

CANADA / JUDGMENT

Coffey v. Sabbaghan

2020 BCCA 335

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 335 Coffey v. Sabbaghan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Coffey v. Sabbaghan,

2020 BCCA 335

Date: 20201127

Docket: CA46495

Between:

Andrew Coffey

Appellant

(Plaintiff)

And

Sayyedmojtaba Sabbaghan

Respondent

(Defendant)

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated October 8, 2019 (Coffey v. Sabbaghan, 2019 BCSC 2202, Vancouver Docket M163519).

Counsel for the Appellant:

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Counsel for the Respondent:

C. Bekkering

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Place and Date of Hearing:

Vancouver, British Columbia

November 5, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 27, 2020

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Dickson

Summary:

The parties' vehicles collided when the appellant attempted a left turn at a controlled intersection as the respondent attempted to drive through the intersection. The appellant's claim for damages was dismissed on the basis that the appellant had failed to yield the right-of-way to the respondent, contrary to s. 174 of the Motor Vehicle Act. The appellant appeals and argues that fault should have been found 100% against the respondent. Held: Appeal allowed. The trial judge did not err in concluding that the appellant was at fault in making an unsafe turn, but did err in failing to conclude that the respondent was also at fault. The relative fault of the parties was not significantly different. Liability should be apportioned 50% to each party.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

- [1] This appeal concerns liability for damages arising from a motor vehicle collision where a left-turning vehicle collided with a vehicle driving through an intersection. There have been many such cases arising in this Court and many more in the Supreme Court of British Columbia. Sometimes the left-turning driver is found wholly at fault. Sometimes the through driver is found wholly at fault. More often, each is found to have contributed to the collision. The cases are inevitably highly fact-dependent.
- [2] In this case, the trial judge held in reasons indexed as 2019 BCSC 2202 that the appellant, as the left-turning driver, was wholly at fault for the collision. The appellant appeals, arguing that the trial judge made legal errors in his assessment of the evidence presented at trial, and that on a proper consideration of the principles developed by this Court, the judge should have found that it was the through driver who was wholly at fault. The respondent submits that the appellant is simply seeking to retry the case, and urges this Court to defer to the largely factual conclusions of the trial judge.
- [3] The collision occurred at the intersection of Granville Street and West King Edward Avenue in Vancouver, British Columbia, a few minutes after 3:00 p.m. on July 21, 2014. The intersection is a busy one, and is controlled by traffic lights on each corner. The appellant, Mr. Coffey, was travelling south on Granville Street with the intention of turning east on King Edward. The respondent, Mr. Sabbaghan, was travelling north on Granville Street intending to drive through the intersection and continue northward. Mr. Coffey stopped at the intersection and commenced his turn when he considered it safe to do so. Mr. Sabbaghan drove through the intersection, believing he had the right-of-way based on the traffic light. Their vehicles collided in the south-east quadrant of the intersection, with the right front corner of Mr. Coffey's vehicle colliding with the front left corner of Mr. Sabbaghan's vehicle. Both vehicles were subsequently written off.
- [4] Mr. Coffey brought proceedings against Mr. Sabbaghan seeking damages on the theory that the collision and any consequent damages were caused solely by the negligence of Mr. Sabbaghan. Mr. Sabbaghan defended the action, asserting that the collision was caused or contributed by the negligence of Mr. Coffey. Each alleged that the other had failed to keep a proper lookout. Mr. Sabbaghan pleaded the provisions of the Negligence Act, R.S.B.C. 1996, c. 333, which describe the procedure for the allocation of liability when each party is partly at fault.
- [5] Thus, the issue for the trial judge was whether the collision had been caused by the negligence of either or both of the parties and if both, the allocation of liability. If Mr. Sabbaghan was found to be at fault, either in whole or in part, it would be necessary to assess damages. The evidence on damages was led, but in light of the judge's conclusion that the action should be dismissed, he did not find it necessary to determine the extent of damages to Mr. Coffey resulting from the collision.

