

CANADA / JUDGMENT

Basmadjian v. Kovac

2025 BCCA 360

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 360 Basmadjian v. Kovac

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Basmadjian v. Kovac,

2025 BCCA 360

Date: 20251023

Docket: CA49996

Between:

Annahis Basmadjian

Appellant

(Plaintiff)

And

Anna Lidia Kovac, Marie Kovac, and WS Leasing Ltd.

Respondents

(Defendants)

Before:

The Honourable Chief Justice Marchand

The Honourable Justice Iyer

The Honourable Justice Mayer

On appeal from: An order of the Supreme Court of British Columbia, dated

June 13, 2024 (Basmadjian v. Kovac, Vancouver Docket M1912317).

Counsel for the Appellant:

G. Cameron

Counsel for the Respondents:

V.G. Critchley, K.C.

Place and Date of Hearing:

Vancouver, British Columbia

September 3, 2025

Place and Date of Judgment:

Vancouver, British Columbia

October 23, 2025

Written Reasons by:

The Honourable Chief Justice Marchand

Concurred in by:

The Honourable Justice Iyer

The Honourable Justice Mayer

Summary:

The appellant pedestrian was struck by the respondent driver while crossing the road in a marked crosswalk. When the accident occurred, the respondent had overtaken a bus that was stopping at the crosswalk to allow the appellant to cross. At the liability only trial, the jury found the appellant 90% and the respondent 10% at fault for the accident. The appellant appeals, arguing the trial judge erred by failing to instruct the jury that she had the right of way and that the respondent had breached s. 179(3) of the Motor Vehicle Act.

Held: Appeal allowed. Liability apportioned 70% to the respondent and 30% to the appellant. The material facts were not in dispute. The trial judge was therefore required to determine as a question of law that (1) the appellant had the right of way and (2) the respondent breached s. 179(3). The judge was required to instruct the jury accordingly. Failure to do so was a material misdirection that may have affected the verdict.

Reasons for Judgment of the Honourable Chief Justice Marchand:

Introduction

- [1] On May 19, 2019, the appellant pedestrian, Annahis Basmadjian, was struck by the respondent driver, Anna Lidia Kovac, while crossing Marine Drive in West Vancouver. At the liability only trial, the jury found Ms. Basmadjian 90% and Ms. Kovac 10% at fault for the accident.
- [2] Ms. Basmadjian appeals, arguing the trial judge erred by failing to instruct the jury that Ms. Basmadjian had the right of way and that Ms. Kovac had breached s. 179(3) of the Motor Vehicle Act, R.S.B. 1996, c. 318 [MVA]. Further, or in the alternative, Ms. Basmadjian contends the verdict is perverse. Ms. Kovac maintains the charge to the jury was error free and, in any event, the jury's division of liability was understandable and appropriate.
- [3] If the appeal is allowed, the parties sensibly ask this Court to fix their respective shares of the liability. The facts are not in dispute, so the Court is well-positioned to do so. Further, it is in the interests of justice to bring finality to the litigation and preserve scarce court resources for other matters.
- [4] For the reasons that follow, I am of the view the judge was required to determine, as a question of law, that (1) Ms. Basmadjian had the right of way and (2) Ms. Kovac had breached s. 179(3) of the MVA. The judge was required to direct the jury accordingly.
- [5] The misdirection on these two important issues may have affected the jury's apportionment of liability. I would therefore allow the appeal and set aside the jury's verdict. I would apportion liability at 70% to Ms. Kovac and 30% to Ms. Basmadjian. There is no need to address whether the verdict was perverse.

The Legislative Context - s. 179 of the Motor Vehicle Act

- [6] In my view, this appeal largely turns on the proper interpretation and application of s. 179 of the MVA. It addresses the rights of way and duties of vehicles and pedestrians in circumstances such as those at issue. To provide the necessary legislative context for the analysis that follows, I set out the relevant subsections below:

Rights of way between vehicle and pedestrian

179(1) Subject to section 180 [which is not applicable here], the driver of a vehicle must yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that the pedestrian is in danger.

- (2) A pedestrian must not leave a curb or other place of safety and move into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.

- (3) If a vehicle is slowing down or stopped at a crosswalk or at an intersection to permit a pedestrian to cross the highway, the driver of a vehicle approaching from the rear must not overtake and pass the vehicle that is slowing down or stopped.

