

CANADA / JUDGMENT

Peterson v. Ganji

2023 BCSC 1543

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1543 Peterson v. Ganji

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Peterson v. Ganji,

2023 BCSC 1543

Date: 20230901

Docket: M223283

Registry: New Westminster

Between:

Severin Munroe Peterson

Plaintiff

And

Fatana Ganji

Defendant

- and-

Docket: M200065

Registry: Vancouver

Between:

Fatana Ganji

Plaintiff

And

Severin Munroe Peterson

Defendant

Before: The Honourable Mr. Justice M. Taylor

Reasons for Judgment

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Place and Dates of Trial:

New Westminster, B.C.

April 17-20, 2023

Place and Date of Judgment:

New Westminster, B.C.

September 1, 2023

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INTRODUCTION

- [1] This trial arises from a motor vehicle accident that occurred on January 23, 2018 in Maple Ridge, British Columbia (the "Accident"). The trial dealt with liability only.

BACKGROUND

The Accident

- [2] The Accident occurred on January 23, 2018 at the intersection of Golden Ears Way and 203 Street in Maple Ridge (the "Intersection") in the late afternoon. At the Intersection, where there is a traffic light, Golden Ears Way runs east-west in two lanes each direction. There are through lanes on both sides of Golden Ears Way and, as one approaches the Intersection, there are mirrored left turn lanes which enable vehicles to turn north or south onto 203 Street. The Intersection is flat and has no elevation change.
- [3] Leading up to the Accident, the defendant, Fatana Ganji (the "Defendant"), was travelling eastbound on Golden Ears Way in a 2014 Mitsubishi Outlander SUV. The plaintiff, Severin Munroe Peterson (the "Plaintiff"), was travelling westbound on Golden Ears Way in a 2009 Mazda 3.
- [4] The Plaintiff entered the left turn lane at the Intersection intending to turn southbound on 203 Street. After the light turned yellow, the Plaintiff commenced his left turn across the opposing lane, whereupon the Defendant's oncoming vehicle collided with the right rear end of the Plaintiff's vehicle.

The Evidence

- [5] The Plaintiff and Defendant testified at trial as well as three lay witnesses who were present at the Accident scene. In addition, two engineering experts prepared accident reconstruction reports which were filed as exhibits. The two experts also testified at trial.

The Plaintiff

- [6] The Plaintiff testified that he is familiar with the area near the Accident scene and lives nearby. He recalled that the weather at the time of the Accident was dark with light rain and that the roads were wet, although visibility was clear. He recalled that cars had their headlights on at that time.
- [7] The Plaintiff testified that he was heading westbound on Golden Ears Way in a 2009 Mazda 3 and had the intention of turning left onto 203 Street. He testified that he put his left signal on and entered the left lane as he approached the Intersection. He recalled that he was the first vehicle in the left lane and that he crept slowly into the Intersection and came to a full stop, about a quarter of the way into the Intersection or less. He confirmed in his testimony that his view of oncoming vehicles was not obstructed. He recalled letting a few cars go past while the light was green and one pass after the light turned yellow. After that, he scanned the eastbound lane for oncoming cars and saw one car in the distance but judged it was not close to the Intersection and far enough away for him to turn safely. He testified that he saw no immediate danger although he could not recall exactly how far that car was from the Intersection when he saw it or how fast it was travelling.
- [8] The Plaintiff testified that he accelerated at normal speed into his left turn and had just about passed through the Intersection when he was hit. He did not see the vehicle that hit him. He could not recall if the light was red or yellow when he commenced his turn but stated that if the light was not red it was at a minimum stale yellow. He could not recall how much time passed from the time he commenced his turn to the moment of impact.
- [9] The Plaintiff testified that there was damage to the back passenger door and rear panel of his vehicle. The damage was sufficient that the vehicle was subsequently written off.

The Defendant

- [10] The Defendant testified that she was driving her Mitsubishi Outlander SUV at the time of the Accident traveling eastbound on Golden Ears Way, approaching the Intersection in the middle lane. She stated that she was familiar with the Intersection.
- [11] The Defendant recalled that her headlights were on and that the weather conditions were dark, rainy, and wet. She testified that as she approached the Intersection the traffic light turned from green to yellow, although she admitted on cross-examination that she could have been unsure about the colour of the traffic light. She estimated that the yellow light lasted for 2.0-2.5 seconds during which interval she made a decision not to apply the brakes

and instead decided to accelerate through the Intersection, as she believed it was not safe to stop at the Intersection. The Defendant testified that she did not see the Plaintiff's vehicle until the moment prior to the collision.

Adam Martens

- [12] Mr. Martens was driving a Chevy Spark in the same eastbound direction as the Defendant at the time of the Accident with his companion Stephanie Richards sitting in the passenger's seat. He testified that he was traveling at about 70 km/h, which was over the posted speed limit of 60 km/h, but not an uncommon speed for this section of roadway. He stated that he did not believe at the time that travelling at 70 km/h was unsafe for the road conditions.
- [13] Mr. Martens testified that, prior to the Accident, the Defendant had been traveling behind him for some time along Golden Ears Way at approximately the same speed. He stated that he was not sure how far behind him she was immediately prior to the Accident. He said it was hard to quantify but thinks she was several car lengths behind him, although he admitted that this was more or less a guess.
- [14] Mr. Martens testified that he recalled seeing the Plaintiff stopped and waiting in the left-turn lane of the Intersection on the westbound side before Mr. Martens entered the Intersection. He recalled that he entered the Intersection on a yellow light and passed the Plaintiff's car while the light was yellow. After he passed the Plaintiff, he looked in his rear-view mirror. He stated that he has a habit of looking in his rear-view mirror when he travels through an intersection on a yellow light to see if the cars behind him are willing to pass through and risk an accident. As a result, Mr. Martens testified that he saw the Plaintiff commence his left turn, which he recalled was at a normal speed, and then witnessed the collision in his rear-view mirror.
- [15] Mr. Martens was not able to recall how much time passed between the moment he passed the Plaintiff's car in the Intersection and the Accident taking place. He could not say how long it took from the time he entered the Intersection until he exited the Intersection. However, he did recall that, after the Accident, he drove about 100 metres further east along Golden Ears Way to a point where the right and left lanes merge, where he stopped his car to turn around and return to the scene of the Accident.

