

CANADA / JUDGMENT

Jory v. Pereira

2019 BCSC 1465

COURT

Supreme Court of British Columbia

DECIDED

29 August 2019

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2019 BCSC 1465 Jory v. Pereira

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jory v. Pereira,

2019 BCSC 1465

Date: 20190829

Docket: M76943

Registry: Nanaimo

Between:

William Jory

Plaintiff

And:

Gordon Pereira and City of Nanaimo

Defendants

- and -

Docket: M81601

Registry: Nanaimo

Between:

Gordon Pereira

Plaintiff

And:

William Jory

Defendant

Corrected Judgment: The text of the judgment was corrected
at page 2 on November 16, 2020.

Before: The Honourable Madam Justice J. A. Power

Reasons for Judgment

Counsel for the Plaintiff William Jory:

G. R. Phillips

and K. A. Sugiyama

Counsel for the Defendant Gordon Pereira:

D. R. McDonagh

and P. K. McMurchy

Place and Dates of Trial/Hearing:

Nanaimo, B.C.

January 14 - 17, 2019

Place and Date of Judgment:

Nanaimo, B.C.

August 29, 2019

Introduction

- [1] This judgment relates to two actions that involve the same motor vehicle collision which took place at an intersection on Rutherford Road in Nanaimo, British Columbia. The two drivers involved have brought action against each other alleging negligence and both drivers allege they have suffered injury as a result of the collision. The collision involved significant force and both vehicles suffered total damage as a result of the collision.
- [2] Both actions were heard together at trial. The action against the City of Nanaimo was discontinued prior to trial. This trial related to the issue of liability for the collision. By agreement of counsel, Mr. Jory's action proceeded first. The issue of quantum of damages was severed by a Consent Order of Master Dick.

- [3] The issue that I must decide on this trial relates to liability for the collision, and if one driver is not solely liable for the collision to what extent each party is responsible. As part of my factual findings on the trial, I must determine whether Mr. Pereira was speeding and whether he presented an immediate hazard to Mr. Jory who was a left turning driver. I must also determine whether Mr. Jory stopped before commencing his left turn.
- [4] For the reasons that follow, I have determined that Mr. Jory is 40% at fault for the collision and Mr. Pereira is 60% at fault.
- [5] In undertaking the fact-finding process, I have kept in mind the guidance from our Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at para. 11 that I must consider the preponderance of the probabilities evident from the circumstances and I must consider the evidence as a whole. I have also kept in mind that truthfulness and reliability are not necessarily synonymous.

Facts

Background

- [6] Before discussing the evidence in this case, I will set out the location of the collision in order to give that evidence context. I will then briefly set out the background to the collision from the perspective of the witnesses, before turning to my findings of fact and legal analysis.
- [7] The collision occurred at the intersection of Rutherford Road and Cedar Ridge Place in Nanaimo, British Columbia. The collision occurred on Sunday, May 17, 2015, and the weather and road conditions were clear and dry.
- [8] In the area of the collision, Rutherford Road runs roughly east/west. Cedar Ridge Place runs roughly north/south and approaches Rutherford Road to form a "T" intersection.
- [9] At the time of the collision, Mr. Pereira was driving a 2006 Chevrolet Cobalt travelling east on Rutherford Road. Mr. Jory was driving a 2011 Dodge Caravan travelling northbound on Cedar Ridge Place and was turning left onto Rutherford Road intending to head west on Rutherford Road.
- [10] At the location of the collision, Rutherford Road has two lanes in each direction, which are divided by a cement median which has some vegetation. The lane closest to the centre median was referred to throughout the trial by witnesses alternately as the median lane, the meridian lane, or the left lane. I note that it could also be considered the fast lane or the passing lane, but for the purposes of this judgment I will call it the median lane. The speed limit on Rutherford Road is 50 kilometres per hour.