[]

Background

- [7] This is a somewhat unusual case because the events at issue were captured on video and are not in dispute.
- [8] The parties filed an agreed statement of facts, photographs of the scene and a number of video clips showing the positions and actions of the parties prior to the accident. The jury also heard evidence from the parties, their accident reconstruction experts and Ms. Kovac's spouse, who was a passenger in the front seat of the pickup Ms. Kovac was driving at the time of the accident. A basic outline of the events at issue follows.
- [9] At approximately 6:45 pm on May 19, 2019, Ms. Basmadjian was standing on the northwest corner of Marine Drive and 23rd Street at a marked crosswalk. At that location, Marine Drive runs east-west with two lanes of travel in each direction. Approaching the intersection from the east, Marine Drive bends gently to the left. There is a bus stop just to the west of the intersection. The conditions were clear and dry.
- [10] The crosswalk was equipped with pedestrian-controlled lights that flash when activated. The lights were not functioning from February 11, 2019 to April 11, 2019, but were functioning from April 11, 2019 onward. In other words, they were functioning on the day of the accident.
- [11] Ms. Basmadjian was standing next to the pole that was fitted with the pedestrian-controlled lights. She lived in the area and was familiar with the crosswalk. She used it almost every day.
- [12] Ms. Basmadjian was not sure whether the lights were functioning but did not activate them. She was looking down at her phone. A west-bound bus was approaching the intersection in the right lane. As the bus slowed to stop for Ms. Basmadjian, she looked up from her phone and began walking then slowly jogging in front of the bus to cross Marine Drive. She testified she jogged because she did not want to inconvenience the people on the bus and thought it was safe to cross.
- [13] Ms. Basmadjian was already on Marine Drive by the time the bus came to a complete stop just over the zebra stripes that formed the crosswalk. According to the agreed statement of facts, Ms. Basmadjian crossed "in the crosswalk". The video shows Ms. Basmadjian actually crossed just to the west of the zebra stripes.

- [14] As Ms. Basmadjian crossed in front of the bus, she looked to her right but not to her left. When she entered the left lane, she struck the right front side of Ms. Kovac's pickup truck as it passed the bus.
- [15] Like the bus, Ms. Kovac was travelling westbound. She was overtaking the bus at or slightly below the posted speed limit of 50 km/hr. She was aware she was approaching a crosswalk. She knew she was not allowed to pass a vehicle that was stopped at a crosswalk for a pedestrian. She assumed, incorrectly, the bus in the right lane was slowing to stop at the bus stop to the west of the intersection and crosswalk.
- [16] Although the bus driver sounded the horn very shortly before the impact, neither Ms. Basmadjian nor Ms. Kovac saw the other until it was too late.
- [17] Ms. Basmadjian sustained significant injuries that required hospital treatment. The parties resolved the quantum of Ms. Basmadjian's injuries and loss prior to trial.
- [18] Liability was the sole issue for the jury.

The Engineering Reports

- [19] The bus was equipped with multiple video cameras, so there are five time-stamped video clips that capture important data regarding the accident. As a result, the parties' expert witnesses had a great deal of information to work with.
- [20] Ms. Kovac obtained and filed an expert report from Kurt Ising dated October 23, 2023. In reply, Ms. Basmadjian obtained and filed an expert report from Donald Rempel dated April 22, 2024. As mentioned above, both Mr. Ising and Mr. Rempel testified.
- [21] Mr. Ising's report summarized his key conclusions as follows:
1. The Kovac Ford approached impact at a speed between 45 and 50 km/h.
 2. Ms. Basmadjian crossed Marine Drive at about 10 to 11 km/h, slightly less than the average jogging speed for a woman of her age.
 3. Ms. Basmadjian did not activate the crossing lights before proceeding.
 4. The bus began braking about 8.1 seconds before impact.
 5. Ms. Basmadjian started moving about 3.9 seconds before impact and stepped off the curb about 2.3 seconds before impact.
 6. The bus stopped at the east edge of the crosswalk about 1.3 seconds before impact. It sounded its horn about 0.5 seconds before impact.
 7. Ms. Basmadjian had a sightline to the Ford about 1.2 seconds before impact. Ms. Kovac had a sightline to Ms. Basmadjian about 1.1 seconds before impact.

8. Ms. Kovac was likely braking hard within about 0.6 seconds of Ms. Basmadjian's appearance from in front of the bus. This is a quick response consistent with her foot already covering the brake pedal. It is unlikely that she could have responded any earlier than this.
9. Ms. Basmadjian also likely slowed before impact but still contacted the right front corner of the Ford.
10. If Ms. Basmadjian had crossed at a walking speed instead of a jogging speed, she could likely have avoided impact. Avoidance could also have been achieved if she stopped to check the view past the bus before proceeding further. If she had activated the crossing lights, she could have alerted Ms. Kovac to her presence.
11. I understand that Ms. Kovac thought the bus was slowing for a bus stop. There was a bus stop just past the crosswalk though the bus ultimately stopped just over the east edge of the crosswalk.

[22] Mr. Rempel did not take issue with Mr. Ising's measurements and calculations. He only took issue with Mr. Ising's avoidance analysis. He wrote:

Mr. Ising's approach to this issue in my view lacks logical consistency in relating avoidance to speed. If Ms. Basmadjian had been walking at the instant sightlines became available then no collision would have occurred at all, even if both Ms. Basmadjian and Ms. Kovac simply maintained their speeds. In other words, Mr. Ising's approach simply stops the clock at a certain position and then attributes reduced speed to Ms. Basmadjian starting at that position. The result is no collision.

