
CANADA / JUDGMENT

McMullin v. Trelenberg

2020 BCSC 49

COURT

Supreme Court of British Columbia

DECIDED

20 January 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 49 McMullin v. Trelenberg

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McMullin v. Trelenberg,

2020 BCSC 49

Date: 20200120

Docket: M145844

Registry: Vancouver

Between:

Marsha McMullin

Plaintiff

And

Dale W. Trelenberg and Mainland Crane Service & Trucking Ltd.

Defendants

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

Counsel for Plaintiff:

Christopher Doll, QC

Counsel for Defendants:

J. Cameron McKechnie

Place and Date of Trial:

Vancouver, B.C.

December 9-13, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 20, 2020

I. introduction

- [1] This trial arises from an accident that occurred on November 29, 2012 at the intersection of 200th Street and 92A Avenue in Langley, between the plaintiff's 2002 Dodge Caravan mini-van and the defendant's 2007 Western Star truck and trailer (the "accident"; the "intersection").
- [2] The actions leading to this accident occur a thousand times a day in British Columbia. For her part, the plaintiff was distracted and did not give full attention to the intersection that she approached at full speed. For his part, the defendant believed, but was not certain, that he could safely turn left at that intersection, and thus made the turn. In most cases, fortune shines, and these actions, individually or combined, elude consequences. In the present case, the combination of these actions inflicted injuries on the plaintiff that will likely cause her acute pain and deprive her of independent capabilities for the rest of her life.
- [3] Although both liability and quantum of damages are disputed, the parties largely agree on the facts, and are not far apart on the suggested ranges of damages if liability is found. They are to be commended for providing a substantial agreed statement of facts. Their primary disagreement concerns the colour of the advance left turn light at the intersection when the defendant started his left turn, and the legal consequences flowing from the acts and omissions of each party.

II. facts

Introduction

- [4] Although the evidence of the three witnesses to the accident differs, and although the evidence of each suffers from some internal inconsistency, this case does not turn primarily on credibility findings. All three witnesses presented as honest persons who were trying their best to present accurate recollections of split-second decisions and actions that occurred seven years ago.
- [5] Where these reasons prefer one account over another, it is based not upon a credibility finding in the sense of dishonesty, but a realistic assessment of the limitations of precise recollection in the circumstances, as well as an overall assessment of the evidence.

The plaintiff

- [6] The plaintiff, Marsha McMullin, is a mother of three. At the time of the accident, she was 32 years old. She is now 40. Before the accident she was actively involved in her church. She was engaged in occasional employment in a range of creative services, including photography, painting, and newsletter and web design.
- [7] Ms McMullin was a generally honest witness. I have accepted her evidence with respect to her injuries, and the effect of those injuries on her life. Insofar as there is any question as to her credibility, it arises from her distraction immediately before the accident, rather than any doubt that she was trying to tell the truth at trial.

The defendants

- [8] The defendant Dale Trelenberg is the owner and an employee of the defendant company. He has been driving trucks professionally for 40 years. At the time of the accident, his company owned two or three trucks. He was familiar driving the semi-trailer crane truck involved in the accident, although he drives it less often now.
- [9] Mr Trelenberg was a laconic, straight-talking witness. He did not present as the kind of person who would be a reckless, incautious, aggressive, or bullying driver. He strove to provide accurate answers, even where it would have been easy to provide evidence more favourable to himself. As will be discussed in more detail below, seeming inconsistencies between his examination for discovery and trial evidence are readily explained by ambiguities in language.
- [10] The defendants accept that the corporate defendant is vicariously liable for whatever liability is ascribed to its principal, Mr Trelenberg.

The intersection

- [11] Appendix A to these reasons, the final page of trial Exhibit 4, shows the intersection.
- [12] The intersection is roughly 2 kilometres south of the Golden Ears Bridge. 199A Street flows south from the bridge, and, after an S-curve, turns into 200th Street. Approximately 1 kilometre further south, through the intersection, 200th Street meets the Trans-Canada Highway.
- [13] The east-west street in the intersection, 92A Avenue, has a single lane in each direction, each with a dedicated left-turn lane.
- [14] The north-south road in the intersection is 200th Street. Each direction has three through-lanes, with a dedicated left-turn lane.
- [15] The lane of importance to this case, the northbound dedicated left-turn lane, is long, starting about 100 metres south of the intersection.

- [16] North and south traffic are separated by a raised median in the centre of 200th Street.
- [17] In each direction, the curbside lane of 200th Street also has a bike lane. In each direction, the curbside lane of 200th Street splits off an additional lane for drivers turning right onto 92A Avenue. This split occurs before the intersection. The bike lane and the right turn lane are not directly relevant to this dispute, except insofar that a driver turning left, like Mr Trelenberg, must not only look out for oncoming 200th Street traffic, as well as traffic on 92A Avenue, but also right-turning traffic merging from the feeder lane, as well as pedestrians and bicycles, in deciding whether it is safe to turn.
- [18] The speed limit for the stretch of 200th Street leading to the intersection is 60 kilometres an hour.
- [19] The intersection is bounded on each north-south side by a wide pedestrian crosswalk with twin white lines. The north-south stop line for the through traffic lanes, marked with a thicker white line, is about one car length back from the inside crosswalk boundary line. The stop line for the dedicated left-turn lane is just over a car length back from the main north-south stop line.
- [20] North-south traffic is controlled by three traffic light panels mounted on a long horizontal bar above the intersection, facing the approaching traffic opposite on each side.
- [21] Unfortunately, the Court was not provided any technical evidence of the display, timing, and duration of the traffic lights at the intersection that day. Such evidence would have been useful to the present case, especially where the recollection of the witnesses was potentially unreliable. Further and specifically, the evidence of the witnesses was not consistent with respect to whether a given light was a solid yellow or a flashing yellow, or a solid or flashing yellow arrow.
- [22] That said, based on the totality of the evidence and the general consensus of the parties, the relevant traffic light sequence for Mr Trelenberg's dedicated advance left-turn lane was as follows:
1. flashing advance green left-turn arrow (when through traffic travelling the opposite direction sees a red light);
 2. yellow light (likely a yellow arrow) (when through traffic travelling the opposite direction still sees a red light), to caution left-turning drivers that the advance left turn will soon end and that through traffic travelling the opposite direction will soon see a green light;
 3. solid green light (when all north-south through traffic sees a green light, and when a left-turning vehicle must generally yield to that oncoming through traffic, but may turn left when safe, as in a regular intersection without dedicated advance left turn signals);
 4. solid yellow light (signalling that a red light will soon appear to stop all northbound traffic, including the left-turn lane, and that east-west traffic will soon have the green light);

5. solid red light.

[23] In other words, the yellow light (likely an arrow) in this case was not followed by a solid red light, and did not signal to left-turning drivers that they were obliged to stop behind the stop line (if safe to do so). Instead, the yellow light or arrow warned left-turning drivers that the green light would soon illuminate in both directions, such as to invite oncoming traffic to flow through, and such that a driver who has proceeded into the intersection in anticipation of a left turn may have to wait until traffic is safe, or until the pre-red light yellow light illuminates, to complete the turn.