- [11] Photographs of the area of the collision were introduced in evidence at trial and include photographs taken by the Royal Canadian Mounted Police (RCMP) and one photograph taken by an employee at the Grand Hotel which was nearby. There were also Google maps introduced into evidence that illustrate aerial views of the collision area as well as street views. These photographs and maps provided assistance to the court in understanding the evidence.
- [12] In addition to the two drivers involved in the collision, Mr. Jory and Mr. Pereira, an independent witness named Troy Monsell gave evidence. There are also reports and evidence from two expert engineers, Trevor Dinn, (Exhibit 3) and a responsive report from Jonathan Gough (Exhibit 4).

William Jory

- [13] William Jory is a retired air traffic controller who lives in Nanaimo with his wife, adult daughter and two granddaughters. He was 67 years old at the time of the collision. Mr. Jory has been retired since 2002 and has led an active life since retirement. Mr. Jory's pre-existing health problems were detailed in the evidence. Of significance, at the time of the collision Mr. Jory's vision was "fine for driving" and he did not wear any corrective lenses. Mr. Jory was not taking any prescription medication nor was he under the influence of alcohol at the time of the collision.
- [14] Mr. Jory testified that he has suffered a brain seizure since the collision, but he testified that did not impact his memory of the events and I conclude that he did have good recall of the events at trial.
- [15] On May 17, 2015, Mr. Jory was driving his adult daughter to work at the Grand Hotel located at the intersection of Cedar Ridge Place and Rutherford Road in Nanaimo. He had just left the Grand Hotel and proceeded on Cedar Ridge Place on a slight downward slope towards Rutherford Road. He testified that he stopped just before the stop line at Cedar Ridge Place and then looked left and saw two vehicles, an unknown beige Sport Utility type vehicle and a black car (the Pereira vehicle). Mr. Jory testified that the black vehicle was in the median lane of Rutherford. He testified that he was of the view that both vehicles were far enough away in order to make a left turn onto Rutherford Road safely. He acknowledged in cross-examination that he might not have had the same opinion if the vehicles were at highway speed instead of in a 50 km speed zone.
- [16] As I have stated, Mr. Jory testified that he had no concerns about making the left hand turn. He testified that prior to doing so he looked to the left, then to the right and then to the left again, before he proceeded slowly into the intersection to make his turn.

- [17] Mr. Jory testified that his vehicle was struck around the door pillar on the driver's side of the vehicle. He was in the intersection, in the median or left hand lane of Rutherford, when the collision occurred. He testified that the force of the collision was "horrendous" and all airbags in his vehicle were deployed.
- [18] After the collision Mr. Jory could see the Pereira vehicle in the bushes on the other side of the road.
- [19] Mr. Jory was initially ticketed by the police with leaving a stop sign when it was unsafe to do so, but Mr. Jory disputed that traffic violation ticket and the ticket was subsequently stayed by the police.

Troy Monsell

- [20] Troy Monsell is a 50-year-old inspector with the City of Nanaimo. He is an experienced driver who, in addition to driving dump trucks as part of his work responsibilities, holds a Class 1 licence which allows him to drive large commercial vehicles. He is also an avid motorcyclist.
- [21] Mr. Monsell was doing volunteer work on May 17, 2015. He was driving west in the median lane down Rutherford Road which had a slight downwards slope, when he saw the events leading up to and the collision itself. Mr. Monsell testified that he had a clear view of the collision as depicted in Photographs 5 and 6 at the trial.
- [22] Mr. Monsell saw Mr. Jory's black caravan vehicle stopped at the Cedar Ridge Place intersection with Rutherford Road. He testified that he saw the black caravan proceed slowly and cautiously into the center median. Mr. Monsell testified that it almost looked like Mr. Jory's vehicle was going to stop again. Mr. Monsell then saw a small black car (the Pereira vehicle), come up from the hedge at a speed he estimated at well over 80 km/h. He witnessed that the collision took place in the median lane. He testified that the Pereira vehicle jerked to the left at the last minute which "lessened the blow" or impact of the collision. Mr. Monsell pulled over to the curb lane on Rutherford Road and assisted both drivers.

