ziemer collision was not in an area known as a moose alley. Mr. Greenwood has been driving between 100,000 km and 150,000 km per year on the roads in northern British Columbia since 1979. He said that personally he has not experienced any excessive moose on the Highway from Dawson Creek to Taylor. The worst place for moose is towards Pink Mountain on the Highway going north from Fort St. John.

[42] Mr. Sears, who drives that stretch of the Highway 12 times per week, said that he would see moose carcasses on the side of the Highway in the dip once every several months. Although it is an active moose area, he did not describe the area as a moose alley. Mr. Flintoff stated that in terms of moose, his experience is that they are everywhere in the Peace River area, including

eating the trees in his back yard. With respect to the section of the Highway from 228 Road to 230 Road, he did not experience any more animals there.

[43] Mr. Walter, who lives on 228 Road, had never seen a moose in the area of the collisions, and had never heard of this area having a propensity for moose. Mr. Wheeler also stated that this area was no worse for moose than anywhere else in the Peace River area.

[44] Mr. Daniel, of the Ministry of Transportation and Infrastructure, gave evidence that the propensity for wildlife generally and specifically moose is generally the same all over the Peace River area. It is not any different for the part of the Highway between 228 Road and 230 Road. Mr. Daniel confirmed that the worst area for moose is by Pink Mountain, north of Fort St. John, and the worst area for deer is on Highway 29 towards Hudson's Hope.

#### **D. The Witnesses**

[45] The witnesses whose evidence is most relevant to the facts in issue are the parties and the three individuals who arrived at the scene of the third collision shortly after it occurred.

##### **1. Alan Flintoff**

[46] Alan Flintoff was the first person to arrive at the accident scene from the south. He lives in Fort St. John. On February 21, 2011 he was the lead pickup truck in front of a convoy of six Schlumberger Sun Oil Company tractor-trailer trucks.

[47] Mr. Flintoff did not see the collision occur. As he approached the scene of the collision from Tower Hill, 4.3 km to the south, he first saw the moose carcass, and when he slowed he saw the Ziemer and Walter vehicles angled in the left or west ditch. When he stopped, the moose carcass was still steaming.

[48] After he stopped, he waved two of the trucks in the convoy through the collision scene. At 7:15 p.m. he placed a call to 911 which lasted for 10 minutes and 54 seconds. Before the end of the call, Mr. Wheeler was waiting to speak to him.

[49] As he drove north over the crest of Tower Hill visibility was good. Mr. Flintoff did not see any headlights or taillights on the Highway. He also did not see any vehicle on the northbound or east side shoulder of the Highway. The following passages are representative of his unshaken evidence:

Q: There were no vehicles parked on the northbound shoulder or the southbound shoulder?

A: Not that I noticed, no.

He confirmed his evidence that there were no vehicles on the northbound side of the Highway:

Q: Did you see anyone pulled onto the west--sorry, the east shoulder, so the northbound side of the Alaska Highway further up the road from the accident site? Did you notice any vehicles?

A: I didn't notice anything up there, no.

Q: So you did not notice any vehicles on the east shoulder with their four way flashers or hazards on?

A: No.

## 2. Sheldon Sears

[50] Sheldon Sears was the first person to arrive at the accident site from the north. He was driving southbound from Taylor where he works as a mechanic to his home at Mile 22 of the Alaska Highway.

[51] When he arrived at the scene of the third collision, he parked on the west side of the Highway two car lengths north of the Zeimer and Walter vehicles.

[52] Mr. Sears testified that as he approached the accident scene he did not see any vehicles parked on the east shoulder of the Highway north of the collision scene, other than a minivan. Upon being recalled the next day, he again gave the same testimony. This passage is representative of the totality of his evidence which was consistent throughout:

Q: Okay. So let's exclude the minivan. So other than the minivan, can you tell us, sir, as you approached the accident location did you see any other vehicle parked on the northbound shoulder or side of the road?

A: Not that I recall, no.

[53] Mr. Sears knew Mr. Wheeler. He described Mr. Wheeler as upset and distraught when he came back to the scene. Mr. Wheeler seemed confused and shocked.

[54] When Mr. Sears was asked how much time had elapsed after he arrived at the scene until he noticed Mr. Wheeler at the scene, he said "in the vicinity of 10 or 20 minutes" although he qualified his answer by adding "it's really tough to say". His testimony was that it was definitely not within a couple of minutes.

## 3. Jay Greenwood

[55] Jay Greenwood had been working in the oil fields in the Dawson Creek area and was driving north on the Alaska Highway towards his home in Charlie Lake. He lived in the same area and did the same type of work that Mr. Wheeler did, and he knew Mr. Wheeler.

[56] Mr. Greenwood estimated the collision scene to be about half a kilometer south of 230 Road. The Schlumberger lead pickup truck and some of the Schlumberger tractor-trailer units were already there. He testified as follows:

Q: ...Now, did you, when you arrived at the scene, see a white Ford F-350 on either shoulder of the highway?

A: When I arrived at the scene?

Q: Yes.

A: No.

Q: Okay.

A: No, I did not when I arrived at the scene.

Q: Okay. Did such a vehicle come to the scene at some point in time that you were there?

A: Yes, it did.

Q: And do you know who the operator of that vehicle was?

A: The [indiscernible] of that vehicle is the person that I knew by the name of Red Wheeler.

This passage is consistent with his evidence in this regard.

[57] Mr. Greenwood testified that 10 to 15 minutes after he arrived at the accident scene, he spoke with Mr. Wheeler.

## **E. The Parties**

### **1. Mr. and Mrs. Ziemer**

[58] Raymond Ziemer, an electrical engineer, was 33 years old in February 2011. He and his wife Jessie Ziemer were travelling with their son Elliott who was 4½ months old at the time of the collision with the Walter vehicle. They had driven from Fort Nelson that afternoon in their 2003 Chevy Avalanche vehicle which was in good condition. The trip was four hours to Fort St. John; they left there at 6:45 p.m. on their way south. He was driving at or near the speed limit, and probably on cruise control at slightly less than 100 km/h.

[59] Mr. Ziemer recalls driving up Taylor Hill, and looking at the pull-outs at the top of the hill because they wanted to stop to feed the baby. As there were vehicles in the pull-outs on both sides of the Highway, they decided to keep going for another half hour. His next memory is of noticing headlights in his lane about 60 feet ahead of him and then seeing them jump into his lane. His next memory is of lying in the snow face down and asking about his family.

[60] When the oncoming lights of the Ford pick-up jumped into his lane, he only had enough time to realise what was happening but no time to react. He has no memory of seeing the moose carcass on the Highway.

[61] As Mr. Ziemer drove south on a slight downslope past the turn-outs at the top of Taylor Hill,

he does not recall seeing any traffic on the Highway ahead or behind of him. He did not see any flashing headlights after seeing the vehicles in the pull-outs.

[62] Ms. Ziemer had her eyes closed at the time of the collision. She does not remember the trip up Taylor Hill and did not see the oncoming vehicle or the collision.

## 2. Mr. Walter

[63] Mr. Walter, who is 29 years old, was born in Russia. English is his third language. He operates his own company which does business in the oil industry in the Peace River area. As a result, he drives long distances for work.

[64] His vehicle is registered in the name of his company, the defendant and third party W. Aron Ventures Ltd. He resides at the intersection of the Alaska Highway and 228 Road and drives that stretch of highway about four times per day. His plan on the evening of February 21, 2011, was to play drop-in floor hockey in Taylor.

[65] Mr. Walter was driving his 2004 Ford Super Duty F350 diesel pick-up truck which was in good condition. He testified that when he left his home that evening, he exited from his property to 228 Road, turned right, and then drove north along the Highway. Before he entered the Highway, he looked around and there were no vehicles either way. There were no northbound head or taillights. There were no southbound head or taillights.

[66] Mr. Walter's speed of travel on the Highway was 90 km/h or possibly a little bit more. Mr. Walter saw no northbound vehicles ahead of him as he drove north. There was one southbound vehicle approaching, but no vehicles following it. As a result, his headlights were on low-beam. He was looking ahead of him on the road and was not distracted by the radio or a cell phone.