This approach and the result ("avoidance") is a typical result applicable to almost any collision. Specifically, for most collisions if the clock is simply stopped at some instant in time and an alternative speed is attributed to one party (in this case Ms. Basmadjian's speed is reduced by half) the result is a non-collision with no need for either party to do anything.

[23] Mr. Rempel then went on to consider Ms. Kovac's opportunity to avoid the collision, which Mr. Ising had not been asked to do. Mr. Rempel summarized his key conclusions on the issue as follows:

3. A driver who drives at a steady speed of approximately 46 kph past a bus in the presence of a crossing of this type will be afforded no opportunity to avoid pedestrians, regardless of the pedestrians' crossing speeds. This considers normal walking speeds or elevated crossing speeds such as jogging speeds.
4. Ms. Kovac had an extended time interval to assess the bus's progression and its approach to the crosswalk. Ms. Kovac had an easy opportunity to match the speed of the bus and stop beside it to avoid the type of collision risk described in (3) above.

5. A sightline remained available between Ms. Kovac and Ms. Basmadjian when the bus had slowed to 24 kph and was approximately 12 metres from the crosswalk, at which time the Ford was approximately 60 metres from the crosswalk. Had Ms. Kovac appreciated at this instant that the bus was slowing to facilitate Ms. Basmadjian, she could have stopped with a normal reaction time (1.5 seconds) and a light braking application of 0.2g.
- [24] In cross-examination, Mr. Rempel agreed with the following points: (1) Ms. Basmadjian and Ms. Kovac had the same sightlines to one another; and (2) it would have been very helpful for Ms. Kovac to have had the benefit of the flashing lights to warn her of a potential pedestrian in the crosswalk.
- [25] For his part, Mr. Ising agreed that if Ms. Kovac had tried to stop at the point when the bus was stopping, she would have been able to stop at the crosswalk. Mr. Ising also agreed, as outlined in his report, that Ms. Kovac had a sightline to Ms. Basmadjian about 4.4 seconds before impact. After that, her view was obscured by the bus. Ms. Basmadjian had a sightline of Ms. Kovac's truck around 4.2 seconds before impact.

Jury Instructions

- [26] In the pre-charge conference, the parties had differing views on how the trial judge should instruct the jury on the right of way issue and s. 179(3) of the MVA.
- [27] Ms. Basmadjian asked the judge to instruct the jury that she had the right of way at the time of the accident, and that Ms. Kovac breached s. 179(3) of the MVA which required her not to pass the bus as it slowed and then stopped at the crosswalk. In her submission, these were the only possible conclusions on the undisputed facts of the case. It was not possible, on the evidence, for the jury to find otherwise. Therefore, as a matter of law, the judge was required to instruct the jury to that effect.
- [28] Ms. Kovac disagreed. She asked the judge to leave the determinations of right of way and breach of s. 179(3) for the jury to resolve based on the facts it would ultimately find. Among other things, she submitted it was up to the jury to make a factual finding about whether Ms. Kovac perceived the bus to be slowing down for the bus stop rather than the crosswalk. If it was reasonable that she did not appreciate the bus was slowing and stopping for a pedestrian at the crosswalk, then she did not breach s. 179(3).
- [29] Ultimately, the judge ruled in Ms. Kovac's favour and left the determinations of right of way and breach of s. 179(3) with the jury.

Standard of Review

- [30] Misdirection of a jury amounts to an error of law reviewable on a correctness standard: *Gandha v. Beauchesne*, 2025 BCCA 122 at para. 23.

- [31] When reviewing jury instructions, an appellate court must consider the entire jury charge, all of the evidence, and the positions taken by counsel in their addresses to the jury. The court should not consider parts of the charge in isolation: *Lennox v. New Westminster (City)*, 2011 BCCA 182 at para. 25.
- [32] The court must determine whether the misdirection may have "misled the jury or whether the issues were placed before it fairly": *Lennox*, at para. 25, citing *Alden v. Spooner*, 2002 BCCA 592, leave to appeal ref'd, [2002] S.C.C.A. No. 535. In other words, where there has been a misdirection, an appellate court will only interfere with the jury's verdict if the misdirection was material: *McIntyre v. Grigg* (2006), 83 O.R. (3d) 161 at para. 38, 2006 CanLII 37326 (C.A.).

Analysis

Instructing juries on questions of law

- [33] In a trial by judge and jury, the judge and jury have well known and distinct roles. The jurors are exclusively responsible for determining the facts, and the judge is exclusively responsible for determining questions of law. Juries must decide the case only on the evidence presented in the courtroom and the law as explained by the judge: *R. v. Gunning*, 2005 SCC 27 at para. 27.
- [34] Questions of law include questions touching on the scope, effect, and application of a rule of law which determines the rights of parties: *Canadian National Ry. Co. v. Bell Telephone Co. of Canada*, [1939] S.C.R. 308 at 316-317, 1939 CanLII 34.
- [35] The failure to give legal effect to undisputed findings of fact is also a question of law: *R. v. Sundman*, 2021 BCCA 53 at para. 160, aff'd, 2022 SCC 31; *R. v. Chung*, 2020 SCC 8 at para. 11. Stated positively, trial judges are required to determine and instruct juries on the legal effect of undisputed facts.