The Trial Judgment

- [6] The trial judge began by describing the physical characteristics of the intersection in these terms:
- [10] The intersection of Granville Street and West King Edward Avenue is a major, well-used Vancouver intersection. Granville Street has three southbound and three northbound lanes at the intersection. These lanes are divided by double solid yellow lines. West King Edward Avenue has two westbound and two eastbound lanes and a left-turning lane on the west and east sides of the intersection. The east and westbound lanes of West King Edward are separated by a wide grassy boulevard. There are stop lines and marked crosswalks on each of the four entrances to the intersection as well as stoplights.
- [7] He then summarized the evidence of the three principal witnesses, Mr. Coffey, Mr. Sabbaghan and an independent witness, Mr. Otero. No accident reconstruction evidence was called, and accordingly, the trial judge was required to make his findings of fact primarily on the basis of the recollections of the three witnesses. These recollections were not entirely consistent.
- [8] For example, Mr. Sabbaghan testified that he was driving in the middle of the three northbound lanes on Granville when he entered the intersection. Mr. Otero, who the trial judge accepted was driving behind Mr. Sabbaghan, said they were both in the left lane. Mr. Coffey never saw Mr. Sabbaghan's vehicle, but his evidence was that before he started his turn, he observed cars stopped in the middle lane and the left lane, which would imply that Mr. Sabbaghan approached the intersection driving in the curb lane. The trial judge did not find it necessary to resolve these inconsistencies, but they illustrate the difficulties presented to the judge in coming to a precise conclusion as to how the collision occurred.
- [9] The trial judge summarized his principal findings in this way:
- [50] In summary, I find as a fact that, with respect to the circumstances of the accident:
- a) Mr. Coffey entered the intersection on a green light and waited for oncoming traffic to clear the intersection before commencing his turn.
 - b) While he was waiting, Mr. Coffey saw some but not all vehicles in the northbound lane of Granville Street stop, waited for one or two seconds, then commenced his left turn. Mr. Coffey commenced his left turn either on a green light or within moments of the light in front of him turning from green to yellow.
 - c) Mr. Sabbaghan entered the intersection from either the left or middle northbound lane either just before, when or within moments after the northbound traffic lights on Granville Street had turned yellow.
 - d) Mr. Sabbaghan was travelling at 40 to 45 kilometres per hour at the time he entered the intersection, a safe rate of speed.

- e) Mr. Coffey did not see Mr. Sabbaghan enter the intersection, possibly because just before or as he was making his left turn, he had looked over his left shoulder to check if vehicles were moving from the westbound turning lane on King Edward to the southbound lane of Granville Street.
 - f) Mr. Sabbaghan saw Mr. Coffey in the northbound left or middle lane of the intersection when he was approximately halfway through and attempted to swerve to the right to avoid a collision but did not have sufficient time to do so, and the vehicles collided with the right front corner of Mr. Coffey's vehicle colliding with the front left corner of Mr. Sabbaghan's vehicle.
- [10] I have underlined the finding of the trial judge concerning the stopped vehicles in the driving lanes of Granville Street because this finding forms a central part of the appellant's submission that the judge erred in finding him solely responsible for the collision.
- [11] The judge then referenced s. 174 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318, which sets out the principal statutory provision governing left-hand turns. Section 174 reads as follows:
- 174 When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.
- [12] The judge then cited this Court's judgment in *Nerval v. Khehra*, 2012 BCCA 436, which he summarized in this way:
- [53] The key requirement is that a left-turning driver must yield to oncoming traffic that is in the intersection or so close as to constitute an immediate hazard. An approaching vehicle is an immediate hazard if it is so close to the intersection that its driver must take some sudden or violent action to avoid the threat of a collision. A left-turning driver must assess whether the oncoming driver is an immediate hazard at the moment before the left-turning driver actually starts to make the turn: *Raie v. Thorpe* (1963), 43 W.W.R. 405 (C.A.)
- [54] As set out in *Nerval v. Khehra* a two-stage analysis is required in determining liability pursuant to s. 174 of the Motor Vehicle Act.
- [55] In the first stage the court must determine whether an immediate hazard was present when the left-turning driver commenced the turn. If it is determined that no immediate hazard was present, a left-turning driver becomes the driver with the right-of-way and the oncoming driver is required to yield.
- [56] The burden of proving the absence of an immediate hazard falls on the left-turning driver.