[67] There were no other southbound vehicles other than the one approaching. There were no vehicles ahead of him travelling northbound. There was not a vehicle on the right shoulder, and no vehicle with 4-way flashers or lights or flares. Mr. Walter testified that if he had seen a flare ahead, he would have definitely slowed down because it would be a warning.

[68] As he was driving, Mr. Walter felt that he had hit something but did not know what he had hit. As soon as he hit it, it threw him out of control and he veered into the opposite lane. Within seconds he saw the southbound headlights coming on him but he could not do anything to avoid the impact.

[69] Mr. Walter agreed that there was nothing that the driver of the southbound vehicle could have done to avoid the impact.

[70] Mr. Walter was able to get out of his vehicle after the impact. He recalls the first northbound vehicle arriving within a minute. He knew Mr. Sears who was in one of the first southbound vehicles to arrive. Later while he was standing beside his truck he heard someone (later identified as Mr. Wheeler) say: "I'm the guy who hit the moose." He is fairly certain that the person he came to know as Mr. Wheeler came back 40 minutes to an hour later. However, he is not sure if emergency responders, the first of whom arrived at 7:39 p.m., had arrived yet as he was in shock after the collision.

[71] Mr. Walter testified that he did not see the white truck of Mr. Wheeler using its flashing hazard lights or any other lights before the collision.

[72] With regard to the moose carcass, Mr. Walter testified that he did not see it before he hit it. It was a black carcass on a black road surface.

### 3. Mr. Wheeler

[73] Mr. Wheeler, who was 71 in February 2011, lives in Charlie Lake, British Columbia. On the day of the collisions, he was driving home from Calgary, Alberta where he had been visiting family. During his 30 years in the oil industry, he drove 90,000 km per year and regularly drove long distances in a day, often in the Peace River area.

[74] The vehicle driven by Mr. Wheeler was owned by his company, the defendant and third party AAEA Application Assistance and Environmental Assessment Ltd. ("AAEA"). This company was dissolved on January 30, 2012 for a failure to file. At the time of dissolution, Mr. Wheeler was the sole director and officer listed in the material filed with BC Registry Services.

[75] Mr. Wheeler's vehicle was a white Ford F350 with a diesel engine. It was in good condition. It was equipped with safety equipment including flares kept behind the back seat, a fire extinguisher, a flashlight, tow rope and a set of four chains. He had been told how to operate the flares but had never used flares.

[76] The truck had aftermarket lighting on the front above the bumper which came on automatically with the high beams. There were also five yellow dome lights on the roof of the truck above the cab, visible from the front and back of the truck, which were tied into the running lights of the truck and always on, but not tied into the four-way flashers. On the back of the truck there are two taillights which flash and two lights the width of the tailgate which do not flash. On the roof near the back of the cab of the vehicle there is a red tube light approximately 8 to 10 inches long which is tied into the flashing light systems. There were also two interior lights and two flashing lights on the exterior mirrors. Although he did not accede to the suggestion in cross-examination that his vehicle was "lit up like a Christmas tree", Mr. Wheeler described his truck with all the lights

on as being “definitely a light show”.

[77] Mr. Wheeler was driving at a speed of 90 km/hr although it may have varied 5 km/h either way. While driving north between 228 Road and 230 Road on the Alaska Highway, a moose ran across the Highway from the left side. As soon as Mr. Wheeler saw the animal he tried to avoid it by hitting his brakes and steering to the right. The moose ran into the front left corner of his vehicle and spun off after impact. He testified that did not know whether the moose had been killed or, if so, whether the carcass remained on the highway. However, he intended to go back to the scene after he checked his truck.

[78] Mr. Wheeler continued braking and brought his truck to a stop in order to check for damage inflicted by the moose. He stopped ten to fifteen seconds later a couple hundred yards north of the site of the collision with the moose.

[79] As he was coming to a stop he checked his rear-view mirror and saw a cloud of snow behind him on the left side of the road, and brake lights. He thought that a southbound vehicle had swerved off the road. He also saw two southbound vehicles go by him then two northbound vehicles go by as he was coming to a stop.

[80] When he was stopped to check his vehicle, the motor of his diesel truck was still running. The four-way flashers were activated. He was stopped for between 5 and 10 minutes.

[81] In order to check his vehicle to determine whether it was still roadworthy, he got out of his vehicle. While he was checking his vehicle he observed lights in the general area where he had hit the moose, and he concluded that another vehicle had either hit the moose or gone off the road and that other vehicles were stopping to assist.

[82] Mr. Wheeler testified that he got back into his vehicle and drove north a “couple of hundred yards at most” to look for a spot to turn around. His hazard lights were on. He returned to the scene not more than five minutes after the impact with the moose and parked in line behind 4 to 6 southbound vehicles. He told onlookers that he was the guy who had hit the moose. He located Mr. Flintoff on the phone with 911 and waited to speak with him. He was there when the RCMP first arrived and spoke with them to tell them he had had contact with the moose. He does not recall speaking with Mr. Greenwood who he knew from Charlie Lake.

[83] Only after he returned to the scene did he learn that there had been a head-on collision between the Ziemer and Walter vehicles.

## **F. Expert Evidence**

1. Dr. Jason Droll, Ph.D.

[84] Dr. Jason Droll, who is a Human Factors Scientist, testified at the trial on behalf of the defendant Mr. Walter. His report entitled Human Factors Report and dated March 26, 2013 was filed in evidence. He was qualified to give opinion evidence in the area of perception, response and decision making, and visibility. Dr. Droll was the only expert witness who gave evidence.

[85] Dr. Droll has substantial qualifications. He holds Ph.D. and Masters Degrees in brain and cognitive sciences, and perceptual psychology which deals with how humans see the world. His specific area of education was visual attention. He attended the University of California, Santa Barbara, as a postdoctoral scholar with studies in visual attention and contrast detection. He also was the recipient of a Central Intelligence Agency grant with respect to visual detection and human expectation dealing with real world detection. He has worked as a Senior Human Factors Scientist since 2008, being involved in numerous matters involving low illumination, visibility factors and contrast.

[86] Dr. Droll was asked to assess human factors issues relevant to the potential for each of two drivers, Messrs. Walter and Wheeler, to have avoided collision with the moose. His analysis addressed the likelihood that a driver in either of their situations, approaching either a moving or a prone moose on the road, would be able to detect the moose from a sufficiently far distance to allow a successful avoidance maneuver. He also considered whether any additional visibility aids which could have been utilised by Mr. Wheeler would have lessened the likelihood of collision.

[87] The main components of the analysis are detection; perception response time (or "PRT"), which is the time drivers require in order to respond to a visible hazard; and potential vehicle maneuvers for an attempted avoidance response such as a swerving or braking. The potential for collision avoidance will depend on the remaining distance to the hazard once the driver begins to respond.

[88] Dr. Droll performed a detailed scientific analysis of detection distance through an analysis of headlight illumination, through mathematical models of visibility contrast, and through review of scientific studies in which experimenters directly measured the distance at which drivers respond to similar hazards.

[89] It was assumed that the moose was young, and less than the average height of 2 meters tall for an adult moose. When prone it was 2 meters long, and extended 1.5 meters into the northbound lane.

[90] With respect to detection, as there was no street lighting in the vicinity the detection of the moose was constrained by the illumination cast by headlights. Headlight illumination was considered with low beams for both drivers. Excluding other factors such as glare, a vehicle distance of 38.5 meters from the moose is the threshold of headlight illumination required for

detection for young drivers, and at 31.5 meters the threshold required for detection by older drivers is met.

[91] Dr. Droll states that visual detection is not strictly a function of illumination, in this case headlight illumination, but there must also be sufficient contrast between the hazard and its background. A dark hazard against a dark background will require a closer detection distance in order for a driver in the position of Mr. Walter to visually observe the hazard. In this case the hazard was a dark moose pelt against dark asphalt, so there was not significant contrast.