[24] Based on the overall evidence, I find that the yellow left-turn arrow was only illuminated for a few seconds before the green light illuminated to allow through traffic in both directions. The yellow left-turn arrow would have been illuminated for a period sufficient to allow an ordinary vehicle travelling at ordinary speed to complete its left turn within its pendency, but not a larger or slower vehicle.

The accident

[25] The accident occurred around mid-day. The weather was gray but clear. The road was slightly wet from rain earlier in the day.

Southbound 1: the plaintiff's evidence

[26] The plaintiff, Ms McMullin, was driving southbound on 200th Street in her gray mini-van. She was travelling from her home in Port Coquitlam, over the Golden Ears Bridge, to a massage therapy appointment in Langley. She had often driven this route, and was familiar with the intersection.

[27] She travelled down the S-curve of 200th Street to the straightaway leading to the intersection. She drove in the curbside (westernmost, her far right) lane.

[28] She estimates her speed throughout to have been between 60 and 65 kilometres per hour, and that she was travelling at the speed of the traffic around her.

[29] There was traffic to her left, but she could not remember the specifics.

[30] She said that she had a clear view of the intersection throughout her approach.

[31] As she drove south on 200th Street, the plaintiff's attention was not solely on the intersection ahead. She was looking back in her rear view mirror, "keeping [her] eyes on" a yellow Volkswagen "bug" that was weaving over multiple lanes behind her. She said that she was anxious about the yellow Volkswagen as she had earlier in her life nearly been hit by an aggressively-driving drunk driver. She stated that she twice looked back in her rear view mirror at the yellow vehicle.

- [32] When she was about half or three-quarters of a city block north of the intersection, she saw the defendant's truck in the turning lane opposite the intersection. The truck was still behind the opposite crosswalk, but was moving forward. She could not estimate the speed, but conceded that the truck was "not slow moving."
- [33] The plaintiff testified that at that time the light for her lane was solid green. She assumed that the truck would stop as she had the green light.
- [34] When she was approximately four car lengths from the intersection, she glanced up at her rear-view mirror to look again at the yellow Volkswagen. When her eyes returned forward towards the intersection, she was about two car lengths from the intersection. She saw that the truck had not stopped, but was continuing its turn into the intersection in front of her. She slammed on her brakes. Her van skidded forward and collided with the truck.
- [35] In light of all of the evidence, it is likely that she was indeed "keeping her eyes on" the Volkswagen. This distraction likely went beyond two brief discrete glances, as she travelled south towards the intersection, and as she assessed the safety and condition of the intersection.

Southbound 2: Ms Wallin's evidence

- [36] Ms Wallin was the only non-party witness to the accident who testified.[1]
- [37] At the time of the accident Ms Wallin lived just a few blocks from the intersection. She was very familiar with it, crossing it on average twice a day.
- [38] Ms Wallin was driving her Mazda southbound from 96th Street. As she approached the intersection, she started slowing down, as the light was red for southbound traffic.
- [39] At about six car lengths north of the intersection, she saw the defendant's truck across the intersection in the dedicated left-turn lane, slowly moving forward. She saw the truck slowly enter the intersection and head toward its axel turning point a short distance into the intersection. The truck never made a full stop.
- [40] Importantly, she and other southbound traffic still faced a red light when the truck started its turn.
- [41] When she reached about three car lengths from the intersection, her light turned green. Instead of accelerating, she continued to slow down, as she saw that the defendant's truck was in the process of turning left (west) in the intersection onto 92A Avenue, in front of her.
- [42] Suddenly, in her peripheral vision, she saw to her right (either in the curbside lane or the second lane) "a gray streak go by" her, towards the intersection. She described the plaintiff's vehicle as "flying by me." She thought to herself, of the plaintiff's vehicle, "why aren't they stopping? Oh my God: they're going to hit."

- [43] Ms Wallin then saw the plaintiff's vehicle jam on its brakes. It skidded towards and struck the truck. She believed that the collision occurred near the back of the truck, but it could have been further towards the front. The plaintiff's vehicle went up in the air from the impact.
- [44] She describes her vantage point of the accident and the events leading to it as "a very clear view"; "crystal clear"; "I had front-row seats." Despite the passage of time since the accident, Ms Wallin believes that her memory has not faded, and that her vision of the accident remains "embedded in my head."
- [45] I found Ms Wallin's evidence to be the most objective and reliable. I place great stock in her testimony. She was a disinterested party: her sole objective was to recount what she saw to the best of her ability. She was extremely familiar with the intersection. She was the antithesis of distracted: slowing down as she focused on the intersection. The very reason she was slowing down was because she saw the truck clearly. She did in fact have the best possible view of the accident and the parties. Her description of the accident was vivid. It was a dramatic occurrence that occurred right in front of her: one that naturally would be remembered.
- [46] I specifically accept Ms Wallin's testimony that the southbound light had only just turned green as she (and for that matter, Ms McMullin) neared the intersection. Her focused assessment and recollection of the timing of the lights and the timing of Mr Trelenberg's turn were more reliable than that of the distracted Ms McMullin.
- [47] That said, her evidence was not flawless. In cross-examination she was presented with the witness statement that she signed in August 2014. That witness statement contained some inconsistent and unlikely estimates of her own speed. The attached diagram failed to show the dedicated left-turn lanes on 200th Street, and showed Ms McMullin in the second lane, rather than the curbside lane. That said, I note that the witness statement was signed 21 months after the accident, and that neither text nor the map were directly prepared by Ms Wallin herself. Further, numeric estimates of speed are notoriously imprecise. These minor inconsistencies in the witness statement do not take away from Ms Wallin's status as the most reliable witness at trial.

Northbound: Mr Trelenberg's evidence

- [48] We now turn to the perspective of the defendant.
- [49] Mr Trelenberg was driving his four-axle rig northbound on 200th Street. His truck consisted of a semi-tractor, a folded central crane configuration, and an empty trailer that was just over the length as the width of the two large tires carrying it.
- [50] He had travelled from Chilliwack along the Trans-Canada Highway; he was taking the truck in for servicing about 3 kilometres away, on 96th Avenue.