- [57] At the second stage of the analysis, even if the oncoming driver is found to have had the right-of-way, the court must determine whether this driver was nonetheless negligent and at fault for causing or contributing to the accident.
- [13] Applying these principles, the judge concluded that Mr. Coffey was negligent in failing to yield the right-of-way to Mr. Sabbaghan, whose vehicle the judge found to have been an immediate hazard within the meaning of s. 174 when Mr. Coffey began his turn. The judge concluded that Mr. Sabbaghan had not been negligent and was not at fault for causing or contributing to the collision. He explained his reasoning in this way:
- [58] I find that Mr. Coffey failed to determine whether the oncoming traffic approaching northbound on Granville Street constituted an immediate hazard before he started his left turn. I find that Mr. Sabbaghan's vehicle, given that it was or it should have been clearly visible to Mr. Coffey in an oncoming northbound lane, constituted an immediate hazard of which Mr. Coffey should have been aware.
- [59] Although the evidence indicates that the two other northbound vehicles behind Mr. Sabbaghan's vehicle, either in the centre or curb lane on Mr. Otero's evidence, stopped at the intersection, I have no evidence from those drivers on which I can conclude that they came to a stop because they were aware that Mr. Coffey's vehicle was about to make a left-hand turn. It may well have been if, for example, those drivers were in the left and curb northbound lanes, that they stopped because they wished to make a turn to their respective left and right.
- [60] I find that Mr. Coffey observed two lanes of approaching northbound traffic begin to slow and stop but failed to see Mr. Sabbaghan's vehicle proceed through the intersection. I find that Mr. Coffey probably turned his attention away from oncoming traffic just prior to the collision to check to see if cars from his left travelling westbound on West King Edward Avenue were going to enter the intersection.
- [61] As a result, I find that Mr. Sabbaghan's vehicle had the right-of-way, and Mr. Coffey's failure to yield before commencing his left-hand turn constituted a breach of s. 174 of the Motor Vehicle Act. I do not find that Mr. Sabbaghan was negligent and at fault for causing or contributing to the collision. As I have already found, he was travelling north on Granville at a safe rate of speed and had either entered the intersection on a late green, that is after the light in front of him had been green for some time, or an early yellow light, that is at the time or very shortly after the light ahead of him turned yellow, as he was entitled to do.
- [14] As a consequence of his conclusion that Mr. Coffey was at fault for causing the collision and Mr. Sabbaghan was not, the judge dismissed the action.

Issues on Appeal

- [15] Mr. Coffey alleges two errors in the trial judgment:

- (a) the judge erred in law by failing to apply the test governing the duties of the parties in the circumstances prevailing at the intersection; and
 - (b) the judge erred in fact by misapprehending, ignoring or misconceiving the evidence in a manner material to the result.
- [16] As he did at trial, Mr. Coffey submits that Mr. Sabbaghan was entirely responsible for the collision. Implicit in this argument is the submission that the judge erred in finding him at fault, as well as by failing to find Mr. Sabbaghan at fault. Neither party argued that both parties bore some responsibility for this collision, but I consider that this conclusion is open to us if the appellant succeeds in establishing that the judge erred in exonerating Mr. Sabbaghan of responsibility, but fails to convince us that the judge was wrong to conclude that the appellant was also negligent.

The Appellant's Position

- [17] Central to the appellant's argument was his submission that the trial judge had erred in his conclusion that Mr. Sabbaghan entered the intersection on a late green or early yellow light. This was a critical point because if the light was green or had just turned yellow when Mr. Sabbaghan reached the intersection, it would follow that Mr. Sabbaghan had the right-of-way and constituted an immediate hazard to Mr. Coffey within the meaning of s. 174 of the Motor Vehicle Act. Failure to yield to Mr. Sabbaghan would, in such circumstances, constitute negligence on the part of Mr. Coffey, and the judge's conclusion that Mr. Coffey bore the responsibility for the collision would stand unless Mr. Sabbaghan was found to have contributed to the collision in some way other than failing to yield the right-of-way. Hence the importance of the issue to the appeal.
- [18] There was evidence to support the judge's finding that Mr. Sabbaghan entered the intersection on a late green or early yellow light. Mr. Sabbaghan testified that the light was green when he entered the intersection. The independent witness, Mr. Otero, testified that the light was yellow, and Mr. Coffey said that it was yellow when he began his turn. Mr. Coffey points out, however, that the trial judge also accepted his evidence that before he began his turn, Mr. Coffey observed that northbound cars were stopping at the traffic light, consistent with the light having turned yellow with sufficient time for the northbound cars to stop safely. I have referred to the judge's finding to this effect in para. 50(b) of his reasons. The judge also explained his finding while discussing his assessment of Mr. Coffey's evidence:
- [45] Mr. Coffey testified that he waited one or two seconds after he saw the vehicles in the left and middle northbound lanes of Granville Street come to a stop before he began to turn to the left. I am unable to accept Mr. Coffey's evidence that he saw all of the oncoming vehicles in the left and middle northbound lanes of Granville Street come to a stop. I accept that he saw some traffic stop, and then waited one or two seconds before starting his left-hand turn. The evidence of Mr. Otero and Mr. Sabbaghan establishes that Mr. Sabbaghan was travelling

along with the northbound flow of traffic and proceeded into the intersection without stopping. I find that Mr. Coffey simply did not see Mr. Sabbaghan's vehicle.

