

CANADA / JUDGMENT

McIntyre v. Quitley

2023 BCSC 2240

COURT

Supreme Court of British Columbia

DECIDED

20 December 2023

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McIntyre v. Quitley,

2023 BCSC 2240

Date: 20231220

Docket: M89968

Registry: Nanaimo

Between:

Christina McIntyre

Plaintiff

And

Michael Joseph Quitley and Ryker David Knight

Defendants

- and -

Docket: M190652

Registry: Victoria

Between:

Ryker Knight

Plaintiff

And

Michael Quitley

Defendant

- and -

Docket: M89625

Registry: Nanaimo

Between:

Michael Joseph Quitley

Plaintiff

And

Ryker Knight

Defendant

Before: The Honourable Justice Harvey

Reasons for Judgment

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Counsel for R. Knight as Defendant:

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Place and Dates of Trial:

Nanaimo, B.C.

September 25-29, 2023

Place and Date of Judgment:

Nanaimo, B.C.

December 20, 2023

Introduction

- [1] The singular issue before me in these three actions is a determination as to liability for a two-vehicle accident that occurred on April 8, 2018 at or near the intersection of 107 Street and Island Highway, near Nanaimo, British Columbia.
- [2] Ryker Knight was proceeding straight on Island Highway near 107 Street, driving a 2009 Honda VTX 1300R motorcycle. Michael Quitley was the driver of a left-turning 2006 Pontiac Montana van.
- [3] Three separate actions were commenced involving the same accident. Mr. Quitley commenced an action (M89625) against Mr. Knight. Mr. Knight commenced an action (M190652) against Mr. Quitley. In another action (M89968), the plaintiff, Christina McIntyre, called no evidence. She was a passenger in Mr. Quitley's vehicle at the time of the accident.
- [4] In both the Quitley action and the Knight action, each plaintiff asserts that the other is solely responsible for the occurrence of the accident. In the McIntyre action, Ms. McIntyre submits liability should be apportioned between Mr. Knight and Mr. Quitley, as she alleges both were at fault for the accident.
- [5] Five witnesses were called at trial. Both Mr. Knight and Mr. Quitley testified as to the circumstances of the accident.
- [6] Three professional engineers were qualified as experts and opined as to the speeds of Mr. Quitley's van and Mr. Knight's motorcycle, both prior to and at the time of impact. Michael Yang offered opinion evidence in the Quitley action. In the Knight action, David Little offered opinion evidence on behalf of Mr. Knight; Trevor Dinn testified on behalf of Mr. Quitley.
- [7] As best they were able, from the information available, the experts offered opinions as to the positioning of the two vehicles in the lanes of travel both before and after impact, the speeds of each on impact and the effect of speed as a contributing factor to the accident.

The Circumstances of the Accident

- [8] The impact occurred as Mr. Quitley was making a left-hand turn across the path of Mr. Knight. Mr. Knight, as the dominant driver, was *prima facie* entitled to the right-of-way. However, Mr. Knight's status as the dominant driver is challenged by the experts of Mr. Quitley who opined that he was travelling at an excessive speed and, were he travelling at the posted speed limit of 70 km/h, could easily have stopped his motorcycle prior to the collision.

- [9] Indeed, in the opinions of Messrs. Yang and Dinn, but for Mr. Knight's speed as he approached the intersection, Mr. Quitley would have passed safely in front of him.
- [10] Mr. Knight, for his part, relies on Mr. Little's opinion that in view of the speed at impact, determined to be between 73 and 100 km/h, Mr. Knight did not have sufficient time to both perceive and avoid the hazard of the left-turning driver. Accordingly, Mr. Knight asserts liability should be imposed 100% on Mr. Quitley.

The Evidence

Mr. Knight

- [11] Mr. Knight was 23 years of age at the time of the accident. He had seven years' experience riding motorcycles.
- [12] Mr. Knight had owned the Honda motorcycle for approximately three months prior to the accident and testified it had no mechanical issues. The headlight was operational and he was wearing full leather gear and a helmet at the time of the accident.
- [13] Mr. Knight had been to Original Joe's restaurant on two separate occasions that evening. He enjoyed a beer with a friend earlier in the evening then later came back, alone, consuming several beers and some food. Alcohol is not suggested as a causative factor.
- [14] Mr. Knight recalled leaving the restaurant a little before midnight. Prior to leaving the parking lot, he warmed up his motorcycle while he had a cigarette(s). He recalled entering the Island Highway to proceed westbound; his next memory was waking up in the hospital some two days later. Mr. Knight has no specific memory of the accident itself or the events leading up to it, after he merged onto the highway.
- [15] The receipts from Original Joe's indicate he cashed out, following the second visit, at approximately 11:45 PM. Mr. Knight was unable to offer any testimony as to his speed as he approached 107 Street, or the movements of Mr. Quitley's vehicle.

Mr. Quitley

- [16] Mr. Quitley, who was 43 at the time of the accident, testified that he and his then girlfriend, Ms. McIntyre, decided to go to a local convenience store after watching a movie at his residence. The Pontiac van that he was driving had no mechanical issues. The headlights were in good working condition and there was no damage to the vehicle pre-accident.
- [17] Mr. Quitley testified he left his residence with Ms. McIntyre at approximately 11:30 PM. He was heading south on the Island Highway intending to turn left at 107th using the designated left-hand turn lane. The posted speed limit was 70 km/h.