[92] The visibility of the moose was calculated using the Adrian Model in laboratory conditions. According to this model a driver is not presented with sufficient detectable contrast between the moose and the asphalt in the background until 32 to 44 meters from the moose. However, validation of the Adrian Model under driving conditions shows that an average young driver may require at least 26 times more contrast than what would be required under ideal laboratory conditions.

[93] The glare of the approaching Ziemer vehicle headlights must be taken into account in determining the ability of Mr. Walter to observe the moose carcass on the road. Even if the degree of glare was not debilitating, any illuminance directed towards an observer can drastically undermine his or her ability to detect roadside hazards. Each of the estimated detection distances has significant potential to be lessened, or abolished entirely, due to glare.

[94] When a hazard becomes visible, a driver cannot respond immediately. Following detection, a driver still must undergo their perception-response time, or "PRT".

[95] Dr. Droll reviewed scientific studies which measured driver detection and response to roadway hazards at night. He concluded that a 2 second PRT would conservatively approximate the response time for a typical driver.

[96] Dr. Droll addressed the relationship between detection distance and PRT. He stated: "Many of the scientific measurements on driver detection of similar hazards show drivers often reach, or pass, the hazard before detection. Obviously, in these cases, the duration of the driver's perception response time is moot: the collision would have already occurred".

[97] The opportunity for avoiding collision is limited by the remaining distance available before impact. If Mr. Walter was traveling 90 km/h and detected the moose from an estimated 38.5 m, he would have no remaining distance for an avoidance maneuver, since accounting for 38.5 to 50 meters for response time would mean that he would already be past the object by the time he began an avoidance maneuver. The same would be true if the detection occurred at a distance of 44 meters.

[98] Dr. Droll concludes that: “Based on calculations of detection distance from headlight illumination, a review of scientific studies on driver detection to similar hazards and perception response time, and remaining distance for vehicle braking, both Mr. Wheeler’s and Mr. Walter’s collision with the moose was a natural outcome of the inherent constraints of visibility, reaction time, and available vehicle response.”

[99] In lengthy cross-examination, Dr. Droll’s analysis and opinions were not shaken. Dr. Droll opined that given PRT and estimates of detection distances, the speed that a vehicle would have to go would be far, far slower than any vehicle would be going on the highway in order to be able to potentially avoid this hazard, and if he was going that slow, then he would be a hazard himself. In further cross-examination, Dr. Droll stated that Mr. Walter had a harder time identifying a prone moose or a carcass as opposed to Mr. Wheeler seeing a walking, standing moose, but he opined that both Mr. Walter and Mr. Wheeler would have had exceptional difficulty detecting the moose carcass and the moose, respectively.

[100] Dr. Droll went on to consider whether any additional visibility aids would have lessened the likelihood of collision.

[101] Dr. Droll’s conclusions with respect to visibility aids are as follows:

- (a) Flashing hazard lights within northbound lane - If Mr. Wheeler had positioned his vehicle in Mr. Walter’s northbound lane immediately south of the moose carcass with flashing lights, Mr. Walter would have been expected to be able to stop behind the Wheeler Ford thus avoiding collision with the moose.
- (b) Flashing hazard lights on shoulder, headlights pointed towards moose - If Mr. Wheeler had positioned his vehicle on the shoulder, slightly south of the moose, and angled his vehicle such that the headlights would illuminate the moose carcass, more light would be cast on the moose carcass than would reach the carcass from Mr. Walter’s own vehicle as he approached. The hazard lights would allow Mr. Walter to prepare himself for a possible hazard ahead. The Walter vehicle would be capable of significant deceleration, possibly coming to a stop before the moose or reaching the moose at a significantly reduced speed, and allowing Mr. Walter to steer his vehicle around the moose on the right side of the lane.
- (c) Flares - Mr. Wheeler could have put flares out near the moose and/or behind his vehicle to alert approaching motorists. Flares have proven to be exceptionally effective at communicating potential hazards.
- (d) Flashlight - In addition to positioning his car south of the moose with flashing

hazard lights, Mr. Wheeler could have attempted to alert approaching motorists by waving a flashlight directly towards the oncoming vehicle. Such a waving light together with the flashing lights would further increase a driver's awareness and anticipation of potentially hazardous conditions ahead.

- (e) Flashing headlights - If Mr. Wheeler had positioned his vehicle either in the northbound lane or on the shoulder, turned off his flashing hazard lights, he could have flashed his headlights on and off or from low to high beam as approaching vehicles came near. This would alert drivers to pay attention, and distinguish the incident conditions from those of a stopped vehicle which is disabled with no other nearby hazards.

[102] Dr. Droll's conclusion with regard to visibility aids is as follows: "If Mr. Walter had approached the Wheeler Ford with flashing hazard lights, stopped in the northbound lane or on the shoulder, illuminating the moose with its headlights, Mr. Walter would be expected to have been able to stop his vehicle before collision or to have steered around the moose. Additional visibility aids such as flares, a waving flashlight, or actively flashing headlights would have all further helped alert Mr. Walter of the hazard ahead."

#### **IV. The Law**

##### **A. Negligence**

[103] The elements of negligence are well-established in Canadian jurisprudence. A successful action in negligence requires that the plaintiff demonstrate: (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3).

[104] The driver of a motor vehicle has a duty to conduct himself so as not to expose other users of the highway to unnecessary risk of harm. That driver will be at fault if he does not exercise the reasonable care, reasonable skill or reasonable self-possession that are required in the circumstances, whether they are in emergency or ordinary circumstances (*Sinclair v. Nyehold* (1973), 29 D.L.R. (3d) 614 (B.C.C.A.) at 618). In short, each driver owes a duty of care to not expose other drivers to unreasonable risk of harm.

[105] Conduct is negligent if it creates an objectively unreasonable risk of harm. In determining whether a person's conduct creates an objectively unreasonably risk of harm, the court must assess whether or not that person has exercised the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The Supreme Court of Canada outlined the standard of care in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at pp. 221-222

as follows:

Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[106] In *Berk v. Brent*, 2001 BCSC 1441, Stromberg-Stein J., as she then was, stated that the standard of care does not require perfection. Rather, the standard of care requires a person to act reasonably in the circumstances (at para. 28).

[107] Even if a defendant has created a hazard to other drivers, other drivers must exercise reasonable care to avoid that hazard. A driver has failed to exercise reasonable care in circumstances where that driver became or should have become aware of the hazard and had in fact a sufficient opportunity to avoid the accident and where a reasonably careful and skilful driver would have availed himself of that opportunity (*Walker v. Brownlee*, [1952] 2 D.L.R. 450 (S.C.C.) at p. 461). The onus is on the party alleging that a driver failed to exercise reasonable care to prove on the balance of probabilities that that driver did not meet the required standard of care (*Haase v. Pedro* (1970), 21 B.C.L.R. (2d) 273 (C.A.) at p. 279, aff'd [1971] S.C.R. 669).

[108] A court may draw an inference that a driver has breached the standard of care because that driver was driving in the wrong lane, but any such inference can be rebutted by evidence that the defendant's conduct was equally consistent with negligence and no negligence (*Pitts Enterprises Ltd v. Farkes*, 2005 BCCA 511 at paras. 3, 5, aff'g 2004 BCSC 1493).

[109] However, there is no automatic presumption of law that a party has been negligent solely on the basis that that party lost control of his car (*Chow-Hidasi v. Hidasi*, 2013 BCCA 73 at para. 20 and *Nason v. Nunes*, 2008 BCCA 203 at para. 14). Some older caselaw indicates that the mere fact that a driver has lost control of their vehicle and been in a collision gives rise to an inference of negligence (*Savinkoff v. Seggewiss* (1996), 77 B.C.A.C. 98 at para. 28). This case law has now been overturned by the Supreme Court of Canada's decision in *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, in which Major J. explicitly rejected the argument that the mere fact of a vehicle leaving a roadway gives rise to an inference of negligence. Whether or not such an inference can be drawn can only be determined after considering the relevant circumstances of the particular case, including the weighing of circumstantial evidence (at pp. 432-435). The burden of proof remains with the plaintiff (at p. 433).