Whose responsibility was it to decide the right of way and breach issues?

- [36] As this Court has explained "it is a useful starting place to determine who had the right of way in accordance with the prevailing rules of the road" when dealing with accidents on a highway: *Enright v. Marwick*, 2004 BCCA 259 at para. 22. Here, the issue was whether that determination was to be made by the judge or the jury.
- [37] Ms. Kovac submits the question of which party had the right of way was for the jury to resolve based on the evidence it accepted.

- [38] Relying on Enright, Ms. Kovac argues a driver must have "some awareness" a vehicle ahead is slowing or stopping for a pedestrian. Otherwise, she says s. 179(3) of the MVA would not include the words "to permit a pedestrian to cross the highway". She argues if a driver is "not aware and had no reason to be aware" of a pedestrian in a crosswalk, the driver is under no statutory duty not to overtake or pass a vehicle that is slowing or stopping at a crosswalk.
- [39] Here, Ms. Kovac maintains there was evidence to establish it was reasonable for her to believe the bus was slowing to stop at the bus stop, not for a pedestrian at the crosswalk. Both Ms. Kovac and her passenger testified to this effect. It was therefore for the jury to decide who had the right of way and whether she breached s. 179(3).
- [40] Ms. Kovac's submission regarding the role "awareness" plays in the right of way and breach analyses raises a question of statutory interpretation.
- [41] The modern approach to statutory interpretation requires the words of a statute to be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 26, quoting Elmer A. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.
- [42] Further, "Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8.
- [43] In my respectful view, the words of s. 179(3) are clear. Their meaning is both plain and consistent with the object of the MVA.
- [44] At a high level, the purpose of the MVA is to "facilitate and make safer the movement of pedestrians and vehicular traffic on the highways and public streets": *British Columbia Electric Railway Company Limited v. Ernest Farrer*, [1955] S.C.R. 757 at 763, 1955 CanLII 43, Estey J.
- [45] More specifically, s. 179(3) is designed to protect pedestrians who are crossing a highway in a crosswalk and who might not be visible because a car that is slowing or stopping for them is blocking them from the view of other approaching vehicles: *Cook v. Teh*, 45 B.C.L.R. (2d) 194 at 211, 220, 1990 CanLII 1077 (C.A.), Wallace J.A. dissenting and Wood J.A. concurring.
- [46] In discussing the application of s. 179(3), in *Loewen v. Bernardi*, Rowles J.A. (Prowse J.A. concurring) explained, "The fact that a driver in the curb or slow lane may have his view of the intersection blocked by another vehicle or vehicles does not entitle him to assume that there is nothing there to be seen." Drivers must assume cars ahead are stopping for a reason. They cannot assume no pedestrian is present: 93 B.C.L.R. (2d) 242 at para. 55, 1994 CanLII 1147 (C.A.).

- [47] Carrothers J.A. (concurring) put it slightly differently when he noted "it is no excuse that [the driver] claimed to have his vision of the crosswalk screened by intervening vehicles as this contradicts the very purpose of the statutory duty clearly imposed on him": Loewen at para. 21.
- [48] On a plain and purposive reading of the statute, drivers are required to assume a pedestrian is present when cars ahead are stopping at a crosswalk.
- [49] Ms. Kovac's reliance on Enright is misplaced. It does not support the proposition s. 179(3) only applies if a driver believes a vehicle ahead of them is stopping for a pedestrian in a crosswalk.
- [50] In Enright, this Court upheld the dismissal of the plaintiff pedestrian's action. In doing so, the Court referenced the trial judge's conclusion that, to an objective observer, the vehicle ahead of the defendant driver's vehicle was not stopped for a pedestrian. The trial judge found this "was reasonably suggestive that there was no pedestrian in the crosswalk": at para. 24.
- [51] But Enright is distinguishable. In that case, the plaintiff pedestrian was not in the crosswalk and did not have the right of way. Rather, the driver had the right of way, and it was the pedestrian who stepped out in front of his car.
- [52] In my view, s. 179(3) of the MVA did not require Ms. Kovac to appreciate the bus was stopping at a crosswalk for a pedestrian. She was required to assume that was the case.
- [53] Ms. Kovac's belief, even if reasonable, was not relevant to who had the right of way and whether she breached s. 179(3). Relieving drivers of their duties under s. 179(3) based on reasonable beliefs would undermine the very purpose of the provision. Section 179(3) is specifically designed to protect pedestrians including those who, reasonably, may not be visible because they are obscured from view by vehicles slowing or stopped at a crosswalk.
- [54] Ms. Kovac's belief rested on an assumption the bus was not stopping for a pedestrian at the crosswalk. This is not an assumption a driver is entitled to make. Drivers are not entitled to "take that chance and disregard the possibility of a pedestrian being present": Loewen at para. 55, Rowles J.A.
- [55] The material facts were not in dispute. The judge was therefore responsible to determine and instruct the jury on who had the right of way and whether Ms. Kovac breached s. 179(3) of the MVA. I turn to those questions next.