Gordon Pereira

- [23] Gordon Pereira was 44 years old at the time of the collision. He has worked in various occupations including in the hotel industry. He eventually changed occupations and was working as a hair dresser at the time of the collision.
- [24] On the day of the collision, Mr. Pereira was not under the influence of any drugs or alcohol. He had no vision problems and testified that he has 20/20 vision. He was en route to a church service that started at 10:00 a.m. when the collision occurred.

- [25] Mr. Pereira had turned off the Island Highway which he believed was an 80 km/h speed zone onto Rutherford Road which he knew to be a 50 km/h speed zone. He testified that he was travelling "with the speed of traffic" when he saw the Jory van. He testified that he was travelling in the curb lane somewhere near the speed limit as he approached the collision location. He testified that he was sure he was not speeding but appeared to be reliant on the fact that he was travelling with the speed of traffic before the collision.
- [26] He testified that Mr. Jory's vehicle entered the intersection leaving him no opportunity to avoid except for taking evasive action at the last minute. He testified that he was sure he was in the curb lane at the time of the collision.

Trevor Dinn

- [27] Trevor Dinn is a Professional Engineer who was qualified as an expert in accident reconstruction. His report is filed as Exhibit 3.
- [28] As part of his report, Mr. Dinn noted that Mr. Pereira's Chevrolet was not available for inspection and the Event Data Recorder from the vehicle was not available for download. He did have available the Event Data Recorder ("EDR") information from Mr. Jory's Dodge Caravan. All counsel are prepared to concede that the EDR data is accurate, although there was no evidence called about the mechanical condition of the Jory vehicle or that the EDR data was being accurately recorded.
- [29] In his report, Mr. Dinn notes that no collision would have occurred if the Dodge had been able to travel a further vehicle length.
- [30] Mr. Dinn's conclusions are as follows:
- The Dodge Caravan and Chevrolet Cobalt impact speeds were likely about 23 and 90 km/h, respectively.
 - The Dodge likely presented a collision hazard for 2.4 seconds or more, which likely resulted in the Chevrolet having been braked prior to impact.
 - The Chevrolet was likely travelling about 115 km/h or more prior to braking.
 - The Dodge was travelling at about 18 km/h 5 seconds prior to impact; it then slowed to 14.5 km/h at 3.8 seconds prior to impact and was located with its front bumper at the stop bar. It had slowed to about 8 km/h at 3 seconds prior to impact. It began increasing speed from 2 seconds prior to impact until impact where it was travelling about 23 km/h.
 - The Dodge required about a further 5 metres of travel and no collision would have occurred.

Jonathan Gough

- [31] Jonathan Gough is a Professional Engineer who provided a responsive report to the Dinn report. Mr. Gough summarizes his concerns with the Dinn report by noting that Mr. Dinn did not have the opportunity to examine either of the vehicles involved in the collision and only limited data was available from the collision scene itself.
- [32] Since Mr. Gough provided a responsive report his own conclusions are limited, but he did opine that it was more likely that the point of impact was in the median lane rather than the curb lane.

ASSESSMENT ON CREDIBILITY

- [33] Turning now to my assessment of the evidence I state at the outset that I accept the evidence of Mr. Jory and Mr. Monsell over the evidence of Mr. Pereira. I find that the evidence of Mr. Jory and Mr. Monsell is consistent with each other and with the expert evidence.
- [34] Mr. Monsell was an independent witness who was also an extremely experienced driver and I find that he had a clear view of the collision. I accept his evidence surrounding the excessive speed of the Pereira vehicle and his evidence that Mr. Jory stopped his vehicle at the stop line before proceeding into the intersection slowly and cautiously. His evidence that the Jory vehicle appeared almost to stop again, appears to be borne out by Mr. Dinn's findings on the speed of the Jory vehicle before impact.
- [35] In not accepting Mr. Pereira's evidence, I do not find that he deliberately misled the court. However, he had no basis for his conclusion that he was not speeding except that he was travelling with the flow of traffic. In cross-examination he was unwilling to concede that if traffic around him was speeding, then so was he. In light of that, I find Mr. Pereira's evidence on his vehicle's speed unpersuasive. Further, I find that Mr. Pereira was likely in a rush to get to the church service on time. Finally, Mr. Pereira's evidence that the collision happened in the curb lane is inconsistent with all of the evidence including the evidence of his own expert Mr. Gough.
- [36] In considering the expert reports, I find the report of Mr. Dinn persuasive and I conclude that his report is consistent with the eye witness evidence of Mr. Jory and Mr. Monsell, which I do accept. I find that the weaknesses attributed to the report by Mr. Gough are acknowledged by Mr. Dinn and are compensated for by his conservative calculations on speed.