- [51] Mr Trelenberg entered the dedicated left-turn lane at its mouth, about 100 metres south of the intersection. The light was red. Ahead of him in the lane several vehicles were stopped, waiting to turn left. He started to slow down in anticipation of stopping for the red light. But then the advance left-turn light turned from red to green; the left-turning traffic ahead of him started to flow and make their turns. Whether due to their distance ahead of his truck, or their relative speed, those left-turning vehicles had all completed their turns and cleared the intersection by the time Mr Trelenberg reached it. His truck was moving slowly down the left-turn lane towards the intersection. Accordingly, as he acknowledged, he was expecting the green left-turn arrow to soon change to yellow.
- [52] Throughout this process, Mr Trelenberg never made a full stop. He passed over the stop line for his dedicated left-turn lane. When the nose of his truck reached the southernmost white line of the crosswalk, the advance left-turn arrow turned yellow.
- [53] Mr Trelenberg testified that when the light turned yellow, it was too late to stop on the crosswalk, given the weight of the truck. I accept his experienced assessment to be correct.
- [54] He described his thought as he passed over the crosswalk as, "now I'm committed". He continued forward into the intersection, and then passed through the intersection with his westward left turn.
- [55] His decision to turn left likely occurred on a short stale yellow light, as he nosed forward past the crosswalk. He knew or ought to have known that the southbound through light would very soon turn green, and would turn green during the course of his turn.
- [56] Conversely, when he started his left turn, southbound traffic, including Ms McMullin and Ms Wallin, faced a red light. Mr Trelenberg said that when he decided to turn and started the turn, the vehicles opposite him in the southbound lane were all stopped. He specifically remembers a transport truck (that is, a long semi-trailer) in the "centre" southbound lane opposite him being stopped.
- [57] At this point in the narrative, there were two seeming inconsistencies in the evidence of Mr Trelenberg.
- [58] First, there was a seemingly important but understandable discrepancy between the evidence of Mr Trelenberg and Ms Wallin. Ms Wallin testified that she was in the left (east) lane of the three southbound through lanes, and that she had a clear view of the plaintiff's vehicle as it sped past her to her right into the intersection, and collided with the plaintiff's truck. In contrast, Mr Trelenberg testified that the transport truck was in the "centre" southbound lane: either occupying the space claimed by Ms Wallin, or blocking her view westwards towards the curbside lane. This discrepancy can be reconciled. Given that there were in effect four southbound lanes (three through lanes and the dedicated left-turn lane), the phrase "centre" lane is ambiguous. I find that it is likely that Ms Wallin was in the second lane from the west (that is, beside the plaintiff's curbside lane); and the transport truck seen by Mr Trelenberg was in the third lane (that is, the easternmost of the two "centre" lanes,

beside the dedicated southbound left-turn lane).

- [59] Second, at trial, Mr Trelenberg testified that the light (i.e. arrow) turned yellow when the front of his truck was on the southern line of the crosswalk. His testimony at discovery was that the advance left-turn light turned yellow "upon crossing the stop line." I am satisfied that Mr Trelenberg's discovery phrase "upon crossing the stop line" did not mean "on the stop line" and was consistent with his trial testimony that he saw the light change approximately two car lengths further north of the stop line. I also accept that at trial he was describing the location of the front of the truck, while in discovery was describing the location of his own body in the truck cab at the time the light changed. In any case, his location was at best an approximation. As set out below, the legally significant question was whether he could have safely stopped his truck at the point the light turned yellow. Whether this occurred at the left turn stop line or at the crosswalk makes no difference to that question.
- [60] Returning to the narrative, I am satisfied that when Mr Trelenberg continued forward to initiate the turn, all of the southbound vehicles he was able to see across the intersection were still stopped. He genuinely thought that he could safely complete the turn. That said, given that the light turned yellow when he entered the intersection, and given the slow speed of his truck, he must have known that he would not complete the turn before the traffic light would turn green for the southbound traffic.
- [61] Mr Trelenberg continued making the turn west. Given the size of the truck and its weight distribution, he had to slow down a little at the start of the turn, and then accelerate as the turn neared completion. Both he and Ms Wallin described this sequence.
- [62] At this point, the front of his truck had almost reached the crosswalk on the west side of the intersection, and his truck was largely perpendicular to 200th Street. Suddenly, out of the corner of his eye, he saw a mini-van travelling straight at his truck into the intersection in the southbound curb lane. It was moving quickly. He saw that the driver was a woman with long dark hair. Her eyes were wide in panic.
- [63] The collision came sooner than he had expected. He could do nothing to avoid the impact of the van, which smashed into the second tire of his truck.
- [64] I am satisfied that he did not see the plaintiff's vehicle, either due to the transport truck, or for another reason, when he started the turn. By the time he first saw her, he was unable to do anything to avoid the collision.

The aftermath of the accident

- [65] The front right (driver's viewpoint) bumper and hood of the plaintiff's mini-van were crumpled in the collision. Both airbags deployed. She bumped her head. Items in the van flew through the air. She sat for a moment, stunned.

- [66] Both drivers left their vehicles. Mr Trelenberg went to see that the plaintiff was fine. The plaintiff testified that she said to Mr Trelenberg, "what the hell were you doing?," to which Mr Trelenberg responded, "I didn't see you. I didn't see you." In Mr Trelenberg's version, the plaintiff said to him in a raised voice: "you went through a red light," to which Mr Trelenberg did not respond.
- [67] Ms McMullen spoke with first responders and the police. She was later driven to the hospital by her husband. She was released later that day.

III. LIABILITY

Law

- [68] The rules of the road set out in the Motor Vehicle Act, RSBC 1996, c 318 (the "MVA") are the starting point, but not the end point, for the assessment of whether either party was negligent, and to what extent. In *Boyd v. Baldwin*, 2015 BCSC 887 at para. 59, Fitch J (as he then was) summarises the role of the MVA in the common law negligence analysis:

In determining whether, and to what extent, parties to an accident met their common law duties of care, a court will be informed by the rules of the road. While the rules of the road provide guidelines for assessing fault in motor vehicle accident cases, they do not, standing alone, provide a complete legal framework. As noted in *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21, "[t]his 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".

- [69] In *Julian v. Joyce*, 2016 BCSC 1417, aff'd 2017 BCCA 217, Justice Watchuk usefully gathers and summarises the authorities governing drivers turning left at an intersection.[2]
- [70] Motorists have an overarching common-law duty to exercise what constitutes, in all of the circumstances, reasonable and due care. All motorists have a general duty to keep a proper look-out and to take reasonable precautions in response to apparent potential hazards: *Julian* (BCSC) at para. 13.

- [71] Section 144 of the MVA echoes this requirement and standard:

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 .

- [72] Section 127 sets out the rights and obligations of a driver facing a green light:

Green light

127(1) When a green light alone is exhibited at an intersection by a traffic control signal,

- (a) the driver of a vehicle facing the green light
- (i) may cause the vehicle to proceed straight through the intersection, or to turn left or right, subject to a sign or signal prohibiting a left or right turn, or both, or designating the turning movement permitted,

, and

(iii) must yield the right of way to vehicles lawfully in the intersection at the time the green light became exhibited.

[emphasis added]

[73] Section 128 sets out the rights and obligations of a driver facing a yellow light:

Yellow light[3]

128 (1) When a yellow light alone is exhibited at an intersection by a traffic control signal, following the exhibition of a green light,

- (a) the driver of a vehicle approaching the intersection and facing the yellow light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection, unless the stop cannot be made in safety, .

[74] The MVA does not contain a specific provision governing advance left-turn lanes, but does specifically address arrows:

Arrows

130 (1) When a green arrow is exhibited at an intersection by a traffic control signal,

- (a) the driver of a vehicle facing the green arrow may cause it to enter the intersection and to make only the movement indicated by the green arrow, but must yield the right of way to pedestrians lawfully in the intersection or in an adjacent crosswalk and to other vehicles lawfully in the intersection

(2) When a yellow arrow is exhibited at an intersection by a traffic control signal,

- (a) the driver of a vehicle approaching the intersection and facing a yellow arrow must cause the vehicle to stop
 - (i) before entering the marked crosswalk on the near side of the intersection, or
 - (ii) before entering the intersection, if there is no marked crosswalk,

unless the stop cannot be made in safety,

- (b) the driver of a motor vehicle approaching the intersection and facing the yellow arrow may, when a stop cannot be made in safety, proceed with caution to make the only movement indicated by the arrow but must yield the right of way to pedestrians lawfully in the intersection or in an adjacent crosswalk, and to other vehicles lawfully in the intersection,

[emphasis added]

[75] Section 174 of the MVA sets out who must yield to whom on a left turn:

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.