Who had the right of way?

- [56] As noted, s. 179 of the MVA addresses the rights of way between vehicles and pedestrians at crosswalks.

- [57] While not defined in the MVA, a "right of way" is understood in the case law to "refer to a preference [] as between a vehicle and a pedestrian, asserting right of passage at the same place and time, but is not an absolute right in the sense that [the possessor] is relieved from duty of exercising due care for [their] own safety and that of others": Enright at para. 21.
- [58] Section 179(1) sets out that where traffic control signals are not in place or not in operation, a driver must yield the right of way to a pedestrian when they are crossing the highway in a crosswalk and the pedestrian is on the half of the highway where the driver is travelling or is approaching so closely from the other side of the highway that the pedestrian is in danger.
- [59] Section 179(2) imposes a duty on pedestrians not to leave a curb or other place of safety and move into the path of a vehicle that is so close that it is impractical for the driver to yield the right of way.
- [60] Section 179(3) imposes a duty on drivers not to overtake and pass a vehicle that is slowing down or stopped at a crosswalk or intersection to permit a pedestrian to cross the highway.
- [61] This Court has endorsed an interpretation of these sections as obligating drivers to maintain an ability to yield the right of way to a pedestrian at a crosswalk. To do so, the driver must be ready and able to stop their vehicle if the pedestrian decides to exercise their right of way. When a vehicle is so close to the crosswalk that it is impractical for the driver to yield the right of way to the pedestrian, the obligation to yield the right of way shifts to the pedestrian. The statute puts an obligation on both parties to "keep the other under observation": Pirang v. Kooy, 76 B.C.L.R. (2d) 396 at 398, 1993 CanLII 1206 (C.A.).
- [62] With respect to s. 179(2), a "curb" is "a raised or guarded place such as a safety island, median or boulevard, all of which are restricted as is the curb to use by pedestrians and forbidden to vehicular traffic": Loewen at para. 10, Carrothers J.A. concurring.
- [63] "Other place of safety" means "the verge or shoulder of the roadway" where there is no curb. The verge or shoulder borders but is not part of the area where vehicles drive, and it would provide a pedestrian with an "other place of safety" like a "curb". It also includes a wheelchair ramp down from the sidewalk to the roadway: Loewen at para. 10, Carrothers J.A. concurring.
- [64] A place of safety does not refer to a "hiatus in the flow of traffic through a marked crosswalk created by a vehicle slowing or stopping for a pedestrian who is crossing a roadway": Loewen at para. 51, Rowles J.A.
- [65] Applying the legal principles to the undisputed facts, Ms. Basmadjian had the right of way at the time of the accident.
- [66] First, all the elements of s. 179(1) were clearly established:

· s. 119 of the MVA defines a "traffic control signal" to mean "a traffic control device, whether manually, electrically or mechanically operated, by which traffic is directed to stop and to proceed". No such traffic control signal was "in place" at the crosswalk;

· although the video evidence showed Ms. Basmadjian was just outside the crosswalk markings, the agreed statement of facts conclusively established she was crossing the highway "in a crosswalk" for the purposes of the trial. This is consistent with the authorities regarding when a pedestrian is "in a crosswalk". See, for example, *Perez-Alarcon v. Lee*, 2013 BCSC 408 at para. 122 and the cases cited there; and

· Ms. Basmadjian was on the half of the highway on which Ms. Kovac's vehicle was driving.

[67] Second, in the circumstances, s. 179(2) has no bearing on whether Ms. Basmadjian had the right of way. When she left the curb (the place of safety), she did so after the bus demonstrated it was yielding the right of way to her. She did not do so in the face of an oncoming vehicle that was "so close" it would have been "impractical" for that vehicle to yield the right of way.

[68] Third, s. 179(3) further supports the conclusion Ms. Basmadjian had the right of way. As outlined above, it prohibits a driver from overtaking and passing a vehicle that is slowing down or stopped at a crosswalk for a pedestrian. A necessary implication of this mandatory provision is that it is the pedestrian, and not the vehicle, that has the right of way in such circumstances. The duty not to overtake or pass a vehicle at a crosswalk under s. 179(3) is inconsistent with the driver having the right of way.

[69] A breach of s. 179(3), as I find below, is inconsistent with Ms. Kovac having the right of way: see *Cook*, at 220, *Wood J.A.*

[70] Finally, in oral submissions, Ms. Kovac suggested a pedestrian only has the right of way at a crosswalk if they enter the crosswalk after a vehicle has fully stopped to allow them to cross, which was not the case here. Ms. Kovac did not provide any authority for this proposition. Instead, she relied on cases where the pedestrian had the right of way in circumstances where a vehicle had already come to a complete stop: *Nolan v. Kohl*, 2024 BCSC 1202; *Karran v. Anderson*, 2009 BCSC 1105; and *Cook*.