FINDINGS OF FACT

- [37] After considering the totality of the evidence, I make the following findings of fact:
- [38] The Pereira vehicle was speeding at the time of the collision and was travelling between 80-115 km/h, and most likely over 90 km/h.

- [39] The Jory vehicle stopped at the stop line on Cedar Ridge Place prior to entering the intersection. The Jory vehicle was proceeding cautiously and perhaps even too cautiously.
- [40] The Jory vehicle could have safely made the turn if the Pereira vehicle had not been speeding.
- [41] I find that Mr. Jory did not accurately assess the hazard presented by the Pereira vehicle since he assumed that the Pereira vehicle was travelling in and around the speed limit. Mr. Jory conceded that the turn would have been unsafe at highway speeds.
- [42] The collision occurred in the median lane of travel.
- [43] The Jory vehicle was travelling at 23 km/h at the time of impact.

Liability

Legal Framework

- [44] Drivers owe a common law duty to take reasonable care for the safety of themselves and others when using a roadway. This duty is supplemented by the statutory duties found in the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [the Act].
- [45] The relevant provisions of the Act in this case are as follows:

Careless driving prohibited

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

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

...

Speed limits

146 (1) Subject to this section, a person must not drive or operate a motor vehicle on a highway in a municipality or treaty lands at a greater rate of speed than 50 km/h, and a person must not drive or operate a motor vehicle on a highway outside a municipality at a greater rate of speed than 80 km/h.

Yielding right of way on left turn

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.

Entering through highway

175 (1) If a vehicle that is about to enter a through highway has stopped in compliance with section 186,

- (a) the driver of the vehicle must yield the right of way to traffic that has entered the intersection on the through highway or is approaching so closely on it that it constitutes an immediate hazard, and
 - (b) having yielded, the driver may proceed with caution.
- (2) If a vehicle is entering a through highway in compliance with subsection (1), traffic approaching the intersection on the highway must yield the right of way to the entering vehicle while it is proceeding into or across the highway.

Stopping at intersections

186 Except when a peace officer directs otherwise, if there is a stop sign at an intersection, a driver of a vehicle must stop

- (a) at the marked stop line, if any,
- (b) before entering the marked crosswalk on the near side of the intersection, or
- (c) when there is neither a marked crosswalk nor a stop line, before entering the intersection, at the point nearest the intersecting highway from which the driver has a view of approaching traffic on the intersecting highway.

[46] In *Nerval v. Khehra*, 2012 BCCA 436, Justice Harris laid out the law governing left-turning vehicles:

[33] The principles laid down in *Pacheco* lead to the conclusion that the starting point of the analysis is that when a left turning driver is assessing making a left turn in an intersection he or she must yield the right of way to oncoming traffic unless it is not an immediate hazard. Describing a driver as dominant means no more than that driver has the right of way, whereas the servient driver has the obligation to yield the right of way. The obligation imposed by s. 174 on the left turning vehicle is that it "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". A left turn must not be commenced unless it is clearly safe

to do so. If there are no vehicles in the intersection or sufficiently close to be an imminent hazard, the driver may turn left and approaching traffic must yield the right of way. In other words, if a left turning driver complies with his or her obligation only to start the left turn when no other vehicles are in the intersection or constitute an immediate hazard, then the left turning driver assumes the relationship of being the dominant vehicle and approaching vehicles become servient and must yield the right of way.