[emphasis added]

[76] *Nerval v. Khehra*, 2012 BCCA 436 is the leading case on s. 174.[4] At paras. 12-13, Harris JA expressly approved the s. 174 analysis of Armstrong J at trial, including his summary of the relevant law. I paraphrase that summary below:

- a) The first question is whether the through driver constituted an immediate hazard before the left-turning driver started her turn. The answer to that question will determine which of the two was the dominant driver before the collision.
- b) A motor vehicle is an immediate hazard if its driver must take a sudden or violent action to avoid the threat of collision if a servient vehicle is about to make a left turn entering or crossing the highway in the path of the approaching vehicle.
- c) The time to assess the question of an immediate hazard is when the left-turning vehicle commences the turn.
- d) A dominant through driver may still be in breach of her duty of care to the left-turning driver if she failed to take reasonable care when entering into the intersection in hazardous circumstances (such as where she was speeding or had an obscured view).
- e) The left-turning driver bears the burden of proving that the negligence of the dominant vehicle caused or contributed to the accident. In other words, that the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed herself.
- f) In such circumstances, any doubt should be resolved in favour of the dominant driver.

- g) The obligation imposed on the left-turning driver by s.174 not to start a turn if there is an immediate hazard has priority over certain other obligations imposed on a through driver (such as by s.158 not to pass a vehicle on its right unless it is safe to do so).
 - h) The resulting onus placed on the left-turning driver is not absolute. It may be qualified by the conduct of the through driver.
- [77] In his explanation and expansion of the s. 174 analysis, Harris JA emphasises that the onus is on the left-turning driver to confirm that it is safe to turn:
- [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 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 [the through driver] 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.

[emphasis added]

Position of the plaintiff: liability

- [78] Ms McMullin argues that she was exercising her legal right to drive through the intersection on a green light, and was the dominant driver (s. 127; Matheson v Fichten, 2012 BCSC 565 at para. 61).[5] Mr Trelenberg was turning left on either a yellow light (for him) or a general north-south green light, and as such was the servient driver: he was obliged to wait for safe opportunity to turn. 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 (s. 174; Lock v Floreani, 2017 BCSC 1313). That Ms McMullin's vehicle posed an immediate hazard was self-evident from the fact that the accident occurred.
- [79] Ms McMullin cites Matheson as the case closest to the present. In that case, the defendant, Mr Fichten, was turning left at an intersection with what he thought was a green advance left-turn arrow. The driver travelling straight through in the opposite curb lane (the second defendant, Mr Bahniwal) claimed that he had a green light. The Court found that Mr Fichten had turned left either on a stale yellow arrow or on no arrow at all, and that when he entered the intersection, Mr Bahniwal had faced a green light. Mr Fichten was held 90% at fault while Mr Bahniwal was held 10% at fault.

Position of the defendants: liability

- [80] The defendants argue that Mr Trelenberg was the dominant vehicle. Under s. 130(2), Mr Trelenberg was entitled to enter the intersection. Although the left-turn arrow had turned yellow, it was not safe for Mr Trelenberg to stop his truck. He was thus entitled to proceed with caution to make the left-turn "movement indicated by the arrow."
- [81] This right was only limited by the requirement of s.174 to 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. The time to assess the "immediate hazard" arises at the specific moment when the left-turning driver decides to turn: *Nerval* at paras 12-13; *Raie v. Thorpe*, (1963) 43 WWR 405 (BCCA) at 410. The defendants argue Ms McMullin did not pose an immediate hazard at the time the left turn was commenced. They submit that the accident occurred entirely due to the fault of Ms McMullin, who was distracted by the yellow Volkswagen and was slightly speeding.

The applicable law

- [82] Both parties proceeded on the basis that s. 174 and its associated jurisprudence provide the governing legal framework for this case. I agree that s. 174 offers some residual guidance to the present situation, which involves a dedicated advance left-turn arrow. For example, the jurisprudence under s. 174 suggests that the court is to assess the presence of an immediate danger at the time the driver starts the turn. Further, the presence of an approaching vehicle that poses an immediate hazard may indicate that a driver turning on an advance left arrow is not exercising due caution as required under that provision, or under the consideration of the common law standard of care.
- [83] In my view, however, an advance left-turn signal is primarily governed by s. 130 of the MVA ("Arrows"). A driver facing a green or yellow dedicated turn arrow is in the same position as a driver facing a green or yellow light in the through lane: that driver enjoys a presumptive right to proceed in the direction stated by the signal, as he is presumptively the dominant driver. The language in the sections governing those through drivers (ss. 127 ("Green light") and 128 ("Yellow light"), quoted above) directly parallels the language in s. 130, and the sections are placed together in the statute. The other case concerning advance left-turn lights, *Walker v. Lightbown*, [1989] BCJ No. 2091 (SC), analyses the case under the then-equivalent of s. 130 (Motor Vehicle Act, RSBC 1979, c. 288, s. 135) and does not apply the then-equivalent of s. 174 (then s. 176).
- [84] The focus of s. 174 is servient drivers waiting for a safe opportunity to turn left in the face of dominant through traffic; it is concerned with ordinary intersections, with no advance left-turn signal. It appears that all of the s. 174 jurisprudence (including *Nerval*, *Joyce*, and the other cases cited by the plaintiff, including *Lock v. Floreani*, *Raie v. Thorpe*, and *Dawes v. Valadas*, 2005 BCSC 1319) concerns such left-turning drivers. *Matheson* cites s. 174, but the case ultimately does not turn on a s. 174 analysis, likely because the preponderance of the

evidence indicated that the driver turned on a red arrow, blocking through traffic that had already started flowing.

- [85] This case, therefore, will start with and be primarily guided by the requirements of s. 130, since it arises from a dedicated advance left-turn signal.
- [86] There is surprisingly little British Columbia case law with respect to s. 130, and specifically with respect to advance left-turn arrows.
- [87] The Matheson accident occurred at an intersection controlled by an advance left-turn arrow, but differs from the present case on two critical points. First, while the Court did not definitively decide whether the driver turned "either very late" in the yellow arrow or entirely after the through traffic signal had turned solid green, the preponderance of the evidence supported the latter; the oncoming traffic had already started to go through the intersection, and had to stop for the late-left-turning driver: para. 49. Second, there was no affirmative finding that it would have been unsafe for the turning driver to stop before the intersection; he was driving an ordinary car, and following other turning vehicles.
- [88] Walker v. Lightbown is the closest case to the present.[6] In that case, the left-turning driver started his turn at the tail-end of an advance left-turn green arrow. Like the present defendant, he was driving a heavy truck, and the arrow turned yellow, and the through-traffic signal turned green, after he had entered the intersection but before he had completed the turn. The through-driving defendant (the roles are the reverse of those in the present case) approached the intersection slightly over the speed limit, and entered the intersection without seeing the turning plaintiff. Hinds J (as he then was) considered the then-MVA sections equivalent to ss. 127 and 130, and concluded at para 19:

In my view those sections must be considered together when circumstances arise, as in this case, where one vehicle is turning left at an intersection when a green arrow is flashing indicating it is permissible to make a left turn, and in the course of that turn the green arrow signal ceased blinking and a green light is illuminated for traffic proceeding through the intersection in the opposite direction to that in which the left turning vehicle was originally proceeding. Each vehicle must yield the right of way to a vehicle lawfully in the intersection. On the findings of fact above set forth I consider that both the Plaintiff's vehicle and the Defendant's vehicle were lawfully in the intersection at the time of the collision. But both should have proceeded with caution in order to give the right of way to the other.