Stephanie Richards

- [16] Ms. Richards was travelling in the passenger's seat of Mr. Martens' Chevy Spark when the Accident occurred. She testified that Mr. Martens entered the Intersection shortly after the light turned yellow. She doesn't know with certainty how much time passed between going through the Intersection and the Accident happening. She stated that the Accident happened "a little bit" after she and Mr. Martens passed through the Intersection.

- [17] Ms. Richards admitted that she did not see the Accident when it occurred but she did recall hearing the impact. She recalled that she heard the sound of the impact as their car had reached the point down Golden Ears way where the right and left lanes merge.

Kelly Tittinger

- [18] Mr. Tittinger testified that he was driving a Dodge Ram 3500 pickup in the eastbound direction along Golden Ears Way, west of the Intersection, at the time of the Accident. His wife was sitting in the passenger's seat. Mr. Tittinger recalled that it was around 4 p.m. and starting to get dark. He recalled that an SUV was ahead of him (the Defendant's car as he later learned) and that he was travelling about 60 km/h. As he was approaching the Intersection, he recalled that the light was green and then went yellow when the Defendant's vehicle was a couple of car lengths from the Intersection.
- [19] Mr. Tittinger testified that the Defendant's vehicle entered the Intersection when the light was still yellow. He also recalled that, when the collision occurred, the light facing him in the Intersection was still yellow but then turned red after the collision. Mr. Tittinger recalled telling his wife immediately after the Accident that the SUV had plenty of time to get through the Intersection but that the left-turning car had "jumped the gun" and pulled in front of the Defendant.
- [20] Mr. Tittinger testified that he was following a couple of car lengths behind the Defendant's vehicle prior to her entering the Intersection. He also recalled that, after the Accident, he was able to stop prior to entering the Intersection with normal braking.

Brad Heinrich

- [21] Mr. Heinrich is a professional engineer who was qualified without objection as an expert in accident reconstruction. His expert report (the "Heinrich Report") dated January 19, 2023 was filed as an exhibit. Mr. Heinrich also testified at trial.
- [22] In his report, Mr. Heinrich summarized the data collected from the Event Data Recorder ("EDR") in the Defendant's vehicle. The EDR data revealed that the Defendant's car was travelling at a speed of 75 km/h 5.0 seconds before impact, accelerated to 76 km/h at 2.0 seconds before impact and then registered a first application of the brakes at 1.0 second before impact, reducing speed to 61 km/h at impact. Mr. Heinrich estimated that the Defendant's impact speed was likely actually higher than the EDR data indicated, likely between 61 and 69 km/h, due to wheel slip.
- [23] Mr. Heinrich simulated the collision using software called PC-Crash. Based upon the assumption that the Defendant was 2.0 to 2.5 seconds from the Intersection when the light turned yellow (which was the Defendant's recollection), Mr. Heinrich explained that, at 2 seconds from the Intersection, she would have had to decelerate from a speed of 75 km/h at 1.1 g to stop before the Intersection, which is not possible on wet roads or, at 2.5 seconds from the Intersection, to decelerate at 0.7 g, which is possible but difficult for skidding tires

on wet roads. Mr. Heinrich concluded that, within these assumed parameters, the Defendant probably could not have brought her vehicle to a complete stop in a safe manner after the light turned yellow.

- [24] Mr. Heinrich also estimated that the Plaintiff's vehicle was likely travelling at between 20-35 km/h at impact. Mr. Heinrich further explained that he could not determine the position of the Plaintiff's vehicle when it started or completed its turn within any meaningfully small range, noting that the point of impact and impact speed of the Defendant's vehicle had a fairly wide range of possible values.

Trevor Dinn

- [25] Mr. Dinn is a professional engineer who was qualified without objection as an expert in accident reconstruction. Mr. Dinn prepared a report dated September 22, 2022 and a second report dated February 27, 2023 in response to the Heinrich Report (the "Response Report"), which were filed as exhibits. Mr. Dinn also testified at trial.
- [26] In the Response Report, Mr. Dinn agreed with Mr. Heinrich that if the Defendant was in fact 2.0-2.5 seconds from the Intersection and travelling at 75 km/h when the light turned yellow it would have been difficult for the Defendant to stop safely before entering the Intersection.
- [27] However, Mr. Dinn further opined that if the Defendant's vehicle had been travelling at the speed limit of 60 km/h instead of 75 km/h, the Defendant's vehicle would likely have cleared the path of the Plaintiff's vehicle without any braking since the slower speed would have taken at least 0.5 seconds more and Plaintiff's vehicle would have required only 0.5 seconds at most to travel out of the way. In reaching this conclusion, Mr. Dinn reasoned that the impact was to the trailing half of the Plaintiff's vehicle and that, for the Plaintiff's vehicle to travel half a car length (2.5 metres) it would have required about 0.5 seconds at 20 km/h and 0.26 seconds at 35 km/h. In either case, this would have been sufficient time for the Plaintiff's vehicle to clear the path of the Defendant's vehicle.
- [28] In the alternative, Mr. Dinn also opined that at 60 km/h the Defendant could have reacted to the yellow light and come to a stop prior to the Intersection at a deceleration rate of 0.4 to 0.57 g, which would have been possible on the wet roadway, albeit likely at a deceleration rate greater than the average driver's expected deceleration response to a yellow light.
- [29] Although Mr. Heinrich had declined to opine about the turn path of the Plaintiff's vehicle due to a lack of information, Mr. Dinn did provide such an opinion in his report. Mr. Dinn had no information about the actual trajectory of the Plaintiff's vehicle as he made his left turn, and so made an assumption about what a likely trajectory was. Mr. Dinn modelled a typical left turn path for a vehicle in the Intersection using various hypothetical assumptions about typical reaction times and other metrics derived from academic literature in the field. In particular, Mr. Dinn assumed:

- that the Plaintiff started his left turn after seeing the light turn yellow;

- that he performed his turn at a rate of acceleration between 1.4 m/s²-1.9 m/s²; and
- that the Plaintiff had a typical perception reaction time of 1.3 seconds to observe and react to a changing light in an intersection.