- [18] Both Mr. Knight and Mr. Quitley agreed that the weather was damp. It rained earlier in the day but was not raining at the time of the accident. The pavement was described as damp and patchy. The streets were well-lit by artificial lighting at the intersection of 107th and Island Highway.
- [19] Mr. Quitley described bringing his vehicle into a fairly lengthy left-hand turn lane heading toward 107th and, while about halfway down the turn lane, he observed the motorcyclist leave the mall and enter the highway.
- [20] Mr. Quitley continued to slow his vehicle and commenced his left-hand turn onto 107th intending to make what he described as a "casual" turn. Prior to initiating his turn, he observed the motorcyclist approximately halfway from the point on which he entered the highway to the intersection he was intending to cross. He did not give an estimate of the actual distance between the motorcycle and the intersection, nor did he estimate the speed of the approaching vehicle. He thought there was sufficient time to execute the turn assuming, as he did, the approaching vehicle was maintaining the posted speed limit.
- [21] He took his eyes off the approaching vehicle about half a second before beginning his turn into the westbound lane.
- [22] Mr. Quitley testified his turn signal was on throughout the manoeuvre. His original approach speed into the turn lane was about 50 km/h but he began slowing to initiate the turn. He thought his speed at the commencement of the turn was approximately 20 to 25 km/h and that he only braked as the two vehicles contacted one another. Mr. Knight's motorcycle impacted the right passenger side of Mr. Quitley's vehicle in front of the forward wheel well.
- [23] He only recalls seeing a light before impact. Mr. Quitley believed that his Pontiac had crossed the centreline of the two northbound lanes at the point he was struck. He said the impact felt like being hit by a train.
- [24] His vehicle was turned at an angle from the impact. The airbags deployed.
- [25] Both Mr. Quitley and Ms. McIntyre exited the vehicle. He estimated the motorcycle was approximately seven to ten feet away from his vehicle. They observed Mr. Knight who appeared to have significant injuries.
- [26] Mr. Knight, according to Mr. Quitley, was in and out of consciousness and making noises but not speaking. 911 was called and first responders came within an estimated five minutes.
- [27] Mr. Quitley identified the photographs of his vehicle both at the scene and at the ICBC wrecking lot.
- [28] In cross-examination, Mr. Quitley agreed that he saw the motorcyclist while he was still in the turn lane and before beginning his turn. He estimated the distance between them was perhaps 250 to 300 feet and that he knew that the motorcycle was accelerating and coming his way.

- [29] Mr. Quitley agreed he took his eyes off the motorcycle for a fraction of a second before commencing the turn at which time he agreed he had no ability to judge the motorcyclist's speed. He agreed with Mr. Pedersen, Mr. Knight's counsel, that he at no time formed an estimate of the speed of the motorcycle, nor did he take steps to determine the motorcyclist's speed before he made the decision to enter the intersection.
- [30] In response to questions by Mr. Ryneveld, counsel for Mr. Quitley in the Knight action, Mr. Quitley confirmed he had no way to ascertain the speed of the motorcyclist when he made the turn and believed "the distance was safe based on an assumption of him going the speed limit".
- [31] Mr. Quitley acknowledged he was aware that motorists speed in the area and when pressed on for an estimate of Mr. Knight's speed he said, in effect, "I guess I did not even try".

The Experts' Opinions

- [32] Each of the three engineers were qualified as accident reconstruction experts and each offered opinions as to various matters addressing factors material to the accident's causation. Each made efforts to reconstruct the following from the available information: the accident, the positions of the vehicles at the time of impact and their respective speeds in advance of the collision and on impact.
- [33] Messrs. Little, Dinn and Yang each prepared an initial report and a supplemental report. The latter reports were prepared following access by all three to security camera footage from Original Joe's which, according to Messrs. Dinn and Yang, allowed them to estimate the motorcycle's speed as it crossed through the field of vision captured by the camera.
- [34] Mr. Little, the expert retained by Mr. Knight, described the investigative steps he took. He did not visit the site scene but rather relied on information obtained from police reports including data from the Pontiac's event data recorder, the fact of the airbag deployment, the photographs depicting the scene of the accident and surrounding area as well as photographs of the vehicles involved, both at the scene and in storage lots.
- [35] He opined that, on impact, the speed of the Pontiac was approximately 25 km/h. He opined that the impact speed of the motorcycle was between 73 to 100 km/h. Mr. Little's assessment of the accident was based on his opinion as to when the motorcyclist first ought to have observed the hazard of the left-turning van. Then, based upon normal perception and reaction times coupled with breaking times, Mr. Little determined whether or not the motorcyclist had sufficient time to take evasive action either by braking or steering away from the accident.