[emphasis added]

- [89] The Court found both drivers negligent, and apportioned the negligence 80% against the through-driver and 20% against the left-turning driver.

- [90] There were several reasons for ascribing greater blame to the through-driver than the turning driver. He was speeding. Further, he in fact saw but failed to yield the right of way to the plaintiff's vehicle "which was completing its turn after that signal had ceased but was nevertheless still lawfully in the intersection": para. 20.
- [91] While less blameworthy, the turning driver was also "negligent in failing to keep a sufficiently adequate lookout as he neared the completion of his left turn, in driving slightly too fast through the intersection, and in failing to yield the right of way to the defendant's vehicle which, technically, was lawfully in the intersection because the traffic signal governing its course of travel had turned green an instant before it entered the intersection": para. 21.

The liability of each party

- [92] Evidence recounted years after a motor vehicle accident that happens over a few seconds is often tenuous. Based on the evidence as a whole, I make the following conclusions, and find that both drivers were negligent, and partly to blame for the accident.

Ms McMullin's liability

- [93] Under s. 127 of the MVA ("Green light"), Ms McMullin was entitled to "cause the vehicle to proceed straight through the intersection" but was obliged to "yield the right of way to vehicles lawfully in the intersection at the time the green light became exhibited."
- [94] As set out below, Mr Trelenberg's truck was a vehicle lawfully in the intersection at the time the green light became exhibited, albeit barely. Ms McMullin was thus obliged to yield the right of way to the turning truck.
- [95] Had she been fully focusing on the intersection ahead of her, she would have seen what was obvious to Ms Wallin: that the defendant's truck was continuing with the turn. It is of course not an unusual occurrence for a vehicle, particularly a long and slow-moving vehicle such as the semitrailer truck, to start its turn at the tail end of a yellow light, and still occupy the intersection when oncoming traffic is invited into the intersection by the green light. Large semi-trailer trucks are not unusual in Langley or at that intersection, with which Ms McMullin was familiar. It was fully foreseeable that the southbound traffic would have to wait momentarily for left-turning traffic, particularly large vehicles, to complete their turns and clear the intersection before proceeding.
- [96] Ms McMullin's distraction can be attributed to her concern about the erratic driving of the yellow Volkswagen behind her. That concern should have prompted her to exercise greater caution. As she approached an intersection with a fresh green light, with the cars to her left stopped or (in the case of Ms Wallin) slowing, rather than moving forward, she should have slowed down herself, rather than proceeding forward at 60 to 65 kilometres an hour.

[97] On this last point, given the imprecision of Ms McMullin's own speed estimate and her own distraction, as well as Ms Wallin's description of the "gray streak" speeding past her, and the assessments of Ms Wallin and Mr Trelenberg that Ms McMullin appeared to be driving quickly, it is likely that Ms McMullin was in fact driving in excess of the stated speed limit at the time of the collision or at least driving at a speed that was excessive relative to the road or traffic, contrary to s. 144 of the MVA.

[98] If I am in error, and if Ms McMullin is to be considered the dominant driver as the through driver on a green light, I still find that she was negligent. Her actions match those of the through driver referred to in the following passage from *Pirie v. Skantz*, 2016 BCCA 70 at para. 14 (which arose in the context of a turning vehicle in an intersection with no advance left-turn arrow: both the turning vehicle and the through vehicle proceeded through the intersection on a stale yellow light):

Having said that, where a through driver: (1) approaches an intersection at an excessive rate of speed or otherwise conducts himself in such a way as to deprive the left-turning driver of the ability to reasonably anticipate he is about to enter the intersection on a stale yellow light; (2) fails to bring his vehicle to a stop in circumstances where other vehicles travelling in the same direction have already done so; or (3) should have become aware of the left-turning driver's own disregard of the law in circumstances that afforded him a sufficient opportunity to avoid the accident through the exercise of reasonable care, the through driver may be found wholly or primarily at fault for the accident: *Pacheco (Guardian ad litem) v. Robinson* (1993), 75 B.C.L.R. (2d) 273 (B.C.C.A.); *Walker v. Brownlee*, (1952), 2 D.L.R. 450 (S.C.C.).

Mr Trelenberg's liability

[99] Section 130(2) permits a vehicle that cannot stop safely when a yellow arrow illuminates to "make the movement indicated by the arrow."

[100] But just as s. 127 does not provide an untrammelled right to enter on a green light, even where an advance left-turning driver is lawfully entitled to complete the turn, s. 130(2)(b) limits the right to turn in two ways: first, the left-turning driver must "proceed with caution" and, second, he must "must yield the right of way to other vehicles lawfully in the intersection."

[101] Mr Trelenberg had entered the intersection, but just barely, when the arrow turned yellow. Given the weight of his truck, Mr Trelenberg could not have stopped safely or avoided entering the intersection. He was entitled to enter the intersection and entitled to "proceed with caution to make the only movement indicated by the arrow": the left turn: s. 130(2)(b).

[102] Before proceeding with the analysis, I note that there exists a seeming conflict between ss. 127(1)(a)(iii) and 130(2)(b). Each requires the driver with the right-of-way to "yield the right of way to vehicles lawfully in the intersection". In the fact-specific context of a motor vehicle claim arising from an advance left turn, these sections should generally be read sequentially, all subject to an overarching obligation to exercise reasonable care and

attention. In other words, Ms McMullin, who entered the intersection after Mr Trelenberg had already lawfully entered the intersection and lawfully started his turn, was obliged to yield to the prior occupant.

- [103] Returning to the intersection, the yellow arrow was a short yellow. Mr Trelenberg made the decision to turn at the end of that short period, when the light was a stale yellow.
- [104] Mr Trelenberg described himself at this point as "committed" due to the weight and balance of the vehicle. He was committed to entering the intersection, but he was not committed (in the sense of physical necessity) to making the actual turn. He could have braked safely upon seeing the yellow light, and stopped straight or only partly turned in the intersection. He could then have waited in safety, with the front part of his truck in the intersection, as oncoming traffic flowed through south in its sequence. He could then have made his turn when the southbound traffic cleared, or, if the southbound flow continued, when the north-south lights turned solid yellow before turning solid red. He did not face the immediate pressure of being trapped in the intersection and blocking east-west traffic and pedestrians, as does a driver waiting to turn in an ordinary intersection when the signal turns yellow immediately before turning red. He would not have been jutting out into oncoming traffic. In effect, he enjoyed a sanctuary of two lane widths in which to await a safe moment to turn: the left-turn lane and the centre median on the opposite side provided that buffer.
- [105] Instead, Mr Trelenberg started and continued through with the turn when he knew or ought to have known that oncoming traffic was on the verge of receiving a green light (that is, at a time when the traffic opposite was nominally entitled to enter the intersection). Put colloquially, he "went for it."
- [106] On his own testimony, he made the decision to turn when his view of the southbound curbside lane was blocked by the transport truck in the opposite centre lane. On direct examination, he said:

It [the plaintiff's minivan] came into view as I'm going through the intersection because the centre lane had traffic in it stopped -- it was that transport truck -- and passing that transport truck then that lane becomes visible. That's when it caught my peripheral vision-- that there's someone coming.