- [34] As observed in *Salaam v. Abramovic*, 2010 BCCA 212 (B.C. C.A.) at para. 33, the words "immediate hazard" are "used to determine when a vehicle may lawfully enter an intersection. They determine who is the dominant driver, but do not, by themselves, define the standard of care in a negligence action."
- [35] The effect of s. 174 is to cast the burden of proving the absence of an immediate hazard at the moment the left turn begins onto the left turning driver. This result flows inevitably from the wording of the section itself, given the nature of the absolute obligation the section creates. If a left turning driver, in the face of this statutory obligation, asserts that he or she started to turn left when it was safe to do so, then the burden of proving that fact rests with them.
- [36] The trial judge did not err in imposing this burden on Ms. Nerval. The first aspect of the burden is to demonstrate that when she began her turn there was no immediate hazard. Having failed to do so, the trial judge was entitled to conclude that Ms. Khehra was an immediate hazard and was the dominant driver.
- [37] The second aspect of the burden relates to proving that despite being the dominant driver, Ms. Khehra nonetheless was negligent and at fault for causing or contributing to the accident. Here, although Ms. Khehra had the right of way, she could exercise that right only in a safe manner. The trial judge correctly relied on the statement of principle from para. 18 of *Pacheco*, quoted above, in assessing the evidence and reaching his conclusions.
- [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.

- [47] In brief, this can be summarized as a two-part test: *Ranahan v. Iron Horse Enterprises & Logistics Inc.*, 2017 BCSC 759 at paras. 44-46. First, the left-turning driver must establish that there was no immediate hazard when they began their turn. If there was no immediate hazard, the left-turning driver becomes the dominant driver with the right of way. Second, even if the through-driver is found to be the dominant driver with the right of way, the court must determine whether the through-driver was nevertheless negligent and at fault for causing or contributing to the accident.
- [48] An immediate hazard exists when the approaching car would need to take "violent or sudden" avoiding action in order to avoid the threat of collision: *Raie v. Thorpe* (1963), 43 WWR 405 (B.C.C.A.).
- [49] Section 175 of the Act contains some additional criteria not considered in *Nerval*, which focused on s. 174. First, in order to reach the two-part test from *Nerval*, the left-turning vehicle must have stopped at the marked stop-line in compliance with s. 186. Finally, when proceeding to turn left, the left-turning vehicle must proceed with caution, even if they are the dominant driver.

PARTIES' POSITIONS ON LIABILITY

Mr. Jory's Position

- [50] Counsel for the plaintiff submits that at the time Mr. Jory began his left hand turn on Rutherford Road, Mr. Pereira was not an immediate hazard to him because the vehicle was far down Rutherford Road, closer to the Wills Road intersection than the Cedar Ridge Place intersection. Mr. Jory was therefore the dominant driver, and Mr. Pereira was negligent in his failure to yield the right of way. In the alternative, the plaintiff argues that even if Mr. Pereira was the dominant driver with the right of way, he was nevertheless negligent and at fault for causing or contributing to the collision because of his high speed, and for his failure to avoid the crash when it appeared or ought to have appeared imminent.
- [51] Finally, the plaintiff submits that Mr. Jory was not negligent for failing to appreciate the high speed at which Mr. Pereira was travelling. Mr. Jory reasonably assumed that Mr. Pereira was following the rules of the road, and was not obligated to consider the possibility that Mr. Pereira was exceeding the speed limit.
- [52] The plaintiff argues that there is no liability to be found against him, and Mr. Pereira is solely responsible for the crash. In the alternative, he submits that he is 20% at fault, and Mr. Pereira is 80% responsible.

Mr. Pereira's Position

- [53] Counsel for the defendant submits that Mr. Jory is solely responsible for the crash. He submits that Mr. Jory did not stop his vehicle at the stop line, as required under s. 186. Further, he submits that Mr. Pereira's vehicle constituted an immediate hazard at the time Mr. Jory began turning; as such, Mr. Pereira was the dominant driver with the right of way, and Mr. Jory was obligated to yield to him, which he failed to do.
- [54] Counsel further submits that Mr. Jory disregarded statutory and common law duties as he failed to proceed with caution and failed to check for ongoing traffic before entering the through lane. Instead of discharging his duties, Mr. Jory accelerated into the path of Mr. Pereira's vehicle, leaving Mr. Pereira with no opportunity to avoid the collision.
- [55] Mr. Pereira submits that he was not speeding at the time of the accident, and was not in breach of any common law or statutory duties. Counsel submits that Mr. Pereira's position is therefore supported by *Walker v. Brownlee*, [1952] 2 D.L.R. 450 (S.C.C.) where the Court held the following:
- [49] While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali*.