[Emphasis added.]

- [19] Mr. Coffey also relies on the evidence of the independent witness, Mr. Otero, whose evidence the trial judge largely accepted. Mr. Otero testified that the vehicles driving alongside Mr. Sabbaghan slowed or stopped when the traffic light turned yellow. Mr. Coffey submits that if the vehicles by Mr. Sabbaghan were able to slow down and stop for the yellow light, it must follow that Mr. Sabbaghan could have done so as well. Failure to stop in such circumstances would place Mr. Sabbaghan in the position of having violated s. 128(1)(a) of the Motor Vehicle Act, which requires that the driver of a vehicle approaching an intersection with a traffic light showing yellow must stop the vehicle before entering the intersection, unless the stop cannot be made safely.
- [20] Mr. Coffey says that at a minimum, the judge was required to grapple with the significance of his finding that Mr. Coffey saw northbound cars stopping at the intersection before commencing his turn. He submits that the only indication that the judge considered the significance of this finding was the following passage:
- [59] Although the evidence indicates that the two other northbound vehicles behind Mr. Sabbaghan's vehicle, either in the centre or curb lane on Mr. Otero's evidence, stopped at the intersection, I have no evidence from those drivers on which I can conclude that they came to a stop because they were aware that Mr. Coffey's vehicle was about to make a left-hand turn. It may well have been if, for example, those drivers were in the left and curb northbound lanes, that they stopped because they wished to make a turn to their respective left and right.
- [21] Mr. Coffey submits that the burden of the evidence was that the vehicles stopping at the intersection were not "behind Mr. Sabbaghan's vehicle", but beside it, and the judge ought to have concluded that if they could stop safely, so could Mr. Sabbaghan. Mr. Coffey further submits that the judge's comments about the reasons for the vehicles stopping were mere speculation, and that the more likely explanation for their actions was that they stopped because the light had turned yellow sufficiently early that all of the cars, including that of Mr. Sabbaghan, could have and should have stopped before entering the intersection.
- [22] Thus, Mr. Coffey argues that the judge's finding that northbound cars were stopping at the intersection before he started his turn leads inexorably to the conclusion that Mr. Sabbaghan could not have entered the intersection on an early green or late yellow light, and must have entered the intersection on a late yellow light in circumstances where he could have and should have stopped safely, thereby avoiding the collision. The consequence, says Mr. Coffey, is that Mr. Sabbaghan bears the entire responsibility for the collision.

- [23] I agree that the judge failed to grapple with what appears to be an internal contradiction in his findings of fact. If, as the judge found, Mr. Coffey saw northbound cars stopping at the light and waited one or two seconds before starting his turn, those vehicles must have been either ahead or abreast of Mr. Sabbaghan (which was the evidence of Mr. Otero) and not behind him, as Mr. Sabbaghan testified. The question is whether the judge's finding that northbound cars were stopped before Mr. Coffey began his turn undermines the judge's conclusion that the light was green or turning yellow to such an extent that the judge's conclusion as to the colour of the light and the status of Mr. Sabbaghan's vehicle as an immediate hazard at the time Mr. Coffey commenced his turn was a palpable and overriding error.
- [24] I would not be prepared to go that far. While it would have been open to the trial judge to come to the conclusion Mr. Coffey urges, there was also evidence to support the findings the judge made. The judge carefully reviewed the evidence of the three witnesses as well as the photographic evidence and drew inferences of fact that were available on that evidence. The fact that other inferences of fact were also available does not amount to a palpable error. As noted by McLachlin J. (as she then was) in *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, "the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact".
- [25] Accordingly, this appeal must be decided on the basis of the trial judge's findings that when Mr. Coffey commenced his turn, Mr. Sabbaghan's vehicle was an immediate hazard within the meaning of s. 174, and also that there were northbound cars stopped at the intersection. The first finding supports the conclusion that Mr. Coffey was at fault in failing to yield the right-of-way to Mr. Sabbaghan. It is the implication of the second finding to an assessment of Mr. Sabbaghan's common law duties that in my opinion was not adequately considered by the trial judge.
- [26] Having the right-of-way does not insulate a driver from an assessment of whether that driver exercised reasonable care in all the circumstances. In *Nerval*, Justice Harris explained that even if a left-turning driver can be said to be at fault for starting a turn when there is an immediate hazard, it does not follow that the through driver, as the dominant driver, cannot also be found to have been negligent:
- [38] Whether a through driver is dominant turns on whether the driver's vehicle is an immediate hazard at the material time, not why it is an immediate hazard. Dominance identifies who must yield the right of way. One consequence of this analysis is that negligence on the part of a through driver does not disqualify that driver as the dominant driver. The through driver remains dominant, even though their conduct may be negligent. Indeed, the through driver's fault may be greater than the servient driver's fault. In other words, a through driver may be an immediate hazard even though that driver is speeding and given her speed would have to take sudden action to avoid the threat of a collision if the left turning driver did not yield the right of way. The correct analysis is to recognize that the through driver is breaching his or her common law and perhaps statutory obligations and to address the issue