[71] These cases do not establish pedestrians have an obligation to wait for a car to stop before they may exercise the right of way. Everyday realities, common sense and s. 179(1) dictate otherwise. Unless it is impractical to do so, vehicles must yield the right of way to pedestrians who are in the act of crossing a crosswalk.

[72] For all of these reasons, Ms. Basmadjian had the right of way.

Did Ms. Kovac breach s. 179(3) of the MVA?

- [73] Having removed Ms. Kovac's belief about why the bus was slowing from consideration, the undisputed facts established Ms. Kovac breached her duty under s. 179(3) of the MVA. There was no evidence for the opposite conclusion.
- [74] Regardless of Ms. Kovac's belief, the undisputed fact is the bus slowed to stop at a marked crosswalk to allow Ms. Basmadjian to cross Marine Drive. This is all that was required for s. 179(3) to apply.
- [75] Ms. Kovac was aware she was approaching a crosswalk. She did not see Ms. Basmadjian but she saw the bus slow down as it approached the crosswalk. The bus slowed for about 8.1 seconds. If Ms. Kovac had thought the bus was stopping at the crosswalk, she would have stopped at the crosswalk too. She understood her obligation to stop and had ample time to do so.
- [76] Ms. Kovac's failure to stop at the crosswalk was a clear breach of s. 179(3) of the MVA.

Did the misdirection mislead the jury?

- [77] As noted above, in cases of misdirection, an appellate court will interfere with a jury's verdict only where the misdirection was material. In my respectful view, that is the case here.
- [78] As explained in the sections above, the trial judge should have instructed the jury that Ms. Basmadjian had the right of way and Ms. Kovac breached s. 179(3). Absent such instructions, the jury had an incomplete legal framework for assessing whether the parties breached the standard of care and for determining each party's share of the fault. The jury was left without a baseline understanding of the parties' rights and obligations.
- [79] All that can be said with certainty about the jury's verdict is it found both Ms. Basmadjian and Ms. Kovac to have breached their respective duties of care. There is no way of knowing how it resolved the right of way and breach of s. 179(3) issues.
- [80] That said, the jury's stark division of fault at 90% for Ms. Basmadjian and 10% for Ms. Kovac, when Ms. Basmadjian was in a marked crosswalk and had the right of way, and Ms. Kovac was in breach of a statutory obligation to stop, suggests the jury reached an incorrect legal conclusion on one or both issues. One very real possibility is the jury concluded, incorrectly, that Ms. Kovac had the right of way and that her only negligence was in failing to observe Ms. Basmadjian when she was there to be seen about 4.4 seconds before impact.

How should liability be apportioned?

- [81] Drivers and pedestrians have a common law duty to take reasonable care for their own safety and the safety of others when using a roadway. The common law duty is supplemented by the statutory duties under the MVA: Perez-Alarcon at para. 118.

- [82] While the MVA's statutory requirements do not provide a complete code for assessing liability in motor vehicle accident cases, they do provide guidelines for assessing fault. Ultimately, the question is "whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road": *Salaam v. Abramovic*, 2010 BCCA 212 at paras. 18, 21.
- [83] For example, having the right of way entitles a pedestrian to assume that others will respect it and follow the rules of the road. However, it does not excuse a pedestrian's responsibility to take reasonable care for their safety and that of others: *Enright* at paras. 21-22.
- [84] Further, a pedestrian has a general duty "to act constantly and consistently with due care" for their own safety when crossing a highway "even in a marked crosswalk": *Loewen* at para. 15, *Carrothers J.A.* concurring.
- [85] Determining each party's respective degree of fault requires a consideration of any lack of reasonable care and breach of statutory duties: *Loewen* at para. 22, *Carrothers J.A.* concurring. It is a highly fact-driven exercise: *Ferrill v. Cockburn*, 2024 BCCA 245 at para. 23.
- [86] Ms. Basmadjian relies on several cases in support of her submission that liability should be apportioned at 10% to her and 90% to Ms. Kovac. Ms. Kovac did not provide any cases on the proper apportionment in the event this Court allowed the appeal.
- [87] In my view, the following cases are most relevant to the apportionment exercise. As noted above, this is a highly fact-driven exercise.
- [88] In *Cook*, a majority of this Court dismissed an appeal from the trial judge's finding that the defendant driver was 70%, the plaintiff pedestrian 20% and the defendant municipality 10% at fault.
- [89] In that case, the plaintiff was crossing a divided highway from west to east. She was in a crosswalk. After she reached the median, she intended to cross two northbound lanes. Vehicles in the right lane stopped to let her cross. A driver stopped in that lane nodded to the plaintiff. The plaintiff then stepped into the left lane where the defendant's vehicle struck her. The defendant was driving just below the posted speed limit of 60 km/hr.
- [90] The trial judge found the defendant at fault in three ways: (1) he failed to keep a proper lookout and failed to see the plaintiff who was there to be seen; (2) he failed to slow down as he approached a crosswalk where vehicles were stopped in the curb lane near a crosswalk, including a bus discharging passengers; and (3) he overtook or passed a vehicle stopped at the crosswalk in breach of what is now s. 179(3) of the MVA.
- [91] The judge found the plaintiff at fault for failing to look to the right for oncoming traffic before stepping into the road in front of the defendant's car, breaching her common law and statutory duties.