[110] Generally, a plaintiff who suffers personal injury will be found to have sustained damage. Damages may include psychological injury but will not include minor, transient upsets (*Mustapha* at

paras. 8-9).

[111] As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the claimed loss "but for" the negligent act or acts of the defendant. Scientific proof of causation is not required. See *Clements v. Clements*, 2012 SCC 32 at para. 46 and *Hansen v. Sulyma*, 2013 BCCA 349 at paras. 22-28.

[112] A person's negligent actions can be the cause of the plaintiff's harm even if there are multiple causes that contribute to that plaintiff's injury or if the negligence of the plaintiff has contributed to her injury (*Skinner v. Fu*, 2010 BCCA 321 at paras. 19-23, rev'g 2009 BCSC 1828).

[113] The particular concerns that affect causation with respect to the duty to warn are discussed in further detail below.

## **B. Wildlife Accident Caselaw**

[114] With regard to wildlife collision cases, "no general propositions of law can be extracted from them except to say that these cases all depend on the facts" (*Pitts Enterprises* at para. 12). Whether a driver is negligent when he runs into wildlife on the road depends on all of the circumstances of the particular case (*Fajardo v. Horianopoulos*, 2006 BCSC 147 at para. 24).

[115] There are a substantial number of cases involving motor vehicle collisions with wildlife: see *Pitts Enterprises*; *Fajardo*; *Racy v. Leask*, 2011 BCSC 846; *Giffen v. Quesnel* (1995), 16 M.V.R. (3d) 252 (B.C.S.C.); *Berk*; *Skinner*; *Schneider v. Steure*, [1992] B.C.J. No. 491 (S.C.); *Maksymetz v. Plamondon*, [1988] 5 W.W.R. 281 (Man. C.A.); *399931 B.C. Ltd. v. MacPherson* (1995), 54 A.C.W.S. (3d) 194 (B.C.S.C.); *Blaine v. Hopkins*, [1990] B.C.J. No. 2724 (S.C.); and *Tabaka v. Greyhound Lines of Canada Ltd.*, 1999 ABQB 894. In these authorities, the following factors have been viewed as significant:

- the time of day when the accident took place;
- the visibility of the animal, including type and colour of fur, contrast with its surrounding environment, and direction of approach;
- road conditions and weather conditions, including the presence of rain, ice or fog, and whether the road and surrounding land was straight and level or at a slope;
- whether or not the accident occurred inside a moose or deer "warning zone", as indicated by signs, generally known to the public, or familiar to the drivers;
- the applicable speed limit on the road where the accident took place, and the actual speeds of the drivers;

- the lighting of the area where the collision took place, including the use of any headlights, highbeams, warning flashers, or other lighting equipment;
- whether traffic was heavy or light; and
- the condition of the drivers' vehicles.

[116] With respect to the so-called "moose alley" cases, a "moose alley" is described as being where it is more probable than not that moose will be found (*Racy* at para. 102 and *Fajardo* at para. 31).

[117] Canadian courts have reached different conclusions on whether a driver is required to significantly reduce their speed when entering a moose warning area. The Manitoba Court of Appeal has held that requiring a driver to reduce speed much below the posted speed limit because of the threat of the sudden appearance on the highway of a large animal, such as a moose or a deer, directly in front of a moving vehicle travelling with dimmed headlights is too high a standard, especially on roads in remote areas. See *Maksymetz* at p. 283.

[118] In contrast, the Newfoundland and Labrador Court of Appeal has held that the failure to decrease speed appreciably upon entering a moose warning area may create an unreasonable risk of harm, and that the appropriate standard of care may well require drivers to reduce vehicle speed in moose warning areas. See *Baker v. Russell*, 2008 NLCA 51 at paras. 31-32.

### **C. Duty to Warn**

[119] As stated above, the driver of a motor vehicle owes a duty of care to other users of the highway, and that driver will be at fault if he does not exercise the reasonable care, skill or self-possession that are required in the circumstances. In circumstances where a driver's management of his vehicle exposes other users of the highway to unnecessary risk of harm, that driver may be subject to a duty to warn other motorists of a potential hazard. To be effective, a warning must be near the danger it warns of and must perform the function of warning while the condition or danger exists (*Dagneault v. Hatton* (1995) 59 B.C.A.C. 55 at paras. 42-51). The standard for assessing reasonableness when discharging this duty to warn is objective (*Fajardo* at paras. 37-40).

[120] A driver who has collided with an animal must take reasonable steps to preclude the possibility of another motorist colliding with that wildlife, but the actions that will constitute reasonable steps will vary depending on the circumstances. Examples of the actions that may be reasonable were provided in *Schneider*, in which the defendant collided with a moose and that moose carcass was later hit by the plaintiff. The defendant did not stop after the collision, but slowed down, looked back through his rear window and believed the moose had been thrown or returned to the ditch area to the side of the road. The defendant continued on his way and phoned

the R.C.M.P. when he reached his destination. In the meantime, the plaintiff collided with the carcass of the moose, which was lying largely in her lane of travel. In this case, Robinson J. held that:

...the defendant was negligent in not taking additional steps to preclude, so far as reasonably possible, the possibility of another motorist encountering the moose either in a wounded or deceased condition. The defendant could have, as counsel for the plaintiff argues, made a U-turn and searched some stretch of the road with his headlights or at least stopped and backed up some distance, or perhaps waited in a stationary position for a reasonable time until an oncoming car approached to pass on a warning of the possibility of a moose in the path of that oncoming car. I appreciate that that is of limited value, but any one of these steps would substantiate the defendant's position that he was not negligent. It is to be noted that the defendant's passenger, upon inquiry from the defendant, disclaimed any injury.

(at para. 7)

[121] A driver is not negligent for a failure to warn other motorists of a hazard if the accident would have occurred regardless of the driver's reasonable steps to warn oncoming traffic. In other words, the plaintiff is still required to prove causation on the balance of probabilities. In *Fajardo*, Ross J. held that because the moose carcass was stretched over the entire oncoming traffic lane, the collision would have occurred in any event. In these circumstances, the plaintiff had failed to establish causation, and his action failed (at para. 40).

[122] However, causation will be proven if the plaintiff can demonstrate that the failure to take reasonable steps to warn other motorists caused or contributed to the plaintiff's injury. In *Hansen*, the Court of Appeal upheld a decision finding that the driver of a parked vehicle was negligent because he had failed to turn on his hazard lights, even though he was parked off the paved portion of the road. In the result, the driver of the parked vehicle was found to be negligent on the basis that if the parked driver had turned on his hazard lights, the intoxicated second driver would likely have been alerted to the presence of the parked vehicle and the collision would have been avoided or the plaintiff's injury would have been less severe. Significantly, the Court of Appeal held that "Even if deceleration would not have totally avoided the impact but would only have reduced Ms. Hansen's injuries, the 'but for' test was still met" (at para. 29).

## **V. Positions of the Parties**

[123] On behalf of Mr. Ziemer it is submitted that Mr. Wheeler was negligent for hitting the moose, and failed in his duty to warn other motorists of the hazard created by the moose carcass. It is strongly submitted that Mr. Wheeler had sufficient opportunity to take steps to warn other motorists. Mr. Walter bears some responsibility for not keeping a careful lookout as he drove north on the Highway.

[124] Mr. Ziemer, as a third party, denies his liability and submits that liability for the third collision

rests with Mr. Walter.

[125] The plaintiff Ms. Ziemer on her own behalf and on behalf of the infant Elliott Ziemer submits that Mr. Wheeler is negligent for striking the moose and creating a hazard, and for failing in his duty to warn other motorists of the hazard. It is also submitted that there should be some liability attributed to Mr. Walter for his negligence in hitting the moose carcass and veering into the lane of oncoming traffic and the Ziemer vehicle.

[126] Mr. Walter submits that he was not negligent for hitting the moose and veering into the oncoming lane thus colliding with Mr. Ziemer. Nor, he submits, was Mr. Ziemer negligent for failing to see the moose carcass or for the collision with the Walter vehicle. He has no further submissions with respect to whether Mr. Wheeler was negligent for failing to avoid impact with the upright moose. However, if Mr. Walter breached the standard of care and is negligent, then so was Mr. Ziemer as he was travelling at a higher speed in the same circumstances with oncoming glare.