- [36] Mr. Little made no allowance for whether or not the motorcyclist braked before impact. The roads, because they were damp, displayed no sign of braking by either vehicle before impact. However, Mr. Little agreed the absence of evidence of braking, given the road conditions at the time, was not determinative as to whether either vehicle braked prior to contact.
- [37] Mr. Little's opined impact speed of the Pontiac was based on the information from the airbag deployment and the positioning of the vehicles following contact. The Pontiac was spun on its axis to its left.
- [38] While the photographs of the accident display a debris field on the highway, the point of impact is not precise.
- [39] Each of the engineers, including Mr. Little, made estimates as to the normal turning curve of a left-turning driver given the layout of the roadway and the final resting position of the Pontiac after contact to try and pinpoint as best they could where the two vehicles contacted one another.
- [40] All of the engineers agreed that the average motorist has a time lag between the initial perception of a hazard and the implementation of a proper reaction to the hazard, such as braking or turning to avoid it. They described this as perception reaction time ("PRT").
- [41] Mr. Little used a figure of three quarters of a second for the PRT of Mr. Knight based on his estimate as to when the approaching Pontiac would first have appeared as a hazard to him.
- [42] He opined the PRT commenced when the Pontiac first crossed into the oncoming lane, not as it commenced its left-turning motion while still within the left-hand turn lane.
- [43] Mr. Little said the left-hand turn signal on the Pontiac would not cause a reaction because the Pontiac, by virtue of its position in a designated left-hand turn lane, would have been perceived as awaiting an opportunity to safely turn left across Island Highway.
- [44] Noting a left-hand turn across oncoming traffic is a common occurrence encountered daily by users of the highway, Mr. Little opined the Pontiac would not be perceived as a hazard to an oncoming motorist whose expectation would be that the left-turning driver would obey safety rules and yield the right-of-way to the oncoming driver.
- [45] Mr. Little disagreed with the opinion of Messrs. Dinn and Yang that left-turning vehicles are perceived as a hazard to oncoming motorists before they enter into that motorist's lane of travel according to, at least, one author whose studies indicated perception awareness begins as soon as a lateral motion is apparent to the oncoming driver.
- [46] He was familiar with the research relied upon by Mr. Dinn suggesting that any lateral movement by the oncoming left-turning vehicle begins the clock on the PRT. However, Mr. Little qualified his view of the results by stating the oncoming through vehicle might perceive the first lateral movement as hazardous thus starting the PRT.

- [47] All three experts agreed that PRT varies according to the experience of the driver, the age of the driver and the driving conditions.
- [48] What Mr. Little did not do, which the other two engineers did, was analyze the video retrieved from Original Joe's security cameras. That video depicts the entry of Mr. Knight's motorcycle onto the Island Highway and then its path across approximately 45 metres of travel as he proceeded towards 107 Street.
- [49] Both Mr. Dinn and Mr. Yang provided estimates of the speed of Mr. Knight during his travel between his appearance on the video until he exited from view of the camera. Both used the distance between poles situated on the patio and the time frame the motorcycle was visible to form estimates of its speed.
- [50] The motorcycle exited the camera's view approximately 90 metres away from the collision site.
- [51] The video itself was only 1.22 seconds in length. The portion from which Mr. Yang and Mr. Dinn estimated the speed of the motorcycle, or at least a range of speeds, was from a 0.2 second portion of the video taken between the last two poles on the patio of the restaurant.
- [52] The estimates of Mr. Knight's speed ranged from, in Mr. Yang's opinion, 112 to 141 km/h. Mr. Dinn provided a more conservative range of 117 to 129 km/h.
- [53] With this information in hand, placing Mr. Knight between 90 metres to 115 metres from the point of impact, both Mr. Dinn and Mr. Yang opined that Mr. Knight, if travelling at the posted speed limit of 70 km/h, would have recognized the hazard and brought his vehicle to a stop before impacting Mr. Quitley.
- [54] Such, in my view, is somewhat disingenuous, given that Mr. Quitley presumed that Mr. Knight was travelling at 70 km/h. Mr. Quitley likely could have completed the turn without Mr. Knight having to take any evasive or breaking action.
- [55] Both Mr. Dinn and Mr. Yang conceded under cross-examination that they did not know the speed of the motorcycle after it left the observation of the security cameras. Neither could offer an opinion as to whether it was accelerating or decelerating once out of view.
- [56] Nonetheless, nothing in the revelation of the new information from the security cameras changed the opinions of any of the engineers as to the impact speeds of both vehicles.
- [57] Mr. Dinn initially opined that the Pontiac was at a complete stop at impact but later agreed that was an error. He accepted the Pontiac was likely travelling at a speed between 14 to 19 km/h, consistent with that offered by Mr. Yang.
- [58] Mr. Little, despite having access to the same video from Original Joe's, did not offer an opinion as to the motorcycle's speed during the time it was captured on video.