[30] On the basis of the foregoing assumptions, and using the speeds from the EDR Data, Mr. Dinn concluded that the Defendant was actually 4.5-5.5 seconds west of the Intersection when the light turned yellow (and not merely 2.0 to 2.5 seconds as assumed by Mr. Heinrich). Mr. Dinn also concluded that the Defendant was 79-101 metres away from the Intersection when the light turned yellow. At that distance, he concluded, most drivers in her position would have been able to stop safely, even travelling at her speed.

The Traffic Sequencing Report

[31] A traffic sequencing report (the "Traffic Sequencing Report") was also filed as an exhibit revealing that the light at the Intersection typically remains yellow for eastbound traffic for 3.7 seconds.

ANALYSIS

Credibility

[32] In *Pirie v. Skantz*, 2015 BCSC 368 at para. 26, aff'd 2016 BCCA 70, Justice Devlin emphasized the importance of weighing the credibility and reliability of witnesses in cases of this nature, reproducing the following quote from *Gichuru v. Smith*, 2013 BCSC 895 at para. 130:

the assessment of a witness's credibility must reasonably subject the witness's story to an examination of its consistency with the probabilities of the surrounding conditions or circumstances. The real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances. See *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at pp. 356-357.

See also *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296.

[33] In my view, the Plaintiff and the Defendant were both credible witnesses, and neither party took specific issue with the credibility of the other party at trial. I found that both of their accounts of their recollections were coherent and contained no obvious internal inconsistencies. Further, neither party was defensive or evasive and indeed both parties willingly admitted under cross-examination that they were unable to remember with certainty the colour of the traffic light at the critical time (which for both of them was potentially an admission against interest). That said, as I will discuss in more detail in my analysis below, I did have concerns about the reliability of their respective accounts on certain key details and the overall consistency of their testimonies with the probabilities of the surrounding conditions and circumstances.

- [34] Similarly, the lay witnesses were also in my view credible. There was no evidence that any of them had any prior or subsequent personal relationship with either the Plaintiff or the Defendant, nor was there any apparent motivation for any of them to be anything other than truthful. I am satisfied that they were doing their best in their testimony to deliver their honest recollection of events.
- [35] However, taking into account the fact that the Accident happened very quickly and over five years prior to the date of the trial, it is to be expected that the reliability of these accounts may be imperfect. In Pirie, Devlin J. reviewed the inevitable issues with reliability in cases of this nature, which are applicable in this case:
- [9] In cases of this kind, where events happen suddenly, and over a period of a few seconds, all parties do their best to give detailed evidence about things such as the position and movements of their vehicles, the colour of traffic lights, distances and time estimates. When reviewing the evidence it must be remembered that the witnesses are not waiting for the accident to happen, and so may not capture every relevant detail years later when testifying at trial.
- [36] I will review my concerns about the reliability of testimony from each of the individual lay witnesses in my legal analysis that follows. I will also address the weight to be given to the expert evidence.

Legal Framework

- [37] As the Accident involved a collision between the Plaintiff's left-turning vehicle and the Defendant's straight-through vehicle at an intersection controlled by traffic lights, the relevant provisions of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA] to be considered are ss. 128(1), 129(1) and 174.
- [38] Sections 128(1), 129(1) and 174 of the MVA state in relevant part:

Yellow light

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,

Red light

129 (1) Subject to subsection (2), when a red light alone is exhibited at an intersection by a traffic control signal, the driver of a vehicle approaching the intersection and facing the red 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, and subject to the provisions of subsection (3), must not cause the vehicle to proceed until a traffic control signal instructs the driver that he or she is permitted to do so.

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.

- [39] In *Yang v. Croin*, 2021 BCSC 955, Justice Jackson helpfully summarized the applicable analysis in cases involving left-turning and straight-through vehicles at an intersection with traffic lights:
- [3] To prove negligence the plaintiff must prove, on a balance of probabilities, the defendant owed a duty of care to the plaintiff, that the defendant breached the standard of care applicable, and that the breach caused, in fact and in law, the plaintiff to suffer damage: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3. Legislative standards are relevant to the common law standard of care, although the two are not necessarily co-extensive: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 29, 59 B.C.L.R. (3d) 81.
- [4] The standard of care governing drivers turning left at light-controlled intersections is determined by a combination of statutory provisions and case law interpreting them. In collisions, the driver who has the right-of-way is the dominant driver; the other driver is often referred to as being servient because they have the duty to yield: *Nerval v. Khehra*, 2012 BCCA 436 at para. 33. In cases involving a collision in an intersection between a left-turning driver and a straight-through driver, it is the colour of the lights that determines which of the drivers has the right-of-way: *Lozinski v. Maple Ridge (District)*, 2015 BCSC 1277 at para. 70.
- [5] A driver approaching an intersection facing a red light must stop and not proceed until their light turns green: *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [MVA], s. 129(1). A driver approaching an intersection facing a yellow light must stop, unless the stop cannot be made in safety: *MVA*, s. 128(1). When a vehicle is in an intersection and its driver intends to turn left, the left-turning driver must yield the right-of-way to opposing traffic that is either in the intersection or so close to the intersection as to constitute an immediate hazard: *MVA*, s. 174. However, a left-turning driver is not without rights: *Bailey v. Jang*, 2011 BCCA 146 at

para. 16. Having yielded to traffic in the intersection and traffic so close as to constitute an immediate hazard, a left-turning vehicle that has signalled their left turn (as required under the MVA) may complete the turn, and traffic approaching from the opposite direction must yield: MVA, s. 174.