as one of apportioning fault, not to reclassify the through driver as servient based on the degree to which the through driver is in breach of her obligations.

- [27] The duty of the dominant driver to use reasonable care in the exercise of a statutory right-of-way was explained by Lambert J.A. in *Carich v. Cook* (1992), 90 D.L.R. (4th) 322 at 326 (B.C.C.A.):

The question as a driver turns left is whether there is any vehicle in any approaching lanes that constitutes an immediate hazard. If there is, the turn should not be made. If there is not, then the turn can be made and of course, care should be taken throughout the turn and as each new lane is entered to make sure that the situation as it was assessed when the turn started has not changed in the meantime. But that care is more a matter of the ordinary duty of a reasonably careful driver and not a duty, in my view, imposed specifically by s. 176 [now s. 174] which, in my view, states the situation when the turn is commenced. Once the turn is commenced both of the drivers in that situation, the one who is doing a left turn and the ones that are approaching straight ahead in a situation where a vehicle could turn in front of them, all must keep a proper look-out.

- [28] Groberman J.A. added these comments in *Salaam v. Abramovic*, 2010 BCCA 212:

- [21] In the end, a court must determine 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. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way.

- [29] The appellant places significant weight on this Court's oral judgment in *Kokkinis v. Hall* (1996), 19 B.C.L.R. (3d) 273 (C.A.). The circumstances in *Kokkinis* bear a striking resemblance to the circumstances at bar. The collision took place at the very same intersection, Granville and King Edward, and also involved a southbound driver attempting to turn left to travel east on King Edward. In *Kokkinis*, the through driver conceded that he had been negligent in failing to stop at the yellow light when he could have stopped safely. The issue was whether the left-turning driver had also been negligent. The trial judge concluded the left-turning driver was negligent in failing to keep a proper lookout when making her turn, and specifically by taking her eyes off the northbound traffic completely to ensure eastbound traffic had not begun to move. The left-turning driver successfully appealed her portion of the liability to this Court.