- [59] Given the limited time frame of the analysis (0.2 seconds), Mr. Little was sceptical of the opinions offered by Mr. Dinn and Mr. Yang as to the motorcycle's speed and noted there was still a distance to travel before the impact during which its speed was unknown.
- [60] He also noted the video analyzed by the Messrs. Dinn and Yang had been compressed from 25 frames per second to 20 and, given the small-time frame over which the analysis occurred, any mistake occasioned by the missing frame(s) would be magnified significantly.
- [61] The missing frames created a visual where the motorcycle appeared to 'leap' forward rather than move smoothly across view.
- [62] Mr. Dinn replied to the critique as to the video's length and its compression from 25 frames to 20 by noting that he had cross-checked his opinion as to speed by performing a similar analysis of the entire 1.22 second video. With the result, he was confident that despite the missing frames (having adjusted for 'leaps' which appeared where a frame had been removed through the process of compression), that the speed range he offered accurately reflected Mr. Knight's speed over the area he was captured on the camera.
- [63] Both Messrs. Yang and Dinn attended the scene and took measurements of the pole placements from where they were depicted on the video taken the night of the accident.
- [64] Neither Mr. Quitley nor Mr. Knight could add to what happened in that remaining distance between the motorcycle leaving the field of view of the security camera from Original Joe's and the collision.
- [65] If, as opined by Mr. Yang, the motorcycle was travelling as fast as 141 km/h at a point in time, it obviously slowed before contacting the Pontiac, whether in response to a perceived hazard, the Pontiac; or prudence, as the high estimate by Mr. Yang is twice the legal speed limit for the area.
- [66] As to the speed of the vehicles at impact, Mr. Little ultimately opined the Pontiac was travelling from 14 to 19 km/h and the motorcycle 73 to 100 km/h. Mr. Dinn, after acknowledging his error initially as to the Pontiac's speed in his first report (he suggested it was stopped), agreed its estimated speed on impact was between 14 and 19 km/h and the motorcycle's speed on impact was about 115 km/h at the time of impact and likely, not less than 100km/h. Mr. Yang, in his initial report, agreed with the other two estimates of the Pontiac's speed and estimated the motorcycle was travelling between 69 to 101 km/h.
- [67] Both experts called by Mr. Quitley, after revising their speed estimates as per the video evidence available, maintained their original estimates as to the motorcycle's speed on impact.
- [68] In light of his new estimates of the approaching speed and his opinion that the impact speed of the motorcycle was unchanged, Mr. Yang noted the following in respect of the question of avoidance:

In my initial report, I estimated that the Honda was travelling at about 69 to 101 km/h at impact. This was based on the post impact motions and damage. My conclusions on impact speed remain unchanged. I also noted that there was no scene evidence to indicate if and to what degree the Honda braked before impact. Therefore, I estimated the possible approach speeds of the Honda based on Mr. Knight's possible reaction times and the amount of time that the Pontiac would have been evident as a hazard.

The new analysis using the provided video shows that the Honda was traveling at an average speed of about 112 to 141 km/h when it was about 115 meters from impact. Since the Honda was approaching at a higher speed than its impact speed, it had braked before impact.

I found that Mr. Knight probably detected the Pontiac as a hazard when he was more than 1.5 seconds and 45 meters from impact. It is likely that Mr. Knight detected earlier than 1.5 seconds from impact, which means he would have been further from impact when he detected the Pontiac.

If the Honda had instead approached the intersection at 70 km/h, Mr. Knight would have required about 49 meters to react to the hazard and come to a stop. Therefore, if Mr. Knight had approached at the speed limit, he likely would have been able to stop before the path of the Pontiac. Even in the edge case where there would still have been an impact, the Honda's impact speed would have been at least 45 km/h lower than the actual collision.

[69] Mr. Dinn, after opining the motorcycle's approach speed was approximately 117 to 129 km/h when 90 metres from the point of impact, noted the following in his supplemental report:

A Pontiac impact speed of about 15 km/h indicates the Pontiac likely took about 2.2 seconds to make their left turn. Calculations with the new motorcycle pre-impact speed of about 117 to 129 km/h indicates that if the motorcyclist had been travelling at 70 km/h instead of about 117 to 129 km/h, 2.2 seconds prior to impact, and then reacted by emergency braking, the collision could have been avoided by coming to a stop prior to impact. The motorcyclist could have also avoided the collision by steering around the Pontiac, assuming the Pontiac continued emergency braking and came to a stop.

[70] Importantly, in my view, Mr. Dinn noted that "if the motorcyclist had been travelling at 70 km/h instead of about 117 to 129 km/h" at the time the Pontiac made its first lateral movement, the Pontiac would have had sufficient time, in advance of impact, to clear the intersection had the motorcyclist been compliant with the posted speed limit.

[71] Mr. Little's supplemental report was unchanged in its conclusion. He disagreed with Mr. Dinn's calculated speed on impact and disagreed that the Pontiac should have been perceived as a hazard when it was still within its own lane in the left-hand turn lane.

[72] Mr. Yang, based on the damage and debris field, felt that the higher speed he estimated for the motorcycle at impact was more probable.

[73] Mr. Little, as previously noted, disregarded the video evidence noting:

Since the motorcycle would have been accelerating during the time it was recorded by the video, any speed calculated from the video would not reflect the speed of the motorcycle just before impact. Consequently, no further analysis of the video was conducted.