- [92] The majority of this Court held the plaintiff had the right of way but failed to take due care when exercising it.
- [93] In *Loewen*, this Court set aside the trial judge's division of liability at 75% to the defendant driver and 25% to the plaintiff pedestrian. It reapportioned liability at 90% and 10% respectively.
- [94] In *Loewen*, the plaintiff was in a marked crosswalk. The defendant's vehicle hit him when he was over half-way across a four-lane road.
- [95] The plaintiff had crossed two lanes of eastbound traffic. A driver travelling westbound in the lane nearest the plaintiff stopped at the crosswalk to allow him to cross. As the car yielded to him, the plaintiff waved "thank you" and crossed in front of it. While crossing, the plaintiff "quickenened his pace", "started to jog" or "started to run".
- [96] The defendant was driving in the next lane and hit the plaintiff as the plaintiff entered that lane. The defendant did not recall seeing pedestrian crossing signs. He was aware cars to his left were slowing down, but believed they were doing so to turn left at the intersection. The defendant did not see the plaintiff until just before he struck him.
- [97] Justice Carrothers (concurring) held the trial judge's division of liability was "distortedly weighted" against the plaintiff, and the result was "unfair, inequitable and unjust": at para. 22. He noted the defendant breached his statutory responsibilities. He also explained the fact the defendant was not speeding did not mean his speed was appropriate. The fact stopped vehicles screened the defendant's view of the crosswalk was no excuse, because that would contradict the purpose of his statutory duty: at para. 21.
- [98] Justice Rowles (Prowse J.A. concurring) reached the same result, noting the plaintiff's contributory negligence in quickening his pace and failing to look for oncoming traffic was "a relatively minor factor in this case": at para. 57.
- [99] In *Hefferland v. Fink*, 1995 CanLII 2047 (B.C.S.C.), the trial judge divided liability between a plaintiff pedestrian and a defendant driver at 25% and 75% respectively.
- [100] In that case, the plaintiff was crossing an east to west road at an intersection with no marked crosswalk. The road had four lanes, two in each direction. An eastbound driver in the left lane saw the plaintiff crossing and stopped to allow him to proceed. After the plaintiff crossed in front of the stopped car and entered the next lane, the defendant's car hit him.
- [101] The judge found the defendant breached what is now s. 179 of the MVA. The driver had a statutory duty to yield the right of way to the plaintiff who was in a crosswalk as defined by the MVA, which includes both marked and unmarked crosswalks: s. 119(1). The plaintiff however was contributorily negligent for crossing in an unmarked crosswalk in dark clothing when it was dark out and raining.

- [102] In *Traynor v. Degroot*, 2003 BCCA 483, this Court upheld the trial judge's finding of 100% liability against a defendant driver. The driver hit the plaintiff pedestrian as she jogged across a busy urban street in an unmarked crosswalk.
- [103] The plaintiff was jogging on the spot, waiting to cross several lanes of traffic. She looked both ways and cars in the curb lane and adjacent lane stopped for her. The driver in the stopped vehicle in the second lane signalled for her to cross. The pedestrian did not look again before crossing.
- [104] The defendant suddenly pulled out from behind the stopped cars, overtook them in the next lane over, and struck the plaintiff as she was crossing the third lane of traffic.
- [105] This Court upheld the finding of no contributory negligence, despite the fact the plaintiff failed to check the third lane before entering it, and despite the fact she was jogging. The trial judge held the plaintiff had the right of way and was entitled to assume drivers on the roadway would yield to her.
- [106] In upholding the judge's no contributory negligence finding, this Court cited *Petijevich et al. v. Law*, [1969] S.C.R. 257, 1968 CanLII 123, where the Supreme Court of Canada overturned a jury verdict finding a plaintiff pedestrian with the right of way solely at fault when the only evidence of contributory negligence was that she was running or walking very fast as she crossed an intersection. The Supreme Court found the defendant wholly liable.
- [107] This Court also cited *Coso v. Poulos*, [1969] S.C.R. 757, 1969 CanLII 95, for the proposition that a pedestrian with the right of way in a crosswalk can expect drivers to respect their right of way, and the pedestrian is not required to exercise extreme vigilance in those circumstances.
- [108] In *Coso*, the plaintiff pedestrian passed in front of a stopped vehicle and looked into the next lane before proceeding. The plaintiff did not see any cars, but in fact the defendant's car was behind the stopped vehicle which blocked it from view. The plaintiff then directed his attention to traffic coming from the other direction and was promptly hit by the defendant's car as it overtook the stopped vehicle. The Supreme Court overturned the Court of Appeal's apportionment of 20% liability to the pedestrian, holding the defendant wholly liable.
- [109] Finally, in *Nolan*, the trial judge found the defendant driver 100% liable for failing to yield to the plaintiff pedestrian as required by s. 179(1) and for passing a stopped vehicle contrary to s. 179(3).