[127] It is submitted by Mr. Walter that as a further alternative, Mr. Wheeler had a duty to warn and that there were steps that Mr. Wheeler could have taken to warn other drivers in the sufficient time that he had to discharge his duty to warn.

[128] On behalf of Mr. Wheeler it is submitted that if he was negligent with respect to impacting the moose or failing in a duty to warn, then the court should consider whether Mr. Walter and/or Mr. Ziemer were negligent. Had Mr. Walter been keeping a proper lookout he would have had an opportunity to avoid the collision. Mr. Ziemer's liability would be on the basis that he was travelling too fast and failing to keep a proper lookout. Apportionment should be 33 and 1/3% to each driver.

## **VI. Discussion**

### **A. Credibility and Reliability of the Witnesses**

[129] I agree with counsel for the plaintiff Mr. Ziemer that Mr. and Ms. Ziemer's testimony is unimpeachable. Mr. Ziemer's evidence was understated and given in a manner of meticulous caution. His evidence of seeing vehicles in the pull-outs at the top of Taylor Hill is accepted as is his evidence that he recalls seeing no other vehicles between the top of Taylor Hill and the location of the collision other than the approaching Walter vehicle.

[130] As his next memory after seeing the vehicles in the pull-outs is seeing the oncoming headlights, I conclude that if there had been a vehicle either parked on the shoulder of the northbound lane with various warning lights activated or traveling in the northbound lane towards him, he would have seen and recalled it. In this regard I note particularly the nature and extent of the lights on the Wheeler vehicle.

[131] Both Mr. and Ms. Ziemer were very credible witnesses. Mr. Ziemer's answer to the question, "And do you recall any flashing headlights, four-way flashers, anything like that as you were climbing the hill?" is given considerable weight. He said:

"No. I recall seeing some vehicles in the pullouts, but I don't recall seeing any oncoming traffic or flashing lights or anything".

[132] I find Mr. Walter to be a credible and forthright witness. In his testimony, he gave clear yes and no answers to questions when he was sure of the answers, and was also straightforward when he was not certain or did not recall. He had clear recall of matters prior to the collision, such as the traffic on the Highway when he entered from 228 Road and drove north, and less certain recall of events after the collision such as the sequence and timing of events after the impact. Mr. Walter was an accurate and reliable historian of the events prior to the third collision, and I accept his evidence of those events.

[133] Mr. Wheeler was not attempting not to be truthful with the court. Throughout lengthy cross-examination I cannot find that he intentionally answered any question inaccurately. However, in many respects I do not find Mr. Wheeler's evidence to be reliable. As all counsel described, Mr. Wheeler has to some extent innocently or unwittingly re-constructed some portions of the events of the evening of February 21, 2011 after his collision with the moose. Rather than state that he did not remember or was unsure of the answer to a question, he often attempted to piece together his prior evidence and statements along with the other evidence. His cadence and pauses in responding were indicative.

[134] I will specify below which portions of his evidence I do not accept, primarily because it is not supported by the evidence of any other witness, and also due to some internal inconsistencies. I note that Mr. Wheeler was distraught, shocked and confused when he returned to the scene of the third collision, states which make it more difficult to have accurate recall of difficult events.

[135] The three independent witnesses who arrived at the scene after the third collision, Messrs. Flintoff, Sears and Greenwood, were all credible and reliable. I accept their evidence as being forthright and dispassionate, and of assistance to the court in determining the factual issues which must be resolved.

### **B. The First Collision - Mr. Wheeler's Collision with the Moose**

[136] Mr. Wheeler testified that the moose ran across the Highway from his left as he travelled north at approximately 90 km/h. He stated that his headlights were on low beam because of oncoming traffic. I accept his evidence in this regard. As will be discussed below, I find that Mr. Wheeler was travelling north in that area some time prior to when Mr. Walter and Mr. Ziemer were on the stretch of highway between 228 Road and 230 Road. The oncoming traffic did not

include the Ziemer vehicle.

[137] When the moose came into his line of vision, he was barely able to get his foot on the brake. He had his foot on the brake, slowing, at the time of impact.

[138] As indicated above, whether a driver is negligent when he runs into wildlife on the road depends on all of the circumstances of the particular case (*Fajardo* at para. 24). In this case the most significant factor was visibility.

[139] The other factors did not contribute to the circumstances leading to the collision. Mr. Wheeler was driving at a safe speed at or below the speed limit and the traffic was very light at the time of the collisions. The weather and road conditions were good for winter driving. His vehicle was in good condition and equipped for winter driving in the north. Further, although moose were common in the area, the collisions did not occur in a moose alley. As in *Fajardo*, the collisions happened in an area where it was possible but not more probable than not that moose would be encountered (at para. 31).

[140] However, as set out in the evidence of Dr. Droll, visibility was problematic in these circumstances. I rely on the report of Dr. Droll. He considered detection, perception response time, and potential vehicle maneuvers. He concludes that Mr. Wheeler's collision with the moose was a "... natural outcome of the inherent constraints of visibility, reaction time, and available vehicle response."

[141] As in *Pitts Enterprises*, the moose in this case was not visible until it was too late to take evasive action. The moose had a dark pelt, and was contrasted against a dark background. Further, the road was not illuminated by artificial light, so the moose would not be illuminated until it was within the reach of the Wheeler vehicle's low beam headlights. Given Mr. Wheeler's speed of 85 to 95 km/h, he would not have had an opportunity to take evasive maneuvers in the time between seeing the moose and colliding with it.

[142] The standard of care for this stretch of highway is the same as it is generally throughout the Peace River area, namely that wildlife including moose are a known hazard generally. A driver must be actively observing the road and must be equipped to perceive and respond to possible hazards including moose, for example, by having working headlights and functioning brakes. However, that does not require each driver to be able to see animals in circumstances where they could not be expected by a reasonable driver, such as before an animal suddenly runs in front of a vehicle or when an animal is not readily visible such as a dark, prone carcass on a dark highway at night. The standard of care does not require a driver to take unreasonable precautions.

[143] Taking into account all of the circumstances of Mr. Wheeler's collision with the moose

including that he was travelling below the speed limit on a familiar road, that the location of the collision was not a moose alley, and that the dark animal was minimally visible in the dark against low beam headlights, I find that Mr. Wheeler did not breach the standard of care by colliding with the moose. He is not negligent for this collision.

### **C. The Second Collision - Mr. Walter's Collision with the Moose**

[144] I come to the same conclusion with regard to Mr. Walter's negligence in hitting the moose carcass and find that he was not negligent for that collision.

[145] Mr. Walter lived close to the location of the collision and was therefore very familiar with the area. I accept his evidence and find that he was travelling at a safe speed below the speed limit, paying attention to his driving and the road in front of him, and keeping a proper lookout.

[146] Similarly as with Mr. Wheeler's collision with the moose, visibility is the most relevant circumstance. I rely on Dr. Droll's expert evidence that the collision was a natural outcome of inherent constraints. However that conclusion is stronger in the case of Mr. Walter as the moose carcass was a prone stationary dark mass lying mostly in his lane on dark asphalt. Mr. Walter had his headlights on low beam as the Ziemer vehicle was approaching, and thus was faced with glare from the oncoming Ziemer vehicle as well as an inherent inability to detect the carcass. As indicated by the expert evidence, a driver's perception response time is further reduced in the case of glare.