Position of the Parties

- [74] Ms. McIntyre argues both drivers were at fault given (1) Mr. Knight's excessive speed and (2) Mr. Quitley's failure to assess the danger of encroaching into the motorcyclist's lane of travel given its speed.
- [75] Mr. Quitley argues the accident is wholly the fault of Mr. Knight, given his high rate of speed. Both experts retained on behalf of Mr. Quitley agreed that were he travelling the speed limit, his vehicle would have been far enough from the collision site to have either braked or swerved so as to avoid the collision.
- [76] Alternatively, if found negligent, Mr. Quitley argues Mr. Knight's high speed on a damp road at night was significantly more blameworthy than Mr. Quitley's failure to recognize that the speed of the motorcycle made it an immediate hazard such that he ought not to have attempted to turn in front of it.
- [77] Mr. Knight argues that Mr. Quitley bears sole responsibility for the accident based upon his unsafe entry into Mr. Knight's lane of travel when Mr. Knight was so close as to make the accident unavoidable.
- [78] When pressed as to the issue of speed and whether liability ought to be apportioned between both drivers, Mr. Knight's counsel resisted the notion that his speed, even if accurately assessed within the range opined by Messrs. Dinn and Yang, contributed to the accident, given the speed estimate was made when Mr. Knight was still 90 metres from the collision site.

Discussion

- [79] Mr. Knight argues that s. 174 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA], is determinative of the question of liability.

- [80] Section 174 reads as follows:

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.

- [81] Mr. Knight argues that on the totality of the evidence, and more particularly based on Mr. Little's opinion, given his total lack of recall of the circumstances after leaving the parking lot of Original Joe's, that he was at all times the dominant through driver. Therefore Mr. Quitley, by failing to yield the right-of-way to him, must bear 100% responsibility for the accident.
- [82] I was referred to *Pacheco v. Robinson* (1993), 75 B.C.L.R. (2d) 273, 1993 CanLII 383 (C.A.), where the Court noted the following in respect of the duties of a left-turning driver:
- [15] In my opinion, a driver who wishes to make a left hand turn at an intersection has an obligation not to proceed unless it can be done safely. Where each party's vision of the other is blocked by traffic, the dominant driver who is proceeding through the intersection is generally entitled to continue and the servient left-turning driver must yield the right of way. The existence of a left-turning vehicle does not raise a presumption that something unexpected might happen and cast a duty on the dominant driver to take extra care. Where the defendant, as here, has totally failed to determine whether a turn can be made safely, the defendant should be held 100 percent at fault for a collision which occurs.
- [18] In my opinion, when a driver in a servient position disregards his statutory duty to yield the right of way and a collision results, then to fix any blame on the dominant driver, the servient driver must establish that after the dominant driver became aware, or by the exercise of reasonable care should have become aware, of the servient driver's own disregard of the law, the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself. In such circumstance any doubt should be resolved in favour of the dominant driver. As stated by Cartwright, J. in *Walker v. Brownlee* (1952), 2 D.L.R. 450 (S.C.C.) at 461:

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.

- [83] As to the issue of Mr. Knight's speed as he approached the intersection of Island Highway and 107 Street, Mr. Pedersen referred me to *Cooper v. Garrett*, 2009 BCSC 35, where a through-driving motorist, despite speeding, was not liable for a left-turn collision. The analysis reads as follows:

- [41] If Mr. Garrett seeks to cast any blame onto Mr. Naeem for the collision, he must establish that after Mr. Naeem became aware, or by the exercise of reasonable care should have become aware, of Mr. Garrett's disregard of the law, he had sufficient opportunity to avoid the accident: *Walker v. Brownlee* at 461.
- [42] Travelling over the speed limit will only constitute negligence if the speed prevented the driver from taking reasonable measure to avoid the collision. However, the experts agree that the moment that Mr. Garrett encroached onto the westbound lane, it was impossible for Mr. Naeem to avoid the collision.
- [43] The next issue is whether the collision could have been avoided if Mr. Naeem drove at a lower speed or at the speed limit. The speed of a vehicle and the location of the vehicle are related. It is impossible for Mr. Naeem to have been travelling at about 85 kilometres per hour along Marine Drive and then instantly change to the posted speed limit 40 metres from where the collision occurred. As Mr. Naeem argues, if he had kept to 30 kilometres per hour from the outset, he would have been back in Burnaby when Mr. Garrett ploughed across oncoming traffic that morning. If he sped along at 120 kilometres per hour he would have cleared the area well before Mr. Garrett made his left-hand turn.
- [44] While it seems attractive to attribute blame based on the speed of the dominant driver and hypothesize on what would have happened if Mr. Naeem kept to the speed limit, the fact is that Mr. Naeem drove at the speed he did and there was nothing he could have done, driving at the speed he did, to avoid the collision. When Mr. Garrett decided to proceed with his left-hand turn, Mr. Naeem was approximately 40 metres away. He was an immediate hazard and Mr. Garrett should have yielded to him.
- [84] Mr. Pedersen says regardless of the speed at which Mr. Knight was travelling, the logic in *Cooper* applies.
- [85] With respect, that is not how I interpret *Cooper*, nor is it consistent with the views of Mr. Quitley's experts as to correlation between speed and distance.
- [86] As to Mr. Knight's reaction, or lack thereof, Mr. Pedersen referred to *Gerbrandt v. Deleeuw*, [1995] B.C.J. No. 1022 at para. 11, 1995 CanLII 407 (S.C.), where, quoting from *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654, 1973 CanLII 2, the following was noted:

It is trite law that, faced with a sudden emergency the creation of which the driver is not responsible, he cannot be held to a standard of conduct which one sitting in the calmness of a Courtroom later might determine was the best course.