- [110] The plaintiff intended to cross a one-way street with two lanes at an intersection. The intersection did not have a marked crosswalk. A car in the lane closest to her stopped to allow her to cross. As the plaintiff passed the stopped car, she quickly looked into the next lane to make sure it was clear. She saw it was empty and continued. A few moments later the defendant's car hit her before she fully crossed the lane. The defendant saw the stopped car up ahead but did not realize it was stopping for a pedestrian.
- [111] In declining to find the plaintiff contributorily negligent, the judge noted that most cases with such a finding "involve an identifiable element of lack of care" by the pedestrian like "jaywalking outside the crosswalk area, running through the crosswalk without looking, not waiting for traffic to stop, or crossing in poor weather at night while wearing dark clothing." None of those factors was present: at para. 53.
- [112] Taking guidance from the authorities, in my view, Ms. Kovac's fault outweighs Ms. Basmadjian's. No case has been brought to my attention where, in circumstances like the present, a pedestrian has been found at greater fault than a driver, let alone 90% at fault.
- [113] Here, Ms. Kovac saw the crosswalk ahead. She saw the bus. It slowed for about 8.1 seconds before stopping. Ms. Kovac had the opportunity but did not see Ms. Basmadjian in the area of the crosswalk about 4.4 seconds before impact. More importantly, Ms. Kovac knew she was not to pass a vehicle that was stopping to permit a pedestrian to cross at a crosswalk. She had ample time to stop but failed to do so because she assumed the bus was stopping at the bus stop rather than the crosswalk. This was not an assumption she was entitled to make. Ms. Kovac's conduct breached and undermined the very purpose of s. 179(3).
- [114] On the other hand, Ms. Basmadjian had the right of way and was entitled to assume other drivers would stop at the crosswalk. In that context, her failure to take reasonable care of herself must be seen as less serious than Ms. Kovac's breach of s. 179(3) of the MVA.
- [115] Had Ms. Basmadjian not been distracted by her phone, she may have seen Ms. Kovac's vehicle around 4.2 seconds before impact. She may then have been more careful when crossing in front of the bus. Nevertheless, she began to cross the street only when it was clear the bus was yielding the right of way to her, and she was not distracted by her phone as she was crossing the street.
- [116] However, Ms. Basmadjian's failure to press the crosswalk lights is significant evidence of fault. Although the bus was already stopping to permit her to cross and s. 179(3) prohibited Ms. Kovac from passing the bus, activating the lights would have been an easy and prudent way for Ms. Basmadjian to alert vehicles to her presence. The very reason some crosswalks are equipped with pedestrian-activated flashing lights is to enable pedestrians to protect themselves by signalling their intention to cross a street so that vehicles will stop for them. I note none of the cases relied on by Ms. Basmadjian involved a plaintiff who had failed to activate pedestrian-controlled flashing lights at a marked crosswalk.

- [117] It also would have been prudent for Ms. Basmadjian to walk rather than jog across the street. She testified she jogged because she did not want to inconvenience a bus full of people. Her conduct was courteous, but it was not safe. That said, I recognize some courts have not considered this factor particularly significant in weighing fault against pedestrians. Some have even found no contributory negligence: see Traynor and Petijevich.
- [118] Finally, Ms. Basmadjian admitted she did not look for westbound vehicles other than the bus when she crossed the street. She focused on a vehicle some distance away to her right. She did not stop to check for westbound traffic when she came to the edge of the bus and crossed into Ms. Kovac's lane. She bears some responsibility for her lack of attention.
- [119] Cumulatively, Ms. Basmadjian's lack of attention, failure to activate the pedestrian lights, and jogging in the crosswalk justify departing from the cases outlined above where courts apportioned very low levels of fault to pedestrians.
- [120] In all of the circumstances, I would apportion fault 70% to Ms. Kovac and 30% to Ms. Basmadjian.

Conclusion and Disposition

- [121] The material facts were not in dispute. I am of the view the judge was therefore required to determine, as a question of law, that (1) Ms. Basmadjian had the right of way and (2) Ms. Kovac had breached s. 179(3) of the MVA. The judge was then required to instruct the jury accordingly.
- [122] The misdirection on these key issues was material. It is impossible to know if the verdict would have been the same with a proper instruction. The significant gap between the apportionment of liability by the jury and the apportionment of liability in factually similar cases strongly suggests the misdirection affected the verdict.
- [123] I would allow the appeal, set aside the jury's verdict, and apportion fault 70% to Ms. Kovac and 30% to Ms. Basmadjian.

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Justice Iyer"

I AGREE:

"The Honourable Justice Mayer"

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