- [6] The term "immediate hazard" is not defined in the MVA but has been described as an approaching car that is so close to the intersection when the other driver makes their turn that a collision is threatened if the approaching driver does not take some "violent or sudden avoiding action": *Raie v. Thorpe* (1963), 43 W.W.R. 405 at 410, [1963] B.C.J. No. 14 (C.A.). Whether a straight-through driver constitutes an immediate hazard depends on its speed and proximity to the intersection: *Mitchell v. ICBC*, 2004 BCSC 983 at para. 36. Simply put, a left-turning driver (after signalling appropriately) must yield to straight-through traffic that is so close that a left turn cannot be made safely, but it has the right-of-way vis-à-vis traffic that does not constitute an immediate hazard. In the latter circumstance, it is the approaching straight-through traffic that must yield to the left-turning driver.
- [7] Where a left-turning driver enters the intersection without breaching traffic signals, and the straight-through driver enters the intersection on a red light, the left-turning driver is dominant and is entitled to proceed on the assumption that oncoming traffic will stop at the red light: *Lozinski* at para. 70. A left-turning driver is not obliged to ensure all traffic has stopped before proceeding on a yellow light, but their right to proceed on the assumption traffic will stop does not negate their duty to react to "manifest hazards", meaning what is there to be seen: *Tejani v. Greenan*, 2001 BCSC 803 at para. 29.

Application of Legal Framework

The Colour of the Traffic Lights

- [40] Applying the legal analysis set out in *Yang*, the first evidentiary question to be addressed is the colour of the traffic light as the Defendant entered the Intersection.
- [41] In my view, the evidence best supports the conclusion that the light was stale yellow as the Defendant entered the Intersection. In reaching this conclusion, I note in the first place that there was no clear and compelling evidence at trial that the light had turned red prior to the Defendant entering the Intersection. In this respect, I found it significant that none of the witnesses at trial definitively testified that the light was red. Specifically:
- the Plaintiff testified that he could not recall if the light was red or yellow when he looked at vehicles approaching the Intersection and commenced his turn but stated that if the light was not red it was at a minimum stale yellow;
 - the Defendant testified that, as she approached the Intersection, the traffic light turned from green to yellow, although she admitted on cross-examination that she could have been unsure about the colour of the traffic light;

- Mr. Martens recalled that the light was yellow before he entered the Intersection and also yellow as he passed the Plaintiff's vehicle in the Intersection. He did not testify that he had seen the light turn red prior to the Accident;

- Ms. Richards testified that Mr. Martens entered the Intersection shortly after the light turned yellow but she did not know with certainty how much time passed between going through the Intersection and the Accident happening, nor was she in a position to positively identify the colour of the light when the Defendant entered the Intersection; and

- Mr. Tittinger testified that when the collision occurred, he was a couple of car lengths behind the Defendant and the light facing him in the Intersection was yellow and then turned red only after the collision.

[42] The most that can be said from this testimony is that some of the witnesses thought the light could have been red or yellow, but were not sure, while the remainder recalled that it was yellow. In my view, this is not enough to support the conclusion, on a balance of probabilities, that the light was red. To the contrary, the preponderance of the witness evidence supports the conclusion that the light was more likely yellow than red.

[43] Second, the evidence in my view also supports the conclusion that, as the Defendant entered the Intersection, the light was stale yellow, and not merely yellow. In reaching this conclusion I have considered the following evidence:

- the Traffic Sequencing Report stated that the light remains yellow for eastbound traffic on Golden Ears Way at the Intersection for 3.7 seconds;

- by the Defendant's own admission she viewed the light turn yellow 2.0 to 2.5 seconds before entering the Intersection. Thus, even if I were to accept her testimony as fully reliable (which I do not for reasons I will explain below), the fact would remain that a considerable period of the total yellow light time had elapsed when she entered the Intersection (equivalent to about half to two-thirds of the 3.7-second total time), which indicates that the yellow light was stale or well on its way to stale.

- Further, and in any event, my view is that the Defendant's estimate was not a reliable metric under the circumstances. In particular, I found her very precise testimony that she was 2.0 to 2.5 seconds from the Intersection when she observed the light turn yellow to be difficult to reconcile with her relative lack of precise recollection concerning many other details, including her speed at the time, the colour of the light as she actually entered the Intersection, the fact that there was the Chevy Spark in front of her (which she could not recall at all), and the fact that she did not see the Plaintiff's vehicle until the moment before the collision, which indicates that she was not paying close attention as she entered the Intersection. Under those circumstances, I consider her testimony to be little more than an after-the-fact rough estimate, which must be weighed in light of the other evidence;