- [87] In short, Mr. Pedersen argues that Mr. Quitley was negligent, and thus 100% liable, for failing to yield to an oncoming immediate hazard, and that Mr. Knight, as the dominant driver, was entitled to assume that the servient driver would not encroach upon his lane.

- [88] Finally, he suggests the onus of proof is on the left-turning driver, here Mr. Quitley, to demonstrate that Mr. Knight had sufficient opportunity to avoid the accident and that a driver such as Mr. Knight, in the agony of collision, cannot be held to a standard of perfection.
- [89] In short, the negligence of Mr. Quitley is his failure to fully stop before entering the turn onto Island Highway even after having noted Mr. Knight approaching and observed the distance of travel from his entry onto Island Highway to a point halfway to 107 Street.
- [90] Mr. Pedersen notes that Mr. Quitley conceded that after first observing Mr. Knight he took his eyes off him and took no appropriate steps to assess his speed, despite the fact Mr. Quitley was aware that drivers were known to exceed the speed limit on Island Highway.
- [91] Mr. Pedersen submits even using the calculations of the other two experts, Messrs. Dinn and Yang, as to the amount of time between the Pontiac becoming a hazard observable to Mr. Knight and the impact, there was insufficient time--either 0.3 seconds or 0.6 seconds--for evasion or braking after the PRT of 1.5 seconds. Again, in Mr. Pedersen's view, the accident was unavoidable from the moment Mr. Quitley made the decision to enter Mr. Knight's lane.
- [92] In assessing the weight to be assigned to the various opinions offered in evidence, I personally note both Mr. Dinn and Mr. Little made initial errors of some consequence.
- [93] Mr. Dinn opined that the Pontiac was stopped at the time of impact. He resiled from that opinion in his supplemental report, recognizing, either from a review of his own data or from an assessment of the other two submitted reports, that the Pontiac was travelling at a speed between 14 to 19 km/h on impact.
- [94] Mr. Little opined that the Pontiac was going 25 km/h before impact but revised that in his supplemental report to say the speed was between 14 and 24 km/h at impact. He agreed that the speed of the Pontiac is critical in determining how much time the motorcyclist would have had to perceive and respond to the hazard it posed.
- [95] Mr. Little also opined that the Pontiac only became a hazard after it encroached into the motorcyclist's lane of travel at which time the PRT began.
- [96] Neither Mr. Yang nor Mr. Dinn agreed with that opinion on the basis of referenced research studies indicating PRT begins when the left-turning driver makes its first lateral move towards the oncoming lane.
- [97] Mr. Little ultimately conceded that through drivers can (not necessarily must) perceive a left-turning vehicle as a hazard before it encroaches into their lane with a resultant increase in PRT.

- [98] More importantly, in my view, is the issue of Mr. Knight's speed. Mr. Little critiqued the speeds suggested by Mr. Dinn and Mr. Yang, but did not perform any calculation himself. Nevertheless, I am satisfied that Mr. Knight was travelling well in excess of the posted speed limit of 70 km/h, at least to the point where he was 90 metres away from the accident scene.
- [99] Neither of the two experts were precise (nor was Mr. Little when it came to the speed on impact) but both offered opinions that, at a minimum, had Mr. Knight travelling 42 to 47 km in excess of the speed limit and, at its highest, double the posted speed limit when 90-115 metres from the accident location.
- [100] The high of their estimates has Mr. Knight either 59 km in excess of the speed limit (Mr. Dinn) or twice the posted limit (Mr. Yang).
- [101] While Mr. Pedersen valiantly resisted the notion that Mr. Knight's speed was a contributing factor to the accident, I find otherwise.
- [102] Mr. Yang offered a similar opinion as to the speed on impact, as did Mr. Little, but given the damage done to the Pontiac and the debris field, opined that the motorcyclist's speed on impact would be closer to the high end (100 km/h) than the low end.
- [103] Such is consistent, in my view, with the analysis performed using the security cameras from Original Joe's.
- [104] I conclude, on the balance of probabilities, that Mr. Knight was speeding and, while not precise, the range of his speed 90 metres from the accident, was a low of 112 km/h to a high of 141 km/h.
- [105] Such a conclusion corresponds, in my view, with the evidence of Mr. Quitley who testified the motorcycle was 250 to 300 feet away some half second or so before he began his turn.
- [106] Mr. Cappus, on behalf of the plaintiff Mr. Quitley, noted the legal framework includes not only s. 174 of the MVA but also s. 148, which reads:

Excessive speeding

148 (1) A person who drives a motor vehicle on a highway at a speed greater than 40 km/h over the applicable speed limit set under the authority of an enactment commits an offence and is liable on conviction to not less than the aggregate of the fine amount and the applicable supplemental fine amount, if any, prescribed under section 148.1 for this offence and, subject to those amounts, section 4 of the Offence Act applies.

- (2) If a person is charged with an offence under subsection (1) and the evidence does not prove the offence but does prove a contravention of section 140, 146 or 147, the person may be convicted of contravening section 140, 146 or 147, as the case may be, and the person is liable on that conviction to not less than the aggregate of the fine amount and the applicable supplemental fine amount, if any, prescribed under section 148.1 for that offence.