ANALYSIS

Did Mr. Jory stop at the stop line?

- [56] In order to proceed to the left-hand turn analysis from Nerval, Mr. Jory must establish that he stopped at the stop line before beginning his left hand turn.
- [57] Mr. Jory testified that he came to a complete stop at the stop line, looked left, then right, then left again, before beginning his turn. This evidence is supported by the neutral eyewitness, Mr. Monsell, who testified that the Jory vehicle was stopped at the stop sign on Cedar Ridge Place for 4-5 seconds before it began to creep into the intersection.
- [58] I am satisfied that Mr. Jory discharged his obligation to stop at the stop-line, in compliance with s. 186 of the Act.

Was Mr. Pereira's vehicle an immediate hazard?

- [59] Mr. Jory bears the burden of proving that Mr. Pereira's vehicle was not an immediate hazard when Mr. Jory began his turn.
- [60] Mr. Jory testified that when he first looked left on Rutherford Road, he observed two cars approaching uphill toward him. At the time, the Pereira vehicle was much closer to Wills Road than to Cedar Ridge Place, behind a beige vehicle. He looked to the right, and saw no immediate hazards. He looked left for a second time, and observed that the Pereira vehicle was now beside the beige vehicle in the median lane. He made a "judgment call" that there was no immediate hazard, as the vehicles were still a fair distance away, and began to make his turn.
- [61] As I have already indicated, I generally accept Mr. Jory's evidence and I accept that if Mr. Pereira had not been speeding at around double the speed limit the left turn would have been safe. However, I have found that Mr. Pereira was speeding and in these circumstances, I am not satisfied that Mr. Jory had discharged his onus to establish that Mr. Pereira was not an immediate hazard.
- [62] I find that Mr. Pereira was an immediate hazard, and therefore was the dominant driver with the right of way.

Was Mr. Pereira nevertheless negligent?

- [63] Having established that Mr. Pereira was an immediate hazard to Mr. Jory, and therefore, the dominant vehicle with the right of way, I must consider whether Mr. Pereira was negligent.
- [64] In this case, there is persuasive evidence from the neutral eyewitness, Mr. Monsell, and from the plaintiff's expert witness that Mr. Pereira was travelling far in excess of the speed limit at the time of the collision. Mr. Pereira's speed was not only approximately double the posted speed limit, it was in fact in excess even of the s. 146 speed limit of highways outside a municipality.
- [65] I find that this excessive speed was in contravention of Mr. Pereira's duties under the common law and under s. 146 of the Act.
- [66] I conclude from all of the evidence that had Mr. Pereira not been speeding he would have been able to avoid the collision. Further, Mr. Jory's vehicle should have been visible to Mr. Pereira since there was only one other vehicle in the area and nothing blocking Mr. Pereira's vision. I find that Mr. Pereira was negligent in not taking evasive action sooner.

Was Mr. Jory negligent in failing to notice Mr. Pereira's speed?

- [67] Mr. Jory argues that Mr. Jory was not negligent for failing to appreciate the speed of Mr. Pereira's vehicle, because drivers are generally entitled to assume that others will obey the rules of the road. However, as Justice Fitch observed in *Pirie v. Skantz*, 2016 BCCA 70 at para. 29, that assumption is not absolute:

[29] With respect to the second argument the appellant advances under this ground, while I do not contest the proposition that a driver is generally entitled to assume that others will obey the rules of the road, this is not an unqualified entitlement. As noted in *Brucks v. Caslavsky*, [1994] B.C.J. No. 996, 45 B.C.A.C. 62 at para. 10:

a driver is entitled to assume that others will obey the rules of the road, and until the contrary becomes apparent to rely on that assumption in deciding whether or not an oncoming vehicle constitutes an "immediate hazard".