- the Plaintiff testified that if the light was not red it was at a minimum stale yellow when he commenced his turn. While the Plaintiff expressed some uncertainty about the colour of the light, I note that his uncertainty was between stale yellow and red, and not uncertainty between green and yellow, nor did he express uncertainty between fresh and stale yellow;
- Mr. Martens and Ms. Richards both testified that the light had turned yellow before their vehicle entered the Intersection. Mr. Martens also testified (albeit with some uncertainty) that the Defendant's vehicle was several car lengths behind theirs, which indicates that there was a material time lag before the Defendant's vehicle followed theirs through the Intersection. This time lag also supports the conclusion that the yellow light was likely stale when the Defendant entered the Intersection. Of course, I must also weigh the fact that Mr. Martens witnessed the Defendant's entry into the Intersection through his rear-view mirror, which does to an extent affect the reliability of his recollection;
- Mr. Tittinger testified that, as he approached the Intersection, he recalled that the light was green and then went yellow when the Defendant was a couple of car lengths from the Intersection, and his vehicle was a couple of car lengths behind the Defendant. I do not find this to be a reliable account of proximity and reject it as being inconsistent with the other lay witness testimony and the expert evidence. In general, Mr. Tittinger's testimony was in my view subject to some significant reliability concerns, as he admitted that he has a restriction on his driver's license relating to astigmatism, and has difficulty seeing in darkness. In addition, some of his testimony was difficult to reconcile with the other uncontested evidence at trial. For example, Mr. Tittinger recalled that the Accident happened on a clear day and on dry roads, when the evidence from the other witnesses was that it was in fact a rainy day and the roads were wet. Mr. Tittinger also stated to ICBC that the Defendant's car collided with the front of the Plaintiff's car when the collision in fact occurred at the rear: and
- With respect to Mr. Tittinger's testimony that the Defendant was only a couple of car lengths from the Intersection when the light turned yellow (and his vehicle was a couple of car lengths behind the Defendant's), my view is that this simply cannot be reconciled with the other evidence or basic physics. The average length of a car is approximately five metres which would have placed Mr. Tittinger's vehicle at about 25 metres from the Intersection when he recalled seeing the light turned yellow. A car travelling at 60 km/h travels about 16.7 metres in a second, which implies that, if his testimony was correct, Mr. Tittinger would have been less than 2.0 seconds from the Intersection when the light turned yellow, and the Defendant would have been less than a second away. Both experts agreed that, even from a distance of 2.5 seconds from the Intersection, a car would have likely been unable to brake safely in that time frame. And yet Mr. Tittinger also testified that he was able to brake comfortably before the Intersection after the Accident occurred, even though he was only a couple of car lengths behind the Defendant. This testimony is simply impossible to reconcile with the expert testimony. I conclude that Mr. Tittinger's recollection about proximity to the Intersection was incorrect and that both his vehicle and the Defendant's were considerably farther from the Intersection than he recalled when the light turned yellow.

- [44] Accordingly, I conclude that the light was stale yellow as the Defendant approached the Intersection. Since the Plaintiff has not proved that the light was red at that time, s. 129 of the MVA is therefore inapplicable under the circumstances and the analysis must proceed under ss. 128(1) and 174.

The Dominant Driver

- [45] In *Pirie*, Devlin J. set out the analysis to be applied in determining who is the dominant driver where one vehicle has made a left-hand turn when the traffic light was yellow:
- [34] Having found that the Plaintiff made her left hand turn when the traffic light was yellow, I must consider the statutory obligation imposed on a driver intending to turn left at an intersection as set out in s. 174 of the MVA.
- [35] The effect of s. 174 is to cast the burden on the left turning driver to prove the absence of an immediate hazard at the moment the left turn begins. Thus, if a left turning driver asserts that he or she started to turn when it was safe to do so, then the burden of proving that fact rests with him or her: *Nerval v. Khehra*, 2012 BCCA 436 [*Nerval*] at paras. 33-35.
- [39] If the court determines that the through driver was an immediate hazard when the left turning driver commenced his or her turn, the left turning driver is considered the servient driver and the oncoming driver is considered the dominant driver. Any doubt is resolved in favour of the dominant driver [citations omitted].
- [46] Dominance identifies who must yield the right of way: *Pirie* at para. 42, citing *Nerval v. Khehra*, 2012 BCCA 436.
- [47] In *Pirie*, Devlin J. defined "immediate hazard" as follows:
- [37] An "immediate hazard" has been defined in these terms: if an approaching vehicle is so close to the intersection when a driver attempts to make a left turn that a collision threatens unless there is some violent or sudden avoiding action on the part of the driver of the approaching vehicle (the through driver), then the approaching vehicle is an immediate hazard. The point in time to assess whether the through driver is an "immediate hazard" is the moment before the driver who proposes to turn left actually starts to make the turn: *Raie v. Thorpe* (1963), 43 W.W.R. 405 (B.C.C.A.) at p. 410; *Vukelich v. Vliegenthart*, 2013 BCSC 879 [*Vukelich*] at para. 36.
- [48] In my view, the Plaintiff in this case failed to meet the burden of proving the absence of an immediate hazard at the time of starting his left turn. As noted in *Pirie*, the point in time to assess whether the through driver is an "immediate hazard" is the moment before the driver who proposes to turn left actually starts to make the turn. In my view, at that moment in time, the Plaintiff had sufficient information available to him to conclude that the Defendant's oncoming vehicle was an immediate hazard. In particular:

- the Plaintiff admitted that he saw the Defendant's oncoming vehicle and there was no evidence that his vision was blocked in any way;
- the Defendant made no unusual maneuvers or lane changes which might have obscured the Plaintiff's view or otherwise confused the Plaintiff;
- the Plaintiff was familiar with the Intersection and the roadway, which should have given him familiarity with traffic flows and helped him to judge relative speeds and distances;
- the evidence was that all the vehicles in proximity to the Defendant's vehicle were travelling at approximately the same speed. Therefore, when Mr. Martens' Chevy Spark passed the Plaintiff's vehicle in the Intersection, the Plaintiff would have been aware of the speed of the Chevy Spark, and likely also that it was traveling above the speed limit, which should have made it easier for the Plaintiff to judge the speed of the Defendant's oncoming vehicle travelling at the same speed;
- there was no evidence the Defendant gave any indication that she was slowing down in advance of the Intersection. To the contrary, the EDR data indicated that the Defendant was driving consistently at between 74 km/h and 75 km/h between 5.0 seconds and 2.0 seconds before impact and then actually began marginally accelerating from 75 km/h to 76 km/h when she was 2.0 seconds from impact;
- the Plaintiff admitted in his testimony that he did not know how far away the Defendant was or how fast she was travelling. At a minimum, this indicates that the Plaintiff did not pay much or enough attention to the oncoming vehicle;
- the Plaintiff also admitted that he knew the roads were wet, which would have made braking more difficult, and yet this did not cause him to perceive a heightened hazard as a result;
- although Mr. Martens was unable to identify in his testimony exactly how far the Defendant's vehicle was behind his Chevy Spark, it is clear that the Defendant was sufficiently close behind him to motivate him to observe the Defendant's entry into the Intersection in his rear-view mirror because he perceived that an accident was a possibility. While this is certainly not definitive proof, it is at least an indication that Mr. Martens believed in the moment that the Defendant's vehicle could represent an immediate hazard to the Plaintiff;
- Mr. Tittinger testified that he commented to his wife immediately after the Accident that the Plaintiff had "jumped the gun". While I have identified issues with the reliability of aspects of Mr. Tittinger's testimony, this was nonetheless a contemporaneous utterance from an eyewitness which is consistent with that witness's observation in the moment that the Plaintiff had potentially failed to identify an immediate hazard. Without in any way giving it weight as expert or opinion evidence, I give it some weight on that circumstantial basis alone, while accounting for the reliability issues I identified above; and

· while the Defendant did admit that she accelerated as she approached the Intersection, the EDR evidence was that the acceleration was marginal (only an increase of 1 km/h). There was no compelling evidence to support the conclusion that this marginal increase in speed alone could have materially distorted the Plaintiff's perception of the immediacy of the hazard.