- [107] Accepting as I do that Mr. Knight's speed was, at all material times, excessive and a contributing factor to the collision, I turn to assess the negligence, if any, of Mr. Quitley.
- [108] Here I agree with Mr. Pedersen that Mr. Quitley was negligent by failing to properly assess the situation that was observable from his vantage point in the left-hand turn lane. In particular, he failed to appreciate the speed of what was clearly a rapidly approaching motorcycle.
- [109] Mr. Quitley conceded he made no assessment of the speed of the approaching motorcycle despite his observation that it had travelled half the distance from its entry onto Island Highway to his location at the intersection of 107th Street during his brief period of observation.
- [110] He then took his eyes off the motorcyclist to perform a "casual sweeping turn" based on his assumption the oncoming motorcycle was travelling at 70 km/h. That assumption was unwarranted on the visual information available to him and on his historical knowledge of drivers speeding in the area.
- [111] Accordingly, I find that he was negligent and that his negligence was causally related to the occurrence of the accident.
- [112] I now turn to assess the fault, if any, of Mr. Knight.
- [113] Mr. Pedersen, while relying on Cooper, did not refer, nor did he distinguish factually, the authorities referred to by Mr. Quitley's counsel on the role of speed in contributing to the occurrence of the accident.
- [114] I agree with the proposition that speed, in and of itself, is not singularly determinative of negligence on the part of a speeding through driver but, as noted in Cooper at para. 42:
- Travelling over the speed limit will only constitute negligence if the speed prevented the driver from taking reasonable measure to avoid the collision. However, the experts agree that the moment that Mr. Garrett encroached onto the westbound lane, it was impossible for Mr. Naeem to avoid the collision.
- [115] In *D'Amici v. Fahy*, 2020 BCCA 89 at para. 45, the Court of Appeal affirmed that the operative question is whether the speed of the through driver was such that it prevented them from taking reasonable steps to avoid the collision.
- [116] In *Hynna v. Peck*, 2009 BCSC 1057, Justice Ballance properly, in my view, confined Cooper to its facts, where she stated:
- [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.

[81] One can conceive of all manner of substandard or reckless driving conduct that might prevent a driver from taking evasive action in response to a servient driver's failure to yield the right-of-way. Based on the defence's reading of the breadth of the ratio in Cooper, such flawed driving conduct is not a relevant consideration even where it is shown that it deprived the defective driver from being able to take reasonable evasive action. The analysis urged by the defence would give unrestrained licence to a through driver to speed excessively, fail to maintain a proper look-out and violate any number of the other rules of the road, and yet not be held responsible for negligence on his part, even where his impugned conduct prevented him from taking reasonable avoidance measures and was a proximate cause of the accident. Resolving liability between two substandard drivers using that approach would effectively attach absolute liability on the driver who has failed to yield the right-of-way pursuant to s. 175. That approach is not sanctioned by s. 175 and seems incompatible with the basic tenets of the law of causation.

[117] In particular I adopt the following passage from para. 81 of Hynna:

... The analysis urged by the defence would give unrestrained licence to a through driver to speed excessively, fail to maintain a proper look-out and violate any number of the other rules of the road, and yet not be held responsible for negligence on his part, even where his impugned conduct prevented him from taking reasonable avoidance measures and was a proximate cause of the accident.

[118] I adopt this passage as applying to Mr. Knight. Even at the lowest speed, admittedly measured 90 metres from the accident site, he was travelling at an excessive speed as defined under the MVA.

[119] I agree with Mr. Cappus that Mr. Knight's speed, up to 141 km/h, robbed him of the opportunity to avoid the collision and that his speeding significantly contributed to the event of the accident.

[120] I do not adopt the assessment that if he had been travelling 70 km/h the accident would not have occurred such that Mr. Knight is totally responsible for the accident. However, his high speed not only detracted from his ability to avoid the collision, but also deprived Mr. Quitley of the opportunity to properly assess Mr. Knight's speed, who was travelling in the dark of night on a vehicle bearing only a single headlight.

[121] As such, I am of the view that both parties were negligent as described above, thus engaging the provisions of the Negligence Act, R.S.B.C. 1996, c. 333 [Negligence Act].

[122] Section 1 of the Negligence Act reads as follows:

Apportionment of liability for damages

1 (1) 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.

- (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
- (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

[123] Turning to the authorities on like-based circumstances, Mr. Cappus notes the following authorities, firstly, *Peterson v. Ganji*, 2023 BCSC 1543.

[124] In *Peterson*, the defendant was travelling through an intersection at a high speed. The plaintiff was turning left. The Court determined the plaintiff began his turn at a time when the defendant was close enough to be an immediate hazard thus breaching his obligation to yield. However, the Court also found fault on the part of the defendant, noting the following:

[64] while the Plaintiff must accept some blame, I also must acknowledge that the Plaintiff's fault arose principally from the fact that he inadvertently misjudged the speed of the Defendant's oncoming vehicle - a momentary but unintentional mistake with unfortunately serious consequences.

[65] By contrast, I find that the Defendant's actions were more blameworthy under the circumstances than the Plaintiff's. The Defendant had made a decision to travel well above the speed limit in circumstances where the roads were wet and light was falling. This was not mere inadvertence but a conscious decision which entailed an associated risk, particularly in the context of a stale yellow light. The Defendant increased the risk by accelerating as she approached the Intersection.