[147] The circumstances in this case are similar to *Pitts Enterprises*, in which the plaintiff collided with a moose and swerved into the opposite lane, resulting in a head-on collision with the plaintiff. Powers J. held that the defendant driver was not negligent on the basis that moose was not visible until it was too late to act:

In the present case, the moose was dark, almost black with non-reflective eyes. The defendant was simply unable to see the moose within time to stop. I have already found that this is not an area which could be described as a "moose crossing" or "moose alley" as referred to in some of the cases. I also find that given the roads conditions, lighting conditions and the possibility, but not necessarily the expectation that moose would be on this road, the defendant was not negligent in driving at 90 to 95 kilometres per hour. Driving at 80 kilometres per hour would not have made a material difference. The earliest the moose would have been visible to the defendant was when the defendant's lights would have illuminated the moose. The evidence is that the lights illuminated the highway 40 to 50 yards ahead. Even if the moose were not a dark object, as it was, at best the defendant would only have been able to see the moose a fraction of a second before he actually did. The headlights illuminated a distance of 40 to 50 yards, which is 120 to 150 feet. Even travelling at 80 kilometres an hour, he still would have travelled approximately 73 feet per second. This would not have made a material difference in this accident.

(at para. 35)

[148] A comparison with the circumstances of Mr. Flintoff is not of assistance. Although Mr. Flintoff did see the moose carcass when he approached, he was travelling at a lower speed as a lead vehicle, using his high beams and did not have glare from oncoming vehicles.

[149] The facts of Mr. Walter's collision with the moose carcass are well discussed in the report of Dr. Droll. He fully considers the ability of a driver such as Mr. Walter to detect a hazard by examining headlight illumination, contrast, and glare in these circumstances. Dr. Droll determined that the PRT is such that the collision would have already occurred by the time the driver has detected the hazard. I accept his conclusion that "it is expected that a typical driver in Mr. Walter's situation would have very likely collided with the moose."

[150] Mr. Walter therefore did not breach the standard of care by colliding with the moose in these circumstances.

#### **D. The Third Collision - Mr. Walter and Mr. Ziemer Collide**

[151] Mr. Ziemer observed the oncoming headlights jump into his southbound lane at about 60 feet or 18 meters from his vehicle which was approaching at approximately 100 km/h, or approximately 28 meters per second. It is apparent that, together with the approach time of the Walter vehicle towards the Ziemer vehicle, there was no opportunity for Mr. Ziemer to respond to the oncoming hazard in his lane of travel.

[152] With regard to Mr. Ziemer's ability to see the moose carcass on the road, it is accepted that the carcass was mostly in the northbound lane. The analysis and conclusion of Dr. Droll are also applicable to the Ziemer vehicle: Mr. Ziemer's ability to detect the prone, dark carcass against the dark asphalt background was constrained by the glare of the headlights of the Walter vehicle.

[153] I find that both Mr. Ziemer and Mr. Walter were not negligent in these circumstances for their collision.

#### **E. Duty to Warn - Mr. Wheeler's Conduct after the First Collision**

[154] A driver who has collided with wildlife must take reasonable steps to preclude the possibility of another vehicle colliding with that wildlife. The actions which will constitute reasonable steps will vary depending on the circumstances. The time available to the driver who has collided with the wildlife is an important factor to consider in assessing reasonableness.

[155] Mr. Wheeler does not dispute that he had a duty to warn; he says that he had no opportunity to warn because the third collision occurred before he stopped to check his vehicle.

[156] In order to resolve the issue of whether Mr. Wheeler had sufficient time to warn other motorists, the factual issues of the length of time between Mr. Wheeler hitting the moose and the

third collision, and of the distance of Mr. Walter behind Mr. Wheeler must be resolved.

[157] It is also Mr. Wheeler's position that he discharged his duty to warn other drivers of the hazard, the moose carcass on the Highway. He testified that he returned to the scene of his collision with the moose as soon as possible and within 5 minutes. I am satisfied that Mr. Wheeler was aware that the moose constituted a hazard to other drivers based on his eventual return to the scene of the collisions.

[158] In order to resolve the issue of whether or not Mr. Wheeler fulfilled his duty to warn of the hazard, it is necessary to examine the observations of the other drivers in the vicinity.

[159] I find that that the entirety of the evidence of Messrs. Walter, Ziemer, Flintoff, Sears, and Greenwood is neither consistent with nor supportive of the evidence of Mr. Wheeler in key areas. It is their evidence which I prefer. These are my reasons.

[160] In order to commence the analysis I start with a blank map of the area between 230 Road and 228 Road. There are three relevant time frames provided by the evidence.

[161] The first time frame is after Mr. Wheeler hit the moose and pulled over to the side of the road to check his vehicle but before the Walter-Ziemer collision occurred. His evidence is that approximately three, or a line or string of vehicles was heading southbound at that time and these vehicles passed him. As he was slowing to a stop and pulling over, he saw in his rear view mirror a puff of snow to the left side of the road. It was illuminated in the headlights and taillights of those southbound vehicles. He assumed that a vehicle had gone off the road, thus creating the puff of snow. Other vehicles stopped at that location.

[162] The location where he stopped at the side of the road was 100-150 yards north of the moose which was lying flat on the Highway. Mr. Wheeler's vehicle at this point was in his words, "definitely a lightshow". After he completed his vehicle check, he testified that he got back in his vehicle and travelled at most another 200 yards north before turning around and returning to the accident scene. According to his testimony, he therefore travelled at most a total of 350 yards north of his collision with the moose before turning around to head south back to the scene of the moose on the road. 350 yards is the equivalent of 320 meters. 230 Road is 750 meters north of the location of the Walter-Ziemer collision, and would be further north of the scene of the collision with the moose. Thus Mr. Wheeler's movements would have been entirely in the area south of 230 Road and south of the slight curve to the west.

[163] Mr. Ziemer and Mr. Walter provide evidence which is consistent between those two drivers and which differs from Mr. Wheeler's evidence about the events on the Highway between 228 Road and 230 Road during this timeframe between the first and third collisions. As Mr. Ziemer travelled

south, after having ascended Taylor Hill and passing the pullouts, he saw no vehicles parked on the side of the road and no vehicles with lights until he saw the headlights which then jumped into his lane.

[164] As Mr. Walter entered onto and travelled north from 228 Road, he saw no vehicles on the side of the road, and no vehicles with lights visible except for the Ziemer vehicle travelling southbound toward him. If Mr. Wheeler had been on the Highway before 230 Road, stopped or travelling in either direction, Mr. Walter would have seen him.

[165] The third collision occurred more or less 750 meters south of 230 Road. Again, 228 Road and 230 Road are numbered according to the old mileage system, and the two crossroads are exactly 2 miles, or 3.2 kilometers, apart. Thus, the point of the accident was approximately 2,450 meters north of 228 Road. A speed of 90 km/h is equivalent to 25 meters per second. It would have taken Mr. Walter approximately 110 seconds to traverse the distance from 228 Road to the accident site (98 seconds to traverse this distance plus 12 seconds to get up to speed). In this entire time frame, he did not see any vehicles proceeding northbound ahead of him. The Alaska Highway from 228 Road to just south of 230 Road is straight. I conclude that Mr. Walter did not see Mr. Wheeler because Mr. Wheeler was out of sight, having driven north of 230 Road.

[166] I prefer the evidence of Messrs. Ziemer and Walter. I conclude from their evidence that at the time of the collision between them and for the duration of their travel south from 230 Road and north from 228 Road respectively, they were the only vehicles on that stretch of highway.

[167] The second relevant timeframe is the period between the Walter-Ziemer collision and the arrival of Mr. Sears and Mr. Flintoff, who were the first witnesses southbound and northbound respectively to arrive at the scene of the Walter-Ziemer collision. Mr. Sears and Mr. Flintoff both testified that they recall no vehicles parked on the side of the Highway. As Mr. Sears drove south having crested the Taylor Hill and come around the bend towards the straight stretch south of 230 Road, he did not see the collision. He did not see any other vehicle except the Schlumberger convey.

[168] As Mr. Flintoff travelled north from 228 Road, he did not see the collision. At first the moose then the motor vehicle accident came into view. He did not observe any vehicle and no vehicle or any lights matching the description of the Wheeler vehicle. It was his role as lead driver to be aware of the road ahead. I put significant weight on his evidence. Mr. Wheeler was not there to be seen.

[169] The third relevant timeframe is the period while the witnesses waited for emergency responders. The evidence for this timeframe was provided by Mr. Sears, Mr. Flintoff, and Mr. Greenwood, whose evidence indicated that there was a line of cars parked in the southbound

direction behind the Sears vehicle. At this time Mr. Flintoff was on the telephone to 911.