[49] Finally, in addressing this issue, I must also consider the expert evidence of Mr. Dinn, who opined that the Defendant was actually 4.5-5.5 seconds west of the Intersection when the light turned yellow. If accepted, this evidence would strongly support the conclusion that there was no immediate hazard.

[50] However, I accord Mr. Dinn's opinion on this issue little weight for two reasons. First, given the fact that the length of the yellow light at the Intersection was only 3.7 seconds long (as indicated in the Traffic Sequencing Report), the necessary implication of Mr. Dinn's opinion is that the light had turned red before the Defendant reached the Intersection. For the reasons I have identified above, this conclusion is inconsistent with the other evidence at trial that the light was stale yellow, not red, when the Defendant entered the Intersection.

[51] Second, as argued by the defence, Mr. Dinn's conclusions are open to question because they are based upon a series of hypothetical assumptions which were not directly supported by the evidence at trial. Apart from the likely range of speed of the Plaintiff's vehicle at the time of the collision (upon which the experts generally agreed), the remainder of the data upon which Mr. Dinn's conclusions were based was derived either from assumptions made by Mr. Dinn concerning the Plaintiff's actions and reactions or scientific traffic studies involving experimental scenarios under potentially very different circumstances. In particular, he made the following assumptions which were not supported by evidence:

- the Plaintiff began to accelerate as soon as the light turned yellow. However, this is open to question, as there was evidence that the Plaintiff waited for the Chevy Spark to pass before commencing his turn;
- the shape of the Plaintiff's left turn trajectory, which was not in evidence; and
- the speed of the Plaintiff's turn rate and his perception reaction time, which was also not in evidence. Instead, Mr. Dinn's assumptions were based upon scientific studies concerning average turn rates and perception reaction times under specific, controlled conditions, which were not necessarily the same conditions as those at the time of the Accident. For example, some of those studies may have involved dry and not wet roads and different light conditions.

[52] As noted in *D'Amici v. Fahy*, 2018 BCSC 1372, aff'd 2020 BCCA 89, the courts should exercise an appropriate level of caution in approaching a report which relies heavily on hypothetical and generalized facts, as was the case in this trial:

- [22] I am going to begin my analysis with a consideration of Dr. Toor's opinion evidence. First, I will say that Dr. Toor was a very good witness and gave his evidence in a manner fitting of a proper expert. I found him to be objective and clearly focused on being of assistance to the Court.
- [23] That said, I am unable to put much weight on his opinion. Dr. Toor was put in a difficult position of preparing a report and developing opinions on the basis of minimal physical evidence or data. As a result, the report is highly speculative.
- [24] This is particularly true with respect to certain key assumptions. For example, his use of a 1.6 second perception response time for the defendant is again based on a median perception response time of 1.1 seconds, taken from what is referred to as the Olsen study. However, as he acknowledged, Olsen suggests that a perception response time anywhere in the range of .7 to 2 seconds would be considered normal. There is no way of telling where the defendant falls within that range, if indeed he does. Similarly, the addition of .5 seconds to reflect distraction from the use of the handsfree phone is speculative and somewhat arbitrary. There is simply no way of knowing whether the defendant was distracted, and, if so, to what degree.
- [25] The evidence also does not establish actual braking time for the defendant. Dr. Toor uses a range of .5 to 1.5 seconds, and although the defendant did testify that he thought it was less than a second, such estimates are largely meaningless for a driver who is responding to an emergent situation.
- [26] At the end of the day Dr. Toor's evidence does little more than offer a range of scenarios about what might have occurred, but it does not go so far as making any one scenario more likely than another.
- [27] In this regard the observations of Madam Justice Neilson in *Christensen v. Gerber*, 2007 BCSC 1397, are particularly apt, at paras. 63 to 64:
- [63] Finally, while I appreciate the value of accident reconstruction evidence in many cases, I also acknowledge the difficulty in making reliable findings as to decisions and actions that are measured in split seconds, against a standard judged "average" by scientific studies in which the experimental scenarios may bear little resemblance to the facts before the court.
- [64] The uncertainties I have described leave it open to postulate various alternative ways in which the accident may have happened. ...
- [53] I find that comparable concerns are applicable in this case with regard to Mr. Dinn's conclusions.
- [54] Accordingly, on the basis of all the foregoing, I find that the Plaintiff failed to meet the burden of proving the absence of an immediate hazard at the time of starting his left turn. The Defendant was therefore the dominant driver and the Plaintiff was the servient driver, and the Plaintiff was obliged to yield the right of way to the Defendant. In this respect this

case has some similarity to *Cipllaka v. Albert-Moore*, 2023 BCSC 457 (which, coincidentally, involved a similar accident at the same Intersection), where Justice Branch found the left-turning driver to be servient, reasoning as follows:

- [19] As noted above, a left-turning driver on a yellow light is not obliged to ensure that all traffic has stopped before proceeding on a yellow light, but the turning driver must still avoid "manifest hazards", meaning what is there to be seen.
- [20] I find that the defendant's vehicle was a manifest hazard at the time the plaintiff's turn commenced. The defendant was heading towards the plaintiff at a high rate of speed. Her vehicle was there to be seen, and was, in fact, seen by the plaintiff.
- [55] In failing to yield the right of way to the Defendant, the Plaintiff breached his statutory duty under s. 174 of the MVA and was negligent.