[125] In *Peterson*, the Court assessed liability 70% as against the defendant through driver and 30% on the left-turning plaintiff. I note however, there, the intersection was controlled and the defendant was faced with a yellow light.

[126] Nevertheless, the speed differential was 75 km/h in a 60 km/h zone in *Peterson*, as opposed to my determination in this case that the motorcyclist was travelling at least 42 km/h over the speed limit and perhaps as much as double the speed limit when only 90 to 115 metres from the intersection.

- [127] Here, I should note I reject the suggestion by Ms. MacKenzie, counsel for Mr. Knight as a defendant in the Quitley action, that it is speculative to try and assess the speed of the motorcyclist at the point of impact from a position 90 metres away from it.
- [128] As against that proposition I have the evidence of Mr. Quitley as to the motorcycle's progression from its entry onto the highway when he last saw and determined, wrongly as events demonstrate, he could safely complete his turn. Accepting his evidence as to the distance travelled by the motorcycle over the short period of observation, coupled with the fact the motorcycle did travel a significant distance in a short period of time from Mr. Quitley's last observation of it, I conclude, on a balance of probabilities, the motorcycle maintained its high rate of speed and did indeed attempt some braking before impact.
- [129] Following along in the assessment of fault, in *Rothenbusch v. Van Boeyen*, 2010 BCSC 1518, Justice Ker was assessing liability for an accident occurring at a T-intersection involving a left-turning vehicle and through vehicle. Fault was assessed 30% against the left turner and 70% as against the through vehicle based upon the through vehicle's speed.
- [130] In *Rothenbusch*, Ker J. stated the following:
- [172] Accordingly, due to Mr. Van Boeyen's speeding, his failure to keep a proper lookout, his distance from the intersection which provided sufficient room to take evasive manoeuvres, the lack of surrounding traffic limiting his movements to the right, and his inexplicable swerve manoeuvre into the incoming lane of traffic, his liability in relation to the collision is greater than that of the defendant in *Hynna* who was only speeding but at a closer location relative to the intersection but less than the defendant in *Chung* who was travelling at an excessively high rate of speed.
- [131] That assessment was based on the through driver travelling at nearly 20 km/h in excess of the posted speed limit; a speed Ker J. found excessive.
- [132] In *Chung Estate v. King*, [1992] B.C.J. No. 1830, 1992 CanLII 606 (S.C.), Justice M. Saunders, as she then was, found as fact that the through driver in a left-turn case was travelling 113 km/h in a 50 km/h speed zone with a collision speed of 100 km/h.
- [133] In apportioning fault, M. Saunders J. (as she then was) stated the following:
- I find the King vehicle was an immediate hazard when the Chung car started into the intersection and that Mr. Chung was contributorily negligent.
- I turn now to apportionment of fault. In my view the excessive and dangerous speed of Mr. King's vehicle far outweighed the fault I have found in Mr. Chung's driving.
- I consider Mr. King's responsibility for the accident to be significantly greater than that of Mr. Chung. I assess the degrees of fault as 80 per cent for Mr. King and 20 per cent for Mr. Chung.

- [134] Here, Mr. Quitley urges me to find that the speed of the motorcycle was even greater than the 63 km/h over the speed limit found in Chung Estate. He notes as well that the driving here occurred at night on damp roads.
- [135] In concluding liability should be apportioned 70% as against Mr. Knight and 30% as against Mr. Quitley, I consider the following: the intersection at which this accident occurred was uncontrolled and, in normal circumstances, the through-driving vehicle, in this case Mr. Knight, was entitled to expect the left-turning driver to yield the right-of-way.
- [136] That being said, I agree substantially with the submissions of Mr. Capps, echoed by Mr. Ryneveld, that the excessive speed of Mr. Knight, somewhere between 112 to 141 km/h, robbed Mr. Quitley as the left-turning driver of the ability to properly assess its speed and the safety of the manoeuvring he undertook.
- [137] While Mr. Quitley was negligent in taking his eyes off the motorcycle and not properly assessing the fact that the motorcycle was coming towards him at a high speed, his negligence was inadvertent--an error in judgment. Mr. Knight's negligence--excessive speed in adverse conditions, was voluntary: Peterson at paras. 64-65:
- [64] However, while the Plaintiff must accept some blame, I also must acknowledge that the Plaintiff's fault arose principally from the fact that he inadvertently misjudged the speed of the Defendant's oncoming vehicle - a momentary but unintentional mistake with unfortunately serious consequences.
- [65] By contrast, I find that the Defendant's actions were more blameworthy under the circumstances than the Plaintiff's. The Defendant had made a decision to travel well above the speed limit in circumstances where the roads were wet and light was falling. This was not mere inadvertence but a conscious decision which entailed an associated risk, particularly in the context of a stale yellow light. The Defendant increased the risk by accelerating as she approached the Intersection.
- [138] Unless there have been offers to settle which might affect the question of costs, the plaintiff Ms. McIntyre is entitled to costs in the McIntyre action (M89968). Costs will be apportioned as between the parties in the Quitley action (M89625) and the Knight action (M190652) in accordance with s. 3 of the Negligence Act.

"Harvey J."

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