[Emphasis added in *Pirie*.]

[68] In this case, while Mr. Jory was generally entitled to assume that Mr. Pereira was following the rules of the road, I find that it should have been apparent to him that Mr. Pereira in fact was not following those rules. I have found that Mr. Jory had stopped at the stop sign before beginning his turn, and had the opportunity to twice observe Mr. Pereira approaching him. He observed Mr. Pereira draw level with the car travelling in the curb lane. Having found that Mr. Pereira was travelling at a speed greatly in excess of the limit, I find that it ought to have been apparent to Mr. Jory that Mr. Pereira was travelling at an unsafe speed. In making this finding, I have considered that Mr. Monsell, who was further away, was able to identify that Mr. Pereira was speeding. Even though his view of the approaching vehicle was not the same, I conclude that it was apparent that Mr. Pereira was not following the rules of the road, and Mr. Jory should have been able to identify that Mr. Pereira was speeding.

How to apportion fault for the accident?

[69] Ultimately, I find that both Mr. Pereira and Mr. Jory were in breach of their statutory and common law duties. Mr. Jory, by failing to notice Mr. Pereira's excessive speed, and by failing to yield to the dominant driver, was in breach of his common law duties to take care for his safety and the safety of other drivers, as well as his duties under s. 175 of the Act. Despite these failures, however, I find that Mr. Pereira's dangerous and excessive speed in a residential area was a substantial cause for the accident.

[70] The defendant argues that the principle in *Walker v. Brownlee* protects Mr. Pereira from liability, since he was the dominant driver. However, the principle from *Walker v. Brownlee* is not an absolute shield for the dominant driver. Justice Ballance made the following observation in *Hynna v. Peck*, 2009 BCSC 1057 at para. 80 when considering whether a speeding dominant driver may nonetheless be liable for an accident:

[80] I do not read the *Cooper* decision as advocating, in the assessment of tort liability, the outright rejection of considerations pertaining to the speed or other conduct of the through driver who constitutes an immediate hazard. Put another way, *Cooper* does not lay down a rigid rule that the Court ought not to consider whether and how the speed of a through driver might have played a causative role in an accident where it has been found that the other driver has failed to yield the right-of-way. In my view, the dictum in *Walker* does not extend that broadly and was not intended to have that reach. The Court in *Walker* speaks of

avoidance action to be taken by a reasonably careful and skilful driver. It is difficult to imagine how a driver who is speeding significantly over the applicable limit can legitimately be portrayed as standing in the position of the reasonably careful and skilful driver contemplated by Cartwright J.

- [71] I am satisfied that this is similarly not a case where Mr. Pereira can legitimately be portrayed as "standing in the position of a reasonably careful and skilful driver", as described in Walker. Mr. Jory has established that had Mr. Pereira exercised reasonable care, he would have become aware that Mr. Jory had entered the intersection in time to give Mr. Pereira sufficient opportunity to avoid the accident. That is, if Mr. Pereira had not been travelling at a dangerous and excessive speed, at the time he observed Mr. Jory enter the intersection there would have been sufficient time for a reasonably prudent driver to come to a safe and controlled halt without any accident occurring. I find that this conclusion is amplified when one considers the degree of caution that Mr. Jory was exhibiting in making the left hand turn.
- [72] I am satisfied that while Mr. Jory was negligent in entering the intersection in front of an immediate hazard, Mr. Pereira's negligence in travelling in excess of 80 km/h, and likely in excess of 90 km/h, was the predominant cause of the collision. Mr. Pereira's conduct was more blameworthy than Mr. Jory's.

Conclusion

- [73] I find that Mr. Jory is 40% liable for the accident. Mr. Pereira bears 60% responsibility for the accident. The parties have leave to speak to costs if that issue is not agreed to between the parties.

"J. A. Power, J."

The Honourable Madam Justice J. A. Power

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