Mr. Wheeler arrived and parked in the line of southbound vehicles about fifth or seventh. He then located Mr. Flintoff and waited for him to finish his telephone conversation with the 911 operator.

[170] Neither did any of Messrs. Flintoff, Sears, or Greenwood observe a vehicle stopped on the shoulder or driving north or south bound north of the third collision in the third scenario above. Mr. Sears testified that Mr. Wheeler arrived at the scene more than a couple of minutes after he arrived. Mr. Wheeler spoke to Mr. Flintoff as he completed the 911 call at 7:26 p.m., and had waited a couple of minutes for the call to end.

[171] From these observations, I conclude that after Mr. Wheeler pulled over to check his vehicle after the moose collision, he drove further north than the distance he described. If he had travelled 200 yards after his vehicle check or 350 yards total after the collision, his vehicle would have been observed by Messrs. Walter and Ziemer as they approached each other. It would also have been observed by the three independent witnesses as they approached the scene of the third collision. This is particularly so given the quantity and luminance of the lighting built into his truck which is illuminated when driving and when parked.

[172] Mr. Wheeler submits that the Ziemer vehicle was the last of this group of southbound vehicles, and that Mr. Walter was 100 meters behind him. Thus the puff of snow he saw was the Walter-Ziemer collision. Since it occurred 10 to 15 seconds after Mr. Wheeler hit the moose, he had no opportunity to warn.

[173] I do not accept the submission that the puff of snow was the Walter-Ziemer collision. Again, it is entirely inconsistent with the evidence which I prefer of Mr. Walter whose evidence establishes that there were no other vehicles on that stretch of the Highway at the time of the Walter-Ziemer collision. Specifically, I accept Mr. Walter's evidence that neither the Wheeler vehicle nor two unidentified vehicles in front of the Ziemer vehicle were on the road at that time.

[174] Further, the conclusion that the puff of snow was the Walter-Ziemer collision is an example of reconstruction. There is no evidence that Mr. Ziemer was in a line of vehicles at the time he collided with Mr. Walter, and no evidence that Mr. Wheeler's truck, slowing or parked, was observed by anyone at the scene.

[175] From the entirety of the evidence and the conclusion that Mr. Wheeler was north of 230 Road and out of sight during the time of the third collision and the arrival of the independent witnesses, a time-line can be determined. The time of the 911 call is known; Mr. Flintoff's arrival time at the scene of the collision can be estimated; Mr. Walter's driving time for the distance of 2,450 meters from 228 Road to the collision scene can be calculated; and Mr. Wheeler's evidence of the time from his collision to the stop and the time taken for the vehicle check is taken into

account.

[176] I conclude that the Walter-Ziemer collision occurred at approximately 7:11 p.m. in the following sequence of events:

- 7:02 p.m. - Mr. Wheeler collides with the moose;
- 7:03 p.m. - Mr. Wheeler comes to a stop and checks his vehicle;
- 7:08 p.m. - Mr. Wheeler continues to drive north;
- 7:09 p.m. - Mr. Wheeler drives north past 230 Road and is out of sight to drivers to the south;
- 7:09 p.m. - Mr. Walter leaves home and sees no vehicles as he enters the Highway from 228 Road;
- 7:11 p.m. - Mr. Walter collides with the moose carcass, loses control and veers into the oncoming southbound lane where he collides with Mr. Ziemer;
- 7:14 p.m. - Mr. Flintoff arrives at the collision scene and waves through 2 vehicles in his convoy;
- 7:15 p.m. - Mr. Flintoff calls 911;
- 7:23 p.m. - Mr. Wheeler arrives at the scene of the third collision, finds Mr. Flintoff, and waits for him;
- 7:26 p.m. - The 911 call ends and Mr. Flintoff speaks with Mr. Wheeler; and
- 7:39 p.m. - The first emergency responders arrive.

[177] Minimum times have been utilised in this timeline. For example, Mr. Wheeler could have resumed his travel north earlier than 7:08 and still been outside the view of Mr. Walter as he entered 228 Road. Mr. Wheeler could have taken closer to 10 minutes rather than 5 minutes to complete his vehicle check.

[178] I conclude that the latest time possible for Mr. Wheeler's collision with the moose was 7:02 pm. It was therefore at least 21 minutes after he hit the moose that he arrived at the scene of the third collision.

[179] More importantly, there was a minimum of 9 minutes between the collision of Mr. Wheeler and the moose, and the Walter-Ziemer collision. Mr. Wheeler's duty to warn arose when he hit the moose. At that time he should have reasonably concluded that he had, although inadvertently, created a hazard on the road. Nine minutes was ample opportunity for him to have taken steps to

warn other motorists.

[180] Warning other motorists of the hazard that he had good reason to believe was lying on the road was a duty. The duty arose at the time that he hit the moose. Not utilising the available 9 minutes to fulfill that duty was a breach of his duty. That breach caused the collisions between Mr. Walter and the moose and the Walter-Ziemer vehicles.

[181] Mr. Wheeler had options regarding the manner of warning. He could have walked but testified that he did not walk back because he did not think it was a necessity and it was cold out; it was not a problem to drive back. He could have backed his vehicle up on the shoulder. He testified that he understood the use and value of flares.

[182] It was neither prudent nor necessary to check his vehicle before warning other motorists. However, if it is accepted that Mr. Wheeler, in the agony of collision, made an erroneous decision to attend to his vehicle before fulfilling his duty to other motorists, there remained at least 3 minutes, and more if he had had a sense of urgency in checking his vehicle, between the time that Mr. Wheeler completed his vehicle check and the Walter-Ziemer collision. His second decision, to drive away after checking his vehicle rather than take steps to warn from that location, led directly to the collisions of Mr. Walter with the moose and thus the Walter-Ziemer collision.

[183] Turning around was not necessary in order to warn other motorists, particularly given that Mr. Wheeler had flares and he had an extraordinarily well-lit truck. Taking the time to turn around is also inconsistent with a timely exercise of the duty to warn. However, as it is Mr. Wheeler's evidence that it was not safe to turn around where he had stopped and he needed to go further north to find a safe place to turn, I will examine that evidence.

[184] I do not accept his evidence of the difficulty in finding a place to turn. His evidence was that he stopped 100-150 or 200 yards from the moose which is a distance of 91 to 182 meters. 230 Road was 750 meters north of the Walter-Ziemer collision and some distance further (about 60 feet) from the moose hit, which is a total of 768 meters. Mr. Wheeler therefore had at least 586 meters before 230 Road. Even if that one-half kilometer did not afford a safe turning area, he could have turned at 230 Road if his intention was to turn and drive south. His stated intention is not confirmed by his actions after he collided with the moose.

[185] The report of Dr. Droll lists steps that Mr. Wheeler could have taken to warn other motorists of the hazard. They include engaging hazard lights, pointing headlights or a flashlight towards the moose, using flares, and flashing headlights at oncoming traffic. Many of those steps could have been taken at the location of his stop. Mr. Ziemer in particular would have been warned if Mr. Wheeler had flashed his headlights at him as he drove south. Mr. Walter would have seen flashing lights down the Highway past the moose, and both drivers would have seen the flares.

[186] In *Francoeur v. Thibodeau*, 2002 NBQB 97 the Court of Queen’s Bench of New Brunswick examined the kind of actions that could satisfy the duty to warn following a wildlife collision. The trial judge estimated that a period of approximately 12 minutes had elapsed between the time of the defendant driver’s initial collision with a moose and the plaintiff’s subsequent collision with that moose carcass (at para. 41). During this time, the defendant pulled his vehicle into the right-hand shoulder of the road, engaged all his lights and hazard flashers, and began to install his safety triangles (at paras. 28-29, 33, 49). In the result, the trial judge was satisfied that “all of the time spent by Mr. Thibodeau between the two collisions, was time prudently and reasonably necessary to secure the scene and warn other users” (at para. 42).