- [30] On appeal, the issue was characterized as "whether Mrs. Kokkinis [the left- turning driver] was on one hand entitled reasonably to assume that Mr. Hall [the through driver] would stop before entering the intersection or on the other hand, whether she can be faulted for failing to see his van 'until it was on top of her', i.e. constituted an immediate hazard": para. 9. This Court concluded that the left-turning driver was entitled to make that assumption.
- [31] The appellant says that the case at bar is on all fours with Kokkinis. There are, however, important points of distinction between the circumstances in Kokkinis and the circumstances at bar. In Kokkinis, the negligence of the through driver was conceded. The through driver admitted that he had run a yellow light in circumstances where he could have stopped safely, which was a breach of his duties under the Motor Vehicle Act. No similar admission is made at bar, and to the contrary, the trial judge expressly found that Mr. Sabbaghan's vehicle entered the intersection on a late green or early yellow light. The Court in Kokkinis also noted evidence that the through driver had been speeding, an element absent in this case.
- [32] As well, the Court in Kokkinis based its conclusion on the footing that the left- turning driver had made an assumption that the through driver would obey the traffic requirements and stop at the light, an assumption this Court held the left-turning driver was entitled to make. No similar assumption could have been made in this case, because the left-turning driver, Mr. Coffey, never saw Mr. Sabbaghan's car. Indeed, it was common ground that neither of the parties saw the other vehicle until it was too late to avoid the collision.
- [33] In my view, the more applicable analogue is the recent judgment of this Court in *Randhawa v. Evans*, 2020 BCCA 292. The collision in *Randhawa* also occurred when a driver attempted to make a left turn across three lanes of traffic, this time on Oak Street in Vancouver. The left-turning driver stopped at an uncontrolled intersection to wait for a break in traffic to make her turn. Traffic was heavy and at some point, the lead vehicles in two of the three lanes stopped to let her make her turn. She started the turn and her vehicle collided with a vehicle driving along the third lane of traffic. Like Mr. Coffey in the case at bar, she did not see the approaching vehicle until it was too late to avoid the collision. The trial judge in *Randhawa* found that the through vehicle was an immediate hazard when the left-turning driver commenced her turn, and accordingly, that the through driver had the right-of-way, as did the judge in the case at bar. It followed that the left-turning driver breached her statutory duty to give way and bore at least some of the fault for the collision.
- [34] The trial judge then considered the position of the through driver. The judge found that the through driver had a positive obligation to be aware of all her surroundings. A reasonable driver in these circumstances "would have been aware of the slowing or stopped traffic", and "would have approached the intersection with caution at a reduced speed looking for the reason that the traffic was slowing or stopped": 2019 BCSC 787 at para. 28. The judge allocated liability 90% to the through driver and 10% to the left-turning driver.

- [35] On appeal, this Court confirmed the conclusion that each party had been at fault, but reapportioned liability 60% to the left-turning driver and 40% to the through driver. Writing for the Court, Justice Goepel explained the basis for liability of the parties in this way:
- [24] Ms. Evans [the left-turning driver] departed from safety rules when she entered the intersection when it was unsafe to do so. She did not keep a proper lookout. She failed to yield the right of way. Ms. Paul [the through driver] was not speeding, but she was at fault for not recognizing that the vehicles to her left had stopped and failing to slow down. I note that the traffic to her left had only come to a stop in the moments before Ms. Evans commenced her turn. Once Ms. Evans pulled into the curb lane, Ms. Paul had no opportunity to avoid the collision. In considering the nature and extent of the departure from the respective standards of care of each of the parties, I am of the view that the conduct of Ms. Evans was clearly more blameworthy. With respect, I find that the trial judge's apportionment of fault was grossly disproportionate to the apportionment the appeal court would have made. I would apportion liability 60% to Ms. Evans and 40% to Ms. Paul.
- [Emphasis added.]
- [36] By similar reasoning, Mr. Sabbaghan was at fault for not recognizing that vehicles around him had either stopped or were slowing down, and in failing to approach the intersection with caution at a reduced speed in order to determine why the vehicles were slowing or stopped. This was a breach of the common law duty all drivers have to operate their vehicles with the care and attention required in all the circumstances. This duty has been described as including "a general duty to keep a proper look-out and to take reasonable precautions in response to apparent potential hazards": *Julian v. Joyce*, 2016 BCSC 1417 at para. 13, *aff'd* 2017 BCCA 217.
- [37] The trial judge addressed this indirectly in para. 59, which I have quoted earlier in this judgment, but restricted his consideration of the stopped cars to a suggestion that they may have stopped in order to make a turn. The appellant submits that this is speculative, but then argues that the cars must have stopped because the light had turned yellow, which is an available but not inevitable inference. In my view, it does not matter why the cars had stopped. What is important is that Mr. Sabbaghan did not slow down to determine for himself why the flow of traffic had slowed. Had he done so, it is more likely that he would have seen Mr. Coffey's vehicle and been in a position to take evasive action earlier.
- [38] That Mr. Sabbaghan was not paying much attention to the slowing of cars driving northbound finds support from his own testimony, when asked to describe the location of cars around him:

Q And as you approached the intersection were there any cars beside you or were they also behind you?

A I did not pay much attention but I think a car was going to turn right.

Later in his testimony, he was asked again about his observations of the position of other northbound vehicles:

Q My question, Mr. Sabbaghan, was is it fair to say you don't remember the particulars of that vehicle very well before the collision?

A Not exactly. But probably was to the right and turned right.