[107] In cross he said:

Mr Doll: At the point when you commenced your turn - I'll take you back to the beginning of that arc - at the point when you commenced your turn, you were unable to see whether or not there was any oncoming traffic in that curb lane?

Mr Trelenberg: Correct

- [108] Mr Trelenberg's turn was in effect a leap of faith: he started and continued through with his turn when he knew or ought to have known that a driver, possibly a distracted driver relying upon the soon-to-be green light, could have been proceeding down the curbside lane at high speed. He acknowledged that traffic was heavy: when he started the turn it was more likely than not that a vehicle would soon appear in the curbside lane and proceed through the green light while his truck was still executing its turn in the intersection.
- [109] To be fair, Mr Trelenberg's leap of faith was predicated on the assumption that a driver continuing southbound would be paying attention and would notice a large truck turning in front of them, and, out of a sense of self-preservation at the very least, not blithely barrel into the intersection. This presumption was not unreasonable. A left-turning driver is entitled to proceed on the assumption that oncoming traffic will act in accordance with the law, and in particular will stop for a red light, absent any reasonable indication to the contrary: *Kokkinis v. Hall* (1996), 19 BCLR (3d) 273 (CA) at para. 10.
- [110] To summarize, while Mr Trelenberg was lawfully entitled to turn in the intersection, he knew as he drove down the dedicated left-turn lane that the advance turn arrow was about to turn yellow, which it indeed did. At that point, he knew that it was unlikely that he would complete his turn before the southbound light turned green. He could have slowed down and stopped at the left-turn line, in anticipation of the yellow. Instead, he proceeded towards the intersection. When the arrow turned yellow he now knew that it was highly unlikely that he would complete the turn before the southbound light turned green. He could have slowed and stopped. He could then have waited in the middle lanes, and completed the turn on the solid yellow light after the southbound through traffic. Instead, he proceeded with the turn. A collision with an inattentive southbound through driver blindly obeying the green light was unlikely but wholly foreseeable.
- [111] The fact that his view was blocked by the transport truck does not change the analysis. Under s. 130(2)(b), he was required to proceed with caution. Whether guided by s. 174 or a general negligence analysis, the left-turning driver must confirm before starting the turn that there is no traffic approaching from the opposite direction that poses an immediate hazard. If the turning driver is unable to confirm the absence of an immediate hazard, he or she must stay put and not start the turn. In *Nerval*, the view of the left-turning driver could not see the approaching through-driver as her view was blocked by a van opposite in the intersection: para. 7. Similarly, in *Burgess v. Fisher*, 2009 BCSC 1766 at para. 32, Justice Barrow said of the left-turning driver (in an intersection with no advance left-turn lane):

The law obliged Mr. Karol to either remain at the stop sign or at least not to proceed into the westbound lane of through traffic on 43rd Avenue unless he could determine that approaching in that lane did not pose an immediate hazard. In order to make that determination, he had to be able to see far enough down the westbound lane to determine whether approaching traffic travelling at or near the speed limit would pose an immediate hazard. The hazard, it is to be recalled, is not just a collision but the immanent prospect of one.

[112] Put in the framework of *Pacheco (Guardian ad litem) v. Robinson* (1993), 75 BCLR (2d) 273 (CA) at para. 18 (cited in *Julian* at para. 91 and *Dawes v. Valadas* at para. 31, I am satisfied that Ms McMullin has discharged her onus of proving that Mr Trelenberg was also negligent. Specifically, Mr Trelenberg had the opportunity to avoid the accident by exercising greater care: he should have waited instead of making his slow turn in the circumstances when he could not see the curbside lane that would likely soon be occupied by a southbound vehicle facing a green light.

Apportionment of liability

[113] The parties provided no alternative submissions or authorities with respect to apportioning liability: each party argued liability as an all-or-nothing proposition.

[114] By the Negligence Act, RSBC 1996, c. 333, s. 1 and the test set out in *Alberta Wheat Pool v. Northwest Pile*, 2000 BCCA 505 at paras. 45-46, "the Court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each."

[115] *Alberta Wheat Pool* at para. 46 explains that blameworthiness for the purpose of apportionment covers a wide moral spectrum:

Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

[116] Groberman JA in *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21 offers further guidance for the apportionment exercise:

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. While s. 175 of the Motor Vehicle Act and other rules of the road are important in determining whether the standard of care was met, they are not the exclusive measures of that

standard.

- [117] As indicated in the outset of these reasons, both the plaintiff and the defendant made mistakes that many drivers commit every day, in most cases with no consequences. Their actions fall closer to the "momentary or minor lapse of care in conduct" pole of misconduct referred to in *Alberta Wheat Pool*.
- [118] As set out above, Mr Trelenberg could have waited to make his turn, either in the left-turn lane, or in the middle of the intersection, rather than turning when he knew he could not see the curbside lane that he knew would soon enjoy a green light, at which point his truck would still be in the intersection.
- [119] As to Ms McMullin, it was wholly foreseeable that traffic turning on the advance left might still be in the intersection completing their turns when her light turned green, and that she would have to slow down or wait to avoid a collision. Ms McMullin was familiar with the intersection, and specifically would have been familiar with the abundance of trucks in the area. Had Ms McMullin paid the attention and care that Ms Wallin did, there would have been no accident.
- [120] Viewing all of the evidence, I attribute 50 percent liability to each of the two individual parties.
- [121] In addition to considering the relative fault of the parties in this case, I have also considered the apportionment in the two other cases in the jurisprudence concerning dedicated left-arrow turns. The Walker through driver was apportioned 80% negligence, while the Matheson through driver was apportioned 10%. Those apportionment exercises largely reflect the more obvious culpability of the opposite parties in those cases: apportionment is a relative exercise. In Walker, the speed and blood alcohol content of the through driver exceeded legal limits. In Matheson, the turning driver had likely started his turn while through traffic already had a green light.

IV. damages

Introduction

- [122] The defendants did not seriously dispute the plaintiff's claims as to the extent of her injury. They acknowledge that the accident caused the plaintiff soft-tissue injuries to her neck and low back, and resultant headaches, all of which have become chronic. In this regard, the evidence of the plaintiff and the medical experts called on her behalf were not seriously undermined through cross-examination.
- [123] Further, the defendants did not adduce any expert medical evidence to refute the evidence of the plaintiff or her medical witnesses. The following analysis will thus be brief.

The plaintiff's injuries and medical evidence

[124] The plaintiff adduced an expert report from Dr Michael Negraeff, an anesthesiologist and pain specialist. He concluded that the following conditions were directly caused by the accident:

- a) Myofascial pain of the head and neck;
- b) Possible cervical facet joint mediated pain;
- c) Mechanical low back pain;
- d) Persistent (chronic) headache attributable to whiplash;
- e) Pain related disability and other factors, including:
 - i. Sleep interference secondary to pain;
 - ii. Mood disorder (depression) secondary to pain;
 - iii. Low self efficacy;
 - iv. Functional impairment secondary to pain.