Duty of the Dominant Driver

- [56] However, this does not end the analysis. Even if a through driver is found to be dominant the through driver can still be found negligent based on a breach of a statutory obligation or a common law duty of care: *Cipllaka* at para. 23. Therefore, I must now turn to consider the Defendant's statutory obligations arising in this case in order to determine whether the Defendant, as the dominant driver, is nonetheless negligent for contributing to the Accident: *Pirie* at para. 36. As noted by Justice Fleming in *Lee v. Tse*, 2013 BCSC 1740:
- [49] The duty on a left turning driver pursuant to section 174 of the MVA is not absolute. It is well established that left turning drivers are entitled to rely on the assumption that other drivers will obey the rules of the road, absent any reasonable indication to the contrary. In particular, a left turning driver is not required to wait until he or she sees that all approaching drivers have stopped: see *Kokkinis v. Hall*, [1996] BCJ No 1560 (CA) [*Kokkinis*]; *Uyeyama (Guardian ad litem of) v. Wittenberg*, [1985] BCJ No 1883 (CA).
- [57] Further, with respect to the obligations under s. 128(1)(a) of the MVA, I emphasize that the onus of proving that the stop could not have been made in safety is on the driver facing the yellow light, in this case, the Defendant: *Ziani v. Thede*, 2011 BCSC 895 at para. 26.
- [58] The Court of Appeal in *Pirie v. Skantz*, 2016 BCCA 70 has recognized that a through driver can, under certain circumstances, be found to be wholly or primarily at fault in an accident involving a driver who turns left on a stale yellow light:
- [14] I take no issue with the appellant's submission that a through driver can, in appropriate circumstances, be found wholly at fault for an accident involving a driver who turns left on a stale yellow light. As a practical matter, a driver like the respondent, who is in a dominant position, will not typically be found to be liable for an accident: *Salaam v. Abramovic*, 2010 BCCA 212 at para. 25. 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.).

[59] In my view, the factual circumstances lead to the conclusion that the Defendant was also negligent in this case. In particular:

- the Defendant approached the Intersection at an excessive rate of speed well above the speed limit. The EDR data revealed that the Defendant's car was travelling at a speed of 75 km/h (in a 60 km/h zone) 5 seconds before impact, accelerated at 2.0 seconds before impact and only commenced braking at 0.5 seconds before impact. Even at the moment of the collision the Defendant's vehicle was still travelling above the speed limit in a range that Mr. Heinrich estimated between 61 and 69 km/h;
- I recognize the principle that evidence of speeding alone is not determinative on the issue of negligence unless the speed prevented the driver from taking reasonable steps to avoid the collision: *D'Amici v. Fahy*, 2020 BCCA 89 at para. 45. However, in this case, I find that the Defendant's excessive speed (even before she accelerated as she approached the Intersection) was a significant contributor to the Accident because it impaired her ability to react safely to the yellow light and reduced the amount of time that she had to avoid the Plaintiff's vehicle;
- With respect to this latter conclusion, I find Mr. Dinn's expert evidence compelling. Mr. Dinn opined that if the Defendant's vehicle had been travelling at the speed limit of 60 km/h instead of 75 km/h, the Defendant's vehicle would likely have cleared the path of the Plaintiff's vehicle without any braking since the slower speed would have taken her at least 0.5 seconds more time to travel through the Intersection and Plaintiff's vehicle would have required only between 0.5 seconds (travelling at 20 km/h) and 0.26 seconds (travelling at 35 km/h) to get out of the way. While I recognize that I accorded Mr. Dinn's conclusions little weight with respect to his conclusions on the Plaintiff's hypothetical turn path, Mr. Dinn's opinion with respect to the connection between a lower Defendant speed and the likely avoidance of a collision is not in my view subject to the same reliability concerns. This is because, in contrast to Mr. Dinn's opinion concerning the turn path of the Plaintiff's vehicle (which was based on questionable and generalized assumptions derived from academic articles without supporting Accident data) Mr. Dinn's conclusion on the issue of the Defendant's speed was in fact based upon data agreed to by both experts (i.e. that the Plaintiff's vehicle was travelling at between 20 km/h and at 35 km/h), an uncontroversial assumption about the length of a car and simple physics (i.e. the time it would have taken at those speeds for the Plaintiff's vehicle to travel half the distance of a car length, which is 2.5 metres). I therefore find Mr. Dinn's opinion to be reliable and persuasive on this issue;

· the Defendant, perceiving that the light had turned yellow, accelerated her speed approaching the Intersection (at 2.0 seconds before the Accident) rather than attempting to decelerate or brake. As noted by Justice Newbury in *Kokkinis v. Hall* (1996), 19 B.C.L.R. (3d) 273, 1996 CanLII 2404 (C.A.) at para. 10, the courts have not viewed this type of activity favourably:

10 To say that the plaintiff can be found at fault because she relied on the assumption that Mr. Hall would stop, and because she checked cross-traffic, would in my view subvert the duty on Mr. Hall to bring his vehicle to a safe stop at the amber light as the other traffic did. An amber light is not, as the current witticism suggests, a signal to accelerate or to pass traffic that is slowing to a stop.

· the Defendant was aware that the roads were wet and that it was getting dark but continued at a rate of speed well above the speed limit;

· the Defendant was familiar with the Intersection and the roadway, and should have been aware that this was a left-turn intersection and on the lookout for potential left-turning vehicles;

· the Defendant admitted under cross-examination that she never saw the Plaintiff until the moment of the collision. In my view, this clearly indicated a lack of due attention to the road because the Plaintiff was the lead car in the left lane with his signal activated and headlights on. In this respect, I note both Mr. Martens and Ms. Richards in their testimony stated that they were able to see the Plaintiff's vehicle prior to entering the Intersection, which indicates that it should also have been visible to the Defendant; and

· given my finding that the light was stale yellow when the Defendant entered the Intersection, I find it is equally or even more likely, based upon the total length of the yellow light indicated in the Traffic Sequencing Report, that she could have been as far as 3.7 seconds away from the Intersection (and not merely 2.0 to 2.5 seconds as she testified, which I did not find reliable) when the light turned yellow. This likelihood that she in fact had an additional 1.2 to 1.7 seconds from the Intersection to react in my view significantly undermines her argument that she could not have stopped safely. In this respect, I give weight to Mr. Heinrich's opinion, provided under cross-examination that, if the Defendant had been 1.0-2.0 seconds farther from the Intersection when the light turned yellow than he had assumed for his report (i.e. 2.0 to 2.5 seconds), the Defendant would have been able to stop comfortably on a wet road driving at 75-77 km/h. Mr. Dinn provided a similar opinion.