Q Is it fair to say, Mr. Sabbaghan, that you're not saying that because of an actual memory but what makes sense to you?

A Because after the accident I saw the car stopped, parked beside the bus stop.

Q But you can't tell this Court today where you saw it prior to the collision?

A No, no one pays attention to that kind of details.

Q And you don't know if there was a taxi that was parallel to you prior to the intersection?

A I did not pay attention. It's possible because lots of taxis on that route.

[39] In my opinion, the failure of the trial judge to consider the implications of his findings concerning the stopped cars for the assessment of Mr. Sabbaghan's compliance with his common law obligations of care is an error of law, not fact. It is similar to the error described by this Court in *Sharma v. Kandola*, 2020 BCCA 161, where the trial judge had found liability against one party only, but this Court concluded both parties were at fault. In doing so, Harris J.A. characterized the error of the trial judge in this way:

[19] The judge fell into reversible legal error by failing to analyse the implications of Ms. Sharma's failure to see the van as she ought to have. This is not a case where a finding that a party was not negligent raises a question of mixed fact and law, reviewable on a standard of palpable and overriding error: see *Tabori v. Renaud*, 2017 BCCA 189 at para. 2. Here, the error lies in failing to assess the relevance for liability of uncontested and obviously material evidence. This is a legal error.

[40] For these reasons, I consider that each party bears a measure of fault for this collision. On the findings of the trial judge, Mr. Coffey was in breach of the statutory requirement to yield the right-of-way to Mr. Sabbaghan's vehicle, which was an immediate hazard at the time Mr. Coffey began his turn. However, on the facts found by the trial judge, Mr. Sabbaghan, like the through driver in *Randhawa*, was also at fault for not recognizing that vehicles around him had slowed or stopped, and for not approaching the intersection at a reduced speed to determine the reason for this change in the flow of traffic.

Apportionment of Liability

[41] Section 1(1) of the Negligence Act provides that:

If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

- [42] Fault in this sense equates to blameworthiness. It has been described as "a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances": *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 (C.A.).
- [43] In this case, the actions of both parties that contributed to the collision can be described as inadequate attention to the circumstances and to the risk of proceeding without a clear view of potential dangers. Neither was speeding excessively or engaged in any conduct that could be characterized as reckless or indifferent to the safety of others. Mr. Coffey did not deliberately enter the intersection knowing that Mr. Sabbaghan's vehicle constituted an immediate hazard to him. He attempted to make a difficult turn across three lanes of traffic, but failed to ensure that it was safe to do so and to give way to the oncoming vehicle that he did not, in any event, see. Mr. Sabbaghan did not try to run a red light, but failed to pay attention to cars travelling northbound with him, failed to recognize that they were slowing down or stopping, and failed to reduce his speed so that he could ascertain the reasons for the slowing vehicles.
- [44] These are the sorts of momentary lapses that were recently described as "mistakes that many drivers commit every day, in most cases with no consequences": *McMullin v. Trelenberg*, 2020 BCSC 49 at para. 117. I am unable to conclude that the conduct of either party fell so significantly below the standard of care expected of that party relative to the conduct of the other party that a meaningful distinction can be made in respect of their respective fault.
- [45] In *Shirley v. Regier*, [1997] B.C.J. No. 1035 (S.C.), Justice K.C. Mackenzie, sitting then as a justice of the Supreme Court, summarized the apportionment issue in this way:
- [12] In the result I am satisfied that both the plaintiff and defendant were at fault as set out above and the fault of each contributed to the accident. Both involved momentary lapses in judgment which do not differ significantly in degree. Accordingly I find the plaintiff and the defendant each 50 per cent at fault for this accident.
- [46] In my opinion, this characterization aptly describes the circumstances at bar. Each party committed momentary lapses in judgment which do not differ significantly in degree. I would apportion 50% of the liability for this collision to each party.
- [47] I would remit the assessment of damages to the trial court, which has already heard the evidence. In light of the divided success, I would order that each party bear his own costs of this appeal. The question of costs in the Supreme Court is also remitted to that court for determination after damages have been assessed.

Disposition

[48] For the foregoing reasons, I would order as follows:

- (i) I would allow the appeal, set aside the order under appeal and substitute an order that allocates 50% of the liability for the collision to each party;
- (ii) I would remit the assessment of damages and costs of the Supreme Court proceedings to the Supreme Court; and
- (iii) I would order that each party bear their own costs in this Court.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Dickson"

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