[187] Mr. Wheeler failed to take any reasonable or entirely possible steps over the period of approximately 9 minutes before the third collision. He did not return to the scene until a minimum of 21 minutes had passed. I find that in these circumstances, his failure to take any steps to warn other motorists of the hazard posed by the moose carcass fell below the standard of care.

[188] I further find that but for Mr. Wheeler’s failure to warn other motorists, the Walter-Ziemer collision would not have occurred or would have been likely to result in significantly decreased injury.

[189] This is not a case like *Fajardo*, in which the collision would have occurred even if the defendant driver had taken reasonable steps to warn other motorists (at para. 40). Unlike in *Fajardo*, the hazard in this case did not take up the entire highway lane. Further, because the weather was clear and Mr. Walter and Mr. Ziemer could see each other approaching, it is unlikely that they would have collided if they had taken evasive action to avoid the moose, which also distinguishes this collision from the accident in *Fajardo*.

[190] Most importantly, I find that both Mr. Ziemer and Mr. Walter would have been likely to avoid or lessen the impact of the collision if they had been warned that there was an approaching hazard. I accept Mr. Walter’s evidence that he would have slowed if he had seen flashing lights which he would have understood as a warning. I also find that Mr. Ziemer was an attentive driver and that he would have been likely to respond to a warning signal from Mr. Wheeler. Both of these findings are supported by the persuasive expert evidence of Dr. Droll which indicated the ways in reasonable drivers could be assisted by roadside warnings of an upcoming hazard.

[191] In conclusion, I find that Mr. Wheeler breached his duty to warn other motorists of the hazard posed by the moose carcass, and that this caused the Walter-Ziemer collision.

### **E. Conclusions on Liability**

[192] I therefore find that: Mr. Wheeler was not negligent for the collision with the moose;

Mr. Walter was not negligent for the collision with the moose or for crossing the center line and colliding with Mr. Ziemer; and Mr. Ziemer was not negligent for the collision with Mr. Walter. No liability arises from these collisions.

[193] Mr. Wheeler, I find, was negligent because he breached his duty to warn other motorists of the moose, which I find he knew was a hazard on the Highway after he collided with the moose. But for his negligence the accident could have been averted. He is liable for this negligence.

#### **F. Liability of the Corporate Defendants AAEA**

[194] One outstanding issue to be addressed is the liability of the corporate defendant, AAEA. Mr. Wheeler argues that s. 346 of the *Business Corporations Act*, S.B.C. 2002, c. 57 precludes the claims of the plaintiffs Jesse and Elliott Ziemer. For the reasons that follow, I disagree with Mr. Wheeler's interpretation, and find the defendant AAEA jointly liable with Mr. Wheeler to all three plaintiffs.

[195] The vehicle that Mr. Wheeler was driving at the time of the collision was registered to AAEA. Mr. Wheeler testified that this was his company. Mr. Wheeler is listed as the sole Director and President and Secretary of this company in the BC Company Summary filed with BC Registry Services on June 19, 2008. This company was dissolved on January 30, 2012 for a failure to file. At the time of dissolution, Mr. Wheeler was still the sole director and officer listed in the material filed with BC Registry Services.

[196] Although the vehicle was registered to AAEA, the evidence at trial was that Mr. Wheeler used this as a personal vehicle as well as a business vehicle. On the night in question, he was using the vehicle solely as a personal vehicle, driving to his home at Charlie Lake from a family visit.

[197] The owner of a vehicle may be vicariously liable for the negligence of a driver as a result of that driver's deemed employment by operation of s. 86(1) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. However, s. 86(2) provides that nothing in paragraph (1) relieves a negligent driver from his or her liability for the loss or damage resulting from an accident. Obviously liability rests with the negligent driver and the statute does not extinguish that driver's liability (*Yeung (Guardian ad litem of) v. Au*, 2006 BCCA 217 at para. 35, aff'd *Transportation Lease Systems Inc. v. Yeung (Litigation guardian)*, 286 D.L.R. (4th) 193 [S.C.C.]). In other words, in ordinary circumstances both Mr. Wheeler and AAEA would be liable for any damage caused by Mr. Wheeler's negligence.

[198] Section 346(1) of the *Business Corporations Act* provides that despite the dissolution of a company under that Act a legal proceeding may be commenced against that company within two years of its dissolution and that such proceedings may be conducted as if the company had not

been dissolved. There are very few cases decided under s. 346. However, it is clear that because of s. 346 it is no longer a defence to claim that a company has dissolved and has no assets (*Carmanah Pacific International Industries Corp. v. Westex Timber Mills Ltd.*, 2009 BCSC 1102 at para. 36).

[199] Section 346(1) of the *Business Corporations Act* causes AAEA to remain liable under s. 86(1) of the *Motor Vehicle Act* despite its dissolution. The remedies that may be taken against AAEA are laid out elsewhere in the *Business Corporations Act*, including ss. 347 to 349. Although these remedies may be impracticable in certain circumstances they are available to an injured plaintiff.

[200] Mr. Wheeler has noted that Raymond Ziemer's claim was brought before the date that AAEA was dissolved, but the claims of Jesse Ziemer and Elliott Ziemer were brought later on after AAEA's dissolution. Based on a strict reading of s. 346, Mr. Wheeler argues that because paragraph (a) explicitly deals with proceedings commenced before a company's dissolution, and because paragraph (b) deals with proceedings that are commenced after dissolution, paragraph (a) does not apply to the claims of Jesse Ziemer and Elliott Ziemer.

[201] I do not agree with Mr. Wheeler's interpretation of the statute. Section 346(1)(b) provides that as long as the litigation has been brought within two years after the dissolution of a company, legal proceedings may be brought against that company. Section 346(1)(a) provides that if proceedings are brought against the company, then they continue as if the company had not been dissolved. The structure of s. 346(1) is one continuous sentence, which makes it clear that these provisions are to be read together and that the subsequent clause, paragraph (b), is to be read into the prior clause, paragraph (a). Therefore, proceedings that are commenced under s. 346(1)(b) may proceed as if the company had not been dissolved.

[202] Mr. Wheeler has argued that s. 346(1) does not state that judgment can be brought against a dissolved corporation. Again, I disagree with this interpretation. Although paragraph (b) does not explicitly state that judgment may be taken against a dissolved corporation, the purpose and structure of the entire provision make it clear that judgment can be acquired from a dissolved corporation. If it were not possible to collect judgment in the course of such proceedings, then the right to commence proceedings would be a meaningless right. The entire object of s. 346 requires that judgment can be taken from a dissolved corporation if a plaintiff is successful. This interpretation is supported by reading s. 346 alongside s. 349, which provides a mechanism for plaintiffs to collect judgment from dissolved corporations.

[203] The claims brought against AAEA by Raymond Ziemer, Jesse Ziemer and Elliott Ziemer are valid under s. 86 of the *Motor Vehicle Act* and s. 346 of the *Business Corporations Act*. AAEA is

jointly liable to each of the plaintiffs along with Mr. Wheeler.

[204] Given my finding that Mr. Walter is not liable for the plaintiffs' damages, the defendant W. Aron Ventures Ltd. is not vicariously liable to the plaintiff under s. 86 of the *Motor Vehicle Act*.

## **VII. CONCLUSIONS**

[205] In Action No. 1139170, Mr. Ziemer is entitled to judgment against the defendants Wheeler and AAEA. His claim against Mr. Walter and W. Aron Ventures Ltd. is dismissed. The third party claims against Mr. Walter and W. Aron Ventures Ltd. are dismissed. The claim by Mr. Walter and W. Aron Ventures Ltd. that they are entitled to judgment in their third party claim against Mr. Wheeler and AAEA for indemnity is dismissed.

[206] In Action No. 1242042, Ms. Ziemer on her own behalf and on behalf of the infant Elliott Ziemer are entitled to judgment against the defendants Mr. Wheeler and AAEA. The claims against Mr. Walter and Aron Ventures are dismissed. The third party claim against Mr. Ziemer is dismissed.

[207] If counsel cannot otherwise agree they should make arrangements with Supreme Court Scheduling to speak to the matter of costs.

*“The Honourable Madam Justice Watchuk”*