[60] As such, I find that the Defendant has failed to prove that the stop could not have been made in safety. I therefore conclude that both drivers breached their statutory duties and that both caused or contributed to the Accident.

Allocation of Fault

[61] In *Cipllaka*, Justice Branch summarized the applicable analysis on allocation of fault:

- [27] Given that I have found that both parties were at fault, the next question is the proper allocation of fault under the Negligence Act, R.S.B.C. 1996, c. 333, s.1. The test set out in *Alberta Wheat Pool v. Northwest Pile*, 2000 BCCA 505 states that when assessing the apportionment of liability, "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" (para. 45).
- [28] This analysis covers a wide spectrum, and evaluates the parties' conduct circumstantially, and the extent or degree to which it may be said to depart from the standard of reasonable care. This can vary from "extremely careless conduct" to a "momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm" (*Alberta Wheat Pool*, para. 46).
- [29] Our Court of Appeal provided further guidance in relation to this assessment in the motor vehicle context in *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21:
- [21] In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. 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.
- [62] In this case, in terms of the respective blameworthiness of the parties, I find that both parties' conduct was closer on the spectrum to a "momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm" rather than "extremely careless conduct": *Alberta Wheat Pool v. Northwest Pile*, 2000 BCCA 505 at para. 46.
- [63] On the one hand, it is clear that the Plaintiff shares some of the blame. The Plaintiff failed to pay due care and attention to the Defendant's vehicle, which I found was an immediate hazard. In particular, I note that the Defendant's vehicle was visible to the Plaintiff, that the Plaintiff should have been aware from the speed of the preceding Chevy Spark that the Plaintiff was travelling above the speed limit and there was no evidence that the Defendant was slowing down. The Plaintiff was familiar with the road and should have been aware that speeding is not uncommon on that stretch of roadway (as Mr. Martens testified): *MacDonald v. Becker*, 2021 BCSC 1464 at para. 51. He should also have been exercising more caution due to wet roads and low light.

- [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.
- [66] Further, the Defendant compounded the situation by clearly failing to pay adequate attention. In contrast to the Plaintiff, who did at least perceive the Defendant's oncoming vehicle but misjudged the speed, the Defendant admitted that she never even saw the Plaintiff's vehicle. This is difficult to justify under the circumstances, as the Defendant was familiar with the Intersection and there was no evidence that the Plaintiff's vehicle was hidden or blocked in any way from view. To the contrary, all three witnesses who were travelling in the same direction as the Defendant testified that they had in fact seen the Plaintiff's vehicle waiting in the left-turn lane before the Defendant entered the Intersection. The clear inference in my view is that the Defendant was simply not paying attention to the road and potential hazards ahead and was distracted.
- [67] Taking into account the foregoing considerations, my view on all the evidence is that fault should be allocated 70% to the Defendant and 30% to the Plaintiff. In reaching this conclusion I have considered the various legal authorities relied upon by the parties in closing argument.
- [68] The Plaintiff relies upon Lee, where liability was apportioned entirely to the through driver, but that decision is distinguishable in my view. In that case, Justice Fleming found that the through driver did not constitute an immediate hazard pursuant to s. 174 because the left-turning driver had a reasonable basis for expecting that the through driver would stop. The Plaintiff in this case had no such reasonable expectation, and therefore should assume more fault.
- [69] In *Hutchings v. Dow et al*, 2006 BCSC 629, the Court apportioned liability 90% to the through driver and 10% to the left-turning driver. However, in that case the evidence was clear that the through driver had "run a red light" (at para. 42) and also that the through driver had ingested alcohol and marijuana before driving. The Defendant in this case was not as blameworthy as the through driver in *Hutchings* and therefore should assume less fault.

- [70] In Pirie, relied upon by the defence, the Court allocated liability 60/40 to the left-turning driver. However, in that case, the Court found that the through driver was not driving above the speed limit, as was the situation with the Defendant in this case. This is a significant distinction which in my view contributes to the Defendant's greater blameworthiness in this case.
- [71] Similarly in Sharma v. Chan, 2017 BCSC 912, where liability was allocated 75/25 to the left-turning driver, there was no clear evidence that the through driver was speeding and there was uncontradicted expert evidence that the through driver was unable to stop safely. In my view the expert evidence in this case was considerably less persuasive than in Sharma with respect to the Defendant's inability to stop safely.
- [72] In MacDonald, where liability was allocated 60/40 to the left-turning driver, the left-turning driver appeared to have acknowledged in his testimony that he had misjudged his turn and there was evidence that the intersection in question was known to be dangerous. There was no admission by the Plaintiff in this case about a misjudgment of a turn or a particularly acute danger, and therefore the Plaintiff is accordingly less blameworthy.
- [73] In Cipplaka, Justice Branch allocated fault 50/50 in a decision with some parallels to this case. However, in allocating fault in that case, Justice Branch found that the "speed of the defendant was not a factor" and that both drivers had failed about equally to pay sufficient attention. In this case, I have found that the Defendant's speed was clearly a significant factor and also that the Defendant was in fact paying less attention than the Plaintiff.

ORDER

- [74] I find that both parties were negligent under all the circumstances. Fault for the Accident is allocated at 70% to the Defendant and 30% to the Plaintiff.

"M. Taylor J."

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