[125] The worst pain has been in her neck, which she describes as being in a state of constant tension. Even light pressure will cause her neck pain to flare up: a guitar strap or even a swimsuit strap causes unbearable pain. The neck pain also causes constant chronic headaches, which can flare up to cause acute pain. She also feels unrelenting pain in her lower back and waist, particularly at the centre of her spine. If she moves the wrong way, the pains sharpen: it feels like she is being stabbed with a knife. The pain then radiates outwards. She suffers from these three conditions all day and all night.

[126] These conditions have plagued the plaintiff since the accident. They likely will plague her all her life. As Dr Negraeff states, " her pain is likely to remain as it is now."

[127] The only medications that have provided relief for the plaintiff's pain have been strong narcotics, with potential long-term harmful effects, including the potential for addiction. These medications include fentanyl and OxyContin. The risks posed by these medications cause the plaintiff anxiety.

[128] In addition to a wide range of medications, she has tried a wide range of treatments for her conditions, including physiotherapy, chiropractics (both conventional and active release therapy), radiofrequency ablation, acupuncture, and stretching, as well as treatment at a pain clinic: none has brought significant relief.

[129] Before the accident, the plaintiff suffered from two pre-existing conditions. An accident in her youth left her with chronic pelvic pain. She also suffered from occasional headaches. These conditions sometimes affected her sleep and certain activities, but they were manageable before the accident, and had only a minor effect on her daily life. Her chronic pain after the accident was of an entirely different intensity and consistency.

Effect of the plaintiff's injuries on her life

[130] The plaintiff's ongoing chronic pain has deprived her of most of the pleasures and independence in her life.

[131] Since the accident, the plaintiff has been unable to do shopping or housework. Even applying shampoo to her hair causes pain after a few seconds.

[132] She is plagued by sleeplessness, and usually wakes up five times a night. She often sleeps in a chair.

[133] The plaintiff is an artistic person who has raised her children with a love of the arts. She had a lifelong passion for music and painting. The accident forced her to give up entirely playing bass guitar, as the weight of the instrument and the strap causes excruciating pain. She is only able to play the piano occasionally and, even then, only briefly.

[134] Music was not only a hobby for her: she often led the congregation at her church in worship by playing musical instruments. That has now ended.

[135] Her church is a very important part of her life. It is a church with a physically exuberant form of worship: parishioners will often raise their hands and move as part of the service. That is now gone. Even sitting for the length of the service is usually too painful.

[136] She has almost entirely given up her other main passion: painting. She and other family members testified that she only paints rarely and can only paint on a small canvas for short periods, as it hurts her back and neck. Photography, which was also a source of income, has also ended.

[137] Before the accident, she enjoyed sporting activities such as hiking, biking, boating, and jet-skiing with her immediate and extended family. She was also an enthusiastic cook. She can no longer do those activities. She feels anxiety that she is letting down her family.

[138] Even her ability to engage in sedentary activities is limited. While she formerly enjoyed reading, she now finds it difficult due to her headaches.

[139] Her accident has also strained the family's relationships with their friends. When they make arrangements to meet friends, they must cancel 90 percent of the time because of the pain.

[140] The accident, and her present limitations, have led the plaintiff to feelings of depression and hopelessness. The accident has also caused her anxiety. It has made her a nervous driver, while she previously enjoyed driving.

[141] Finally, the accident, with Ms McMullin's resultant loss of employment opportunities and independence, partly contributed to the family's decision to move from the Lower Mainland to Steinbach, Manitoba.

Non-Pecuniary Damages

Law

[142] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. That said, such cases serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189; *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[143] The oft-cited case of *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 sets out a non-exhaustive list of factors to be considered when assessing non-pecuniary damages:

- age of the plaintiff;
- nature of the injury;
- severity and duration of pain;
- disability;
- emotional suffering;
- loss or impairment of life;
- impairment of family, marital and social relationships;
- impairment of physical and mental abilities;
- loss of lifestyle; and
- the plaintiff's stoicism.

The defendants' position

[144] The defendants acknowledge that the plaintiff has been injured in her neck, and low back, with resultant headaches, and acknowledge that she is entitled to some non-pecuniary damages for loss of enjoyment of life.

[145] They argue that in attempting to return the plaintiff to the position she would have been in but for the accident, the court must take into account the plaintiff's pre-existing pelvic pain and headaches. The defendants suggest non-pecuniary damages of \$80,000, and cite cases in the range of \$50,000 to \$115,000 as appropriate comparators.

Discussion and decision

[146] I agree that the Court must assess non-pecuniary damages on the basis that she would be suffering pain on a daily basis regardless of the accident. But, as observed above, the plaintiff's pre-accident pain and headaches were largely manageable, and did not significantly affect her life. She raised three children, was a leader in her church, earned an income, and enjoyed regular artistic and outdoors activities. In contrast, the post-accident pain has been debilitating in every aspect of her life. The medical evidence is that she will likely suffer from these effects for the rest of her life.

[147] That lifetime prognosis, coupled with the Stapley factors, all indicate that a generous non-pecuniary award is appropriate. She is only 40 years old. The pain is severe and persistent. It has deprived her of most of life's enjoyments. It has impaired her family and social relationships.

[148] The cases provided by the plaintiff more closely resemble her facts. Specifically, in *Hollyer v. Gaston*, 2016 BCSC 1401 (\$125,000), *Clayton v. Barefoot*, 2018 BCSC 239 (\$130,000), *Ferguson v. Watt*, 2018 BCSC 1587 (\$140,000), *Redmond v. Krider*, 2015 BCSC 178 (\$150,000), and *Cumpf v. Barbuta*, 2014 BCSC 1898 (\$150,000) the plaintiffs were women in their 30s and 40s who suffered similar injuries to their necks and backs, resulting in chronic pain that considerably disrupted their pre-accident lifestyles; at the same time, they suffered pre-existing injuries before their accidents. If anything, the present plaintiff's life disruption, pain, and medication are more serious than those suffered in these comparator cases.

[149] The cases advanced by the defendants are readily distinguishable in terms of the severity of the injuries and pain, and the impact on the plaintiff's life. For example, in *Dennison v. Jensen*, 2019 BCSC 725 (\$50,000) and *Juelfs v. McCue*, 2019 BCSC 1195 (\$65,000), the injuries and pain were minor compared to those of the plaintiff, and they were able to do most of their pre-activities, albeit at a less intense level. The defendants' cases at the upper end of their range are also distinguishable. For example, the plaintiff in *Elpel v. Glover*, 2018 BCSC 1404 (\$115,000), is 16 years older than Ms McMullin, and treatment before the trial had stabilized the plaintiff's chronic pain and had substantially reduced her anxiety and symptoms of depression.

[150] Based on the evidence as a whole and the governing principles, a fair and reasonable award for the plaintiff's non-pecuniary damages is \$150,000.

Loss of housekeeping capacity

[151] Kim v. Lin, 2018 BCCA 77 at para. 31 sets out the principles governing whether to make an award for loss of housekeeping:

Loss of housekeeping capacity [is] just that, a loss of capacity, or the loss of an asset that should be compensated as a pecuniary loss regardless of whether the replacement services which are used to value the loss and determine the quantum of the award are actually purchased. Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work - i.e., where the plaintiff has suffered a true loss of capacity - that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in Liu, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage

[152] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, the court may look to the cost of hiring replacement services, but should ensure that any award for that loss, and any deduction to that award, be tied to the actual loss of capacity which justifies the award in the first place: Kim at paras. 33-34.

[153] The plaintiff struggles with all housekeeping chores. Vacuuming and cleaning cause her considerable neck and back pain. The pain caused by lifting makes it near-impossible for her to do the laundry or shop for groceries. Cooking is difficult, and she is reduced to preparing foods that require a minimal amount of time and effort.

[154] Before the accident, the plaintiff was largely a stay-at-home mother for her three children, and did most of the housework, with assistance from her children and husband. After the accident she has been almost entirely dependent on an outside housekeeper, at \$35 an hour, along with the almost full-time assistance of her 20-year-old daughter, who has taken over the primary roles of caring for the youngest child, as well as cooking. That daughter is soon to leave home to attend university, like the second-oldest child, and this assistance will be lost.

[155] The plaintiff submits that the appropriate award for loss of housekeeping capacity is \$50,000. The defendants raise no arguments in opposition. This lifetime amount is reasonable, and so ordered.

Loss of earning capacity

[156] The plaintiff's claims with respect to loss of past (\$480) and future (\$0) earning capacity are modest. Her injuries made her unable to complete her occasional work for her church working on its newsletter and website.

[157] The defendant does not dispute this head of damages, and it is ordered in the amount sought.

Costs of future care

Law

[158] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 BCLR (2d) 33 (SC); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351 at paras. 29-30.

[159] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable: *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239.

[160] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[161] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Ferguson v. Watt*, 2018 BCSC 1587 at paras. 160-163.

Position of parties and decision

[162] The plaintiff testified as to the actual costs she incurs in relation to her treatment:

- a) Fentanyl patches at \$200 per month (\$2,400 annually);
- b) Massage treatment \$85 per visit, every 3 weeks (\$1,473 annually);
- c) Cannabis CBD and THC oils for creams, \$250 per month (\$3,000 annually);

d) Flexeril, \$20 per month (\$240 annually)

[163] Each of these treatments can be tied to recommendations from the plaintiff's past or present treating doctors post-accident, as well as Dr Negraeff. The defendants did not provide any contrary medical evidence to refute the appropriateness of these treatments or the amounts or costs of this medication.

[164] The defendants' primary objection to the claimed costs of future care focused on the fentanyl patches. They argue that there was no medical opinion that the plaintiff would be able to tolerate that prescription for the rest of her life. The plaintiff notes that she has safely taken and tolerated that medication for several years, and that regardless of whether she specifically obtains pain relief through the fentanyl patch or another medication, the cost will likely be long-term and high. Further, the fentanyl patch seems to be the only medication that consistently helps her deal with the pain. These points were supported by the evidence of the three physicians. I am satisfied that the fentanyl patch, either as a continued medication, or as a proxy for future substitutional strong pain medication, is appropriately compensable.

[165] The plaintiff provided the expert opinion of an economist, Mark Szekely, with respect to the present value of future care costs. Specifically, for every \$1000 of annual costs assessed at the time of trial, the appropriate multiplier is \$29,166.

[166] Applying Mr Szekely's recommended multiplier, the recommended treatments have the following corresponding costs over the expected lifetime of an average person of Mrs. McMullin's age:

Item Costs

- a) Mid cervical facet block injections; \$nil
- b) Counselling \$unknown
- c) Massage \$42,961
- d) Chiropractic \$unknown
- e) Pain science education \$nil
- f) Gentle restorative yoga stress reduction \$nil
- g) Cannabis Clinic \$87,498
- h) Fentanyl \$69,998

[167] The total lifetime claim comes to \$200,457, not including provision for heating pads, general analgesic medication or alternative analgesic medication, or counselling. I am satisfied on the medical evidence that on a balance of probabilities the plaintiff will likely need such treatments for the rest of her life, having suffered acute chronic pain requiring substantial medical relief for the past seven years.

Special damages

[168] The plaintiff provided a summary of her special damages claim based on chiropractic, massage treatments, and driving costs to those treatments). These totalled \$12,047.10 as of November 5, 2018. The plaintiff further claimed:

- a) An additional year of massage therapy at \$1,473 (based on \$85 per treatment, once every 3 weeks)
- b) Medication costs, including:
 - i. Fentanyl for 2015, 2016, 2017, 2018, 2019 at \$2,400 per year = \$12,000
 - ii. Flexeril for 2013 - 2019 at \$240 per year = \$1,680
 - iii. Cannabis and THC oils at \$250 per month since August 2017 = \$6,750

[169] The special damages claim thus totals \$32,477.10.

[170] The defendants' primary argument against these special damages was that they were not all supported by invoices.

[171] Each of these medical costs have been recommended or prescribed by one or more of the plaintiff's treating doctors or Dr Negraeff. They are proportionate to the pain that she has suffered over the past seven years. They are allowed.

V. CONCLUSION AND COSTS

[172] In summary, damages are awarded as follows:

- a) Non-pecuniary damages: \$150,000
- b) Loss of earning capacity: \$480.00
- c) Loss of housekeeping capacity: \$50,000.00
- d) Cost of future care: \$200,457.00
- e) Special damages: \$32,477.10

TOTAL: \$433,414.10

[173] Reflecting apportionment, the defendants are ordered to pay the plaintiff 50% of that amount: \$216,707.05.

"Crerar J"

- [1] At the scene of the accident another person offered to serve as a witness for Ms McMullin. At the end of the day, that potential witness refused to testify; no subpoena was issued as neither party could trace his physical whereabouts.
- [2] The facts in *Julian v. Joyce* differ from the present: there was no dedicated left-turn light. The defendant started her left turn on the yellow light that was about to turn red. In effect, the defendant had to turn left, or else be stranded in the middle of the intersection and block traffic that was about to flow in the perpendicular lanes. The through-driving plaintiff ran a stale yellow light and struck the defendant's vehicle.
- [3] While people often take care to use the term "amber" with respect to traffic lights, the British Columbia Motor Vehicle Act in its present and past iterations has always use the term "yellow." The term "amber" does not appear in the MVA itself. The term only appears in its regulations, and then only with respect to the colour of vehicle turn signals and emergency vehicle flashing lights, not traffic lights.
- [4] As in *Joyce*, the Nerval intersection had no dedicated left-turn signal. Lights were only on the north-south road on which the parties travelled; the perpendicular road was controlled by stop signs.
- [5] In contrast to most of the cases surveyed, where the parties to the litigation are the left-turning driver and the through driver, the plaintiff in *Matheson* was the passenger of the defendant *Fichten*.
- [6] Neither party referred *Lightbown* to the Court. It is nominally unreported but readily available on *Quicklaw*. I do not ascribe any ethical lapse on the part of counsel for its omission. But it should have been located and provided to the Court. In a memorandum, the Court invited the parties' written submissions on the case.

APPENDIX A

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/00/2020BCSC0049.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/mcmullin-v-trelenberg-2020>

Prepared on 26 October 2026